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**Bees, Trees, Preemption, and Nuisance:  
A New Path to Resolving Pesticide  
Land Use Disputes**

by

Alexandra B. Klass

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# Bees, Trees, Preemption, and Nuisance: A New Path to Resolving Pesticide Land Use Disputes

Alexandra B. Klass\*

*This Article proposes a new framework for analyzing certain claims for pesticide damages. With the Supreme Court’s recent decision in Bates v. Dow Agrosociences, plaintiffs in many pesticide cases can now bring a much larger range of state law claims to recover damages for fraud, improper testing, and other claims unrelated to pesticide labeling. This Article argues that by expressly allowing such state law claims while reaffirming the importance of uniform labeling, Bates should encourage litigants and judges to rely more heavily on the label language in litigating negligence claims against pesticide users and to look more broadly to nuisance and trespass claims to obtain relief for pesticide use that complies with the label but nevertheless results in harm. Finally, this Article suggests greater emphasis be placed on new and existing state and federal statutes to obtain relief for pesticide related harm.*

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#### INTRODUCTION

Every year, nearly 5 billion tons of lethal chemicals are intentionally applied to the American landscape.<sup>1</sup> These chemicals, of course, are pesticides.<sup>2</sup> It is in large part through the use of pesticides that the United States has become an agricultural giant, able to provide inexpensive food for its people and the world. Moreover, pesticides are responsible for the eradication and control of many deadly diseases and have saved millions of lives. On the other hand, the harms posed by pesticides to human health and the ecosystem are just as well-known. After Rachel Carson published her influential book, *Silent Spring*<sup>3</sup> in 1962, detailing the environmental harms posed by DDT and other pesticides, the public began to focus far more on the adverse environmental impacts of pesticides and many sectors of society mobilized to take legal and political action. Such action included increased scientific study of pesticides; the formation of strong environmental policy and advocacy groups; the enactment of more comprehensive environmental laws and regulations; and countless lawsuits to ban pesticides and hold landowners, applicators, and pesticide manufacturers liable for harm to human health and the environment. Part of the difficulty in pursuing these remedies is

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1. TIMOTHY KIELY, DAVID DONALDSON & ARTHUR GRUBE, EPA, PESTICIDE INDUSTRY SALES AND USAGE: 2000 AND 2001 MARKET ESTIMATES 10 (2004).

2. "Pesticides" generally include insecticides, herbicides, and rodenticides. The term is defined under federal law as any substance intended for "preventing, destroying, repelling or mitigating any pest," and substances intended for "use as a plant regulator, defoliant, or dessicant." See 7 U.S.C. § 136(u) (2000).

3. RACHEL CARSON, *SILENT SPRING* (1962).

that unlike virtually all other toxic substances regulated under the environmental laws, pesticides (or “economic poisons”<sup>4</sup>) are intentionally released into the environment to kill living organisms, rather than poisoning being a collateral effect of the product’s use.<sup>5</sup>

Not surprisingly, these high stakes and the corresponding growth in public awareness led both to a sharp increase in regulation of pesticides over the past thirty years, and to a considerable amount of litigation. The bulk of this litigation tends to fall into two distinct categories. The first category consists of state law claims by pesticide users against pesticide manufacturers to recover for personal injury or damaged crops based on claims such as failure to warn, negligent design, breach of warranty, and misrepresentation. The key issue in these cases often involves whether such state law claims are preempted by the federal pesticide law, the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).<sup>6</sup> Although these cases generally involve claims under state law (because FIFRA does not have a private right of action for damages), the parties often litigate in federal court because of diversity jurisdiction between the pesticide user and the pesticide manufacturer. These cases will be referred to as the “FIFRA Preemption cases.”

The second category of cases generally involves claims by non-pesticide users against pesticide users (usually neighboring landowners or aerial pesticide applicators), for property damage, crop damage, and/or personal injury. These cases will be referred to as the “Pesticide Land Use cases” to highlight the competing land use issues inherent in the vast majority of these cases, as compared to the product focus of the FIFRA Preemption cases.<sup>7</sup>

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4. The term “economic poison” is often used interchangeably with the term “pesticide” because “economic poison” was the defined term under older versions of federal pesticide law. See, e.g., 7 U.S.C. § 135(a)(1) (1976); Pub. L. No. 86-139, 73 Stat. 286 (1959); Pub. L. No. 104, 61 Stat. 163 (1947).

5. For instance, most chemicals regulated under the various federal environmental laws such as the Clean Water Act, Clean Air Act, the Resource Conservation and Recovery Act or the Comprehensive Environmental Response, Compensation and Liability Act are used in industry for the purpose of creating something else—a product, building or chemical. Pesticides are used for the same reason that they harm the environment—because they kill things. The problem is that most pesticides are harmful to a broad range of organisms and are not sufficiently refined to kill only the target species.

6. 7 U.S.C. §§ 136-136y (2000).

7. Notably, since the early 1900s, the judicial decisions that contain the most sophisticated analysis of these land use conflicts involve the competing needs of bees, trees, and other agricultural commodities. The reason for this may be because bees, unlike other wildlife impacted by pesticides are “owned” for commercial use but unlike other commercial animals, such as livestock, cannot be made to respect property lines through the use of enclosures. See, e.g., *Lundberg v. Bolon*, 194 P.2d 454 (Ariz. 1948); *Lenk v. Spezia*, 213 P.2d 47 (Cal. Ct. App. 1949); *Jeanes v. Holtz*, 211 P.2d 925 (Cal. Ct. App. 1949); *Miles v. A. Arena & Co.*, 73 P.2d 1260 (Cal. Ct. App. 1938); *Anderson v. Minn. Dep’t of Natural Res.*, 693 N.W.2d 181 (Minn. 2005); *Bennett v. Larsen*, 348 N.W.2d 540 (Wis. 1984).

Although the Pesticide Land Use cases seek damages similar to the FIFRA Preemption cases, the Pesticide Land Use cases take place almost exclusively in state court; in these cases, FIFRA is rarely discussed and the arguments focus very heavily on common law negligence claims with far less emphasis on related claims of trespass, nuisance, and strict liability. Not surprisingly, unlike the FIFRA Preemption cases which often look to unifying principles of federal pesticide law to reach a result, the Pesticide Land Use cases vary significantly in terms of the theories used and results reached even though they involve the same types of FIFRA-regulated pesticides at issue in the FIFRA Preemption cases. As a result, there is significant unpredictability in these cases, making it difficult for lawyers to properly advise their clients on the merits and select appropriate experts, and difficult for courts to choose a framework for resolution, resulting in inconsistent results both within and between jurisdictions.

The first purpose of this Article is to explore ways in which the Pesticide Land Use cases can benefit from some of the uniformity principles that permeate the FIFRA Preemption cases in the context of negligence claims. Federal law and, in particular, the federally-approved label for the pesticide at issue, should provide a presumption regarding the standard of care for all negligence claims against pesticide users and other claims that contain, as an element, breach of a duty of reasonable care in using the pesticide. This will result in courts using a negligence per se analysis for all negligence claims against pesticide users as well as other claims that turn on reasonable conduct. Because the Environmental Protection Agency (EPA) already holds the congressionally-delegated authority to determine whether the use of a pesticide is reasonable, the question of whether a defendant acted reasonably in applying the pesticide can be based in large part on an analysis of whether the pesticide label requirements were met.

However, this article demonstrates that negligence is a far less useful mechanism to resolve Pesticide Land Use cases than are other potential common law and statutory claims. To the extent the claim for negligence is coupled with other common law tort claims that do not contain reasonable care as an element, such as trespass to land, trespass to chattel, strict liability or nuisance, courts would analyze those claims under their own common law and compliance or noncompliance with the label would be irrelevant. Indeed, a full analysis of the various claims in the context of the Pesticide Land Use cases reveals that plaintiffs would be better served by focusing their efforts on claims of nuisance and trespass where pesticides have caused damages even where there is no violation of the pesticide label.

The second purpose of this article is to propose a greater role for other legal mechanisms such as state and federal environmental statutes,

in order to better serve the purposes of FIFRA. States should revise their own pesticide laws to provide a private right of action for damages for violation of FIFRA's requirements, and litigants should rely more heavily on existing federal environmental laws as vehicles to obtain injunctive relief or damages resulting from the use of pesticides contrary to the label. State and local governments can also use their inherent authority under FIFRA to entirely prohibit specific pesticides during certain times of the year or in certain locales based on local concerns. In these ways courts, legislators, and regulators can achieve the dual purposes of FIFRA—federal uniformity regarding the pesticide label and protection of the environment—in a manner that provides greater consistency in this area of the law.

Section I of this Article presents a brief background of pesticide use in the United States as well as the FIFRA regulatory scheme. Section II discusses the current state of the FIFRA Preemption cases with emphasis on the principles in those cases that should apply to the Pesticide Land Use cases. Section III discusses the Pesticide Land Use cases and illustrates how the analysis in those cases would benefit from an explicit discussion of FIFRA and a focus on negligence per se rather than common law negligence in resolving negligence claims. Finally, Section IV provides a new framework for reconciling and unifying this confusing but important area of law, based on claims for trespass and nuisance as well as relying more significantly on existing and new state and federal statutory causes of action.

#### I. PESTICIDE USE AND PESTICIDE LAW

In order to fully understand the regulatory framework of pesticide law and how that law is applied to present-day pesticide lawsuits, a brief discussion is necessary regarding (1) the history and use of pesticides in this country, including their benefits and risks; and (2) the development of FIFRA and related statutes governing the use of pesticides at the federal and state levels.

##### A. *History and Use of Pesticides in the United States*

Federal law defines a “pesticide” as any substance intended for “preventing, destroying, repelling, or mitigating any pest” and any substance intended for use as a “plant regulator, defoliant, or desiccant.”<sup>8</sup>

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8. 7 U.S.C. § 136(u) (2000). Pesticides are generally divided by type based on the target species. For instance, the most common pesticides are insecticides (directed at insects), herbicides (directed at weeds), rodenticides (directed at rodents), and fungicides (directed at fungi). Other types of pesticides include acaricides, algicides, attractants, avicides, bactericides, defoliants, dessiccants, growth regulators, mitigicides molluscicides, nematocides piscicides, predacide, repellants, silvicides, slimicides and sterilants. Most of these generic terms end in

According to historical records, pesticides in one form or another have been a part of agriculture since before the time of Christ. Ancient Egyptian records refer to hemlock and aconite around 1200 B.C., and in 1000 B.C. Homer suggested using sulfur on certain plants. The Chinese in the ninth century used arsenic mixed with water to control insects and in the eighteenth century, nicotine fumigation from heated tobacco was used on a wide range of insect-infested plants.<sup>9</sup>

The first synthetic, organic insecticides and herbicides were discovered and produced in the early twentieth century, which led to an explosion of the discovery, use and production of hundreds of commercial pesticides in the 1940s and 1950s.<sup>10</sup> World War II hastened this development by creating conditions where tropical warfare and the accompanying insect-related diseases such as typhus, encephalitis, dengue, and malaria devastated troops on both sides.<sup>11</sup> To address this problem, the U.S. government conducted intense research to assess potential insecticides and ultimately recognized the unique qualities of dichloro-diphenyl-trichloroethane (DDT) to eradicate such pests as malaria-carrying mosquitoes and other disease-carrying insects.<sup>12</sup> Indeed, DDT has been credited with helping the Allied Forces win the war by drastically decreasing the number of disease-related casualties, as well as saving millions of civilian lives throughout the world.<sup>13</sup>

Insecticides generally fall into three categories: (1) chlorinated hydrocarbons first produced in the 1940s (including DDT, chlordane, aldrin, dieldrin, endrin, and heptachlor), many of which are no longer in use because of environmental concerns; (2) organophosphates developed in the 1950s (such as parathion and malathion); (3) carbamates (including carbaryl and carbofuran); and (4) synthetic pyrethroids (such as permethrin and fenvalerate) which come from naturally-derived compounds.<sup>14</sup> As of 2004, there were over 1,000 active chemical ingredients being formulated for nearly 20,000 registered commercial

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"cide" which means "to kill" or "killer." See BERT L. BOHMONT, *THE STANDARD PESTICIDE USER'S GUIDE* 6-8 (6th ed. 2003).

9. See generally BOHMONT, *supra* note 8, at 1-2.

10. *Id.* at 2.

11. D. Raymond Forney, *Importance of Pesticides in Integrated Pest Management*, in *PESTICIDES: MANAGING RISKS AND OPTIMIZING BENEFITS* 174, 179 (Nancy N. Ragsdale & James N. Seiber eds., 1999).

12. *Id.* at 179.

13. *Id.* For an interesting history of the development and use of DDT in the fight against malaria worldwide, see Malcolm Gladwell, *The Mosquito Killer*, *THE NEW YORKER*, July 2, 2001, at 42.

14. Forney, *supra* note 11, at 181; BOHMONT, *supra* note 8, at 1-2; Gary D. Crouse, *Natural Products as Leads for New Pesticides with Reduced Risks*, in *PESTICIDES: MANAGING RISKS AND OPTIMIZING BENEFITS* 80, 86-88 (Nancy N. Ragsdale & James N. Seiber eds., 1999).

pesticides.<sup>15</sup> Virtually every area of agriculture uses such pesticides extensively.<sup>16</sup>

The impact of pesticides on U.S. agriculture is significant, although the question of whether that impact is positive or negative provokes vigorous dispute. While many in the agricultural sector give much of the credit for the enormous increase in agricultural productivity in the twentieth century to pesticide use,<sup>17</sup> others warn that any increased productivity is due to factors other than pesticides and that our over-reliance on pesticides has resulted in pesticide resistance and, in the long term, crop losses.<sup>18</sup> Although it is difficult to quantify the costs, there is evidence that pest populations develop resistance to pesticides with increasing rapidity, and that as resistance spreads, pesticide application rates rise, while pesticide effectiveness falls, leading to increased pesticide costs and decreased yields.<sup>19</sup>

Even apart from disputes over productivity, there is of course a serious, unintended consequence of pesticide use—its adverse and pervasive impact on human health and the environment. For decades, many in the environmental community have denounced the over-reliance on pesticides, attributing it to a school of thought that “perceives nature as something to be attacked, dominated, controlled, and reduced to the

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15. E-mail from Cynthia Doucoure, Environmental Protection Specialist, EPA, to Alexandra Klass, Associate Professor of Law, William Mitchell College of Law (July 20, 2004) (on file with author).

16. Nancy N. Ragsdale & Ronald E. Stinner, *The Role of Benefits in the Regulatory Arena*, in PESTICIDES: MANAGING RISKS AND OPTIMIZING BENEFITS 157 (Nancy N. Ragsdale & James N. Seiber eds., 1999). (showing over 95 percent of corn, soybeans, carrots, potatoes, apples, oranges, raspberries and other major crops were treated with herbicides, pesticides or both, at a cost of \$7.5 billion each year) (citing U.S.D.A., AGRICULTURAL STATISTICS 1997, ch. XIV 1-8 (1997)).

17. According to some statistics, in 1850, each U.S. farmer produced food and fiber for him or herself and three other people. By 1997, each farmer produced enough food and fiber for 129 people—94 in the United States and 34 abroad. *Id.* at 2-3.

18. See CARSON, *supra* note 3, at 79 (discussing how pesticides eliminate “competition” between weeds, causing other weeds to become stronger and threaten crops); Tybe A. Brett & Jane E.R. Potter, *Risks to Human Health Associated with the Exposure to Pesticides at the Time of Application and the Role of the Courts*, 1 VILL. ENVTL. L.J. 355 (1990) (stating that it is doubtful that increased pesticide use enhances agricultural productivity because of pesticide resistance and statistics showing lack of decline in annual crop losses from pests since the 1940s); FRANK R. GRAD, TREATISE ON ENVIRONMENTAL LAW § 8.01 (1986) (citing COUNCIL ON ENVIRONMENTAL QUALITY, NINTH ANNUAL REPORT at 278 (1978)); John Carlucci, Note, *Reforming the Law on Pesticides*, 14 VA. ENVTL. L.J. 189, 198-99 (1994) (“Evidence of pest resurgence, secondary pest outbreaks, and acquired resistance makes clear that the long-term effectiveness of pesticides is overrated. There is also evidence that the supposed short-term advantages of pesticide use have been overstated.”) (citing David Pimentel, et al., *Benefits and Costs of Pesticide Use in the U.S. Food Production*, 28 BIOSCIENCE 772 (1978)).

19. NATIONAL RESEARCH COUNCIL, THE FUTURE ROLE OF PESTICIDES IN U.S. AGRICULTURE 59 (2000).



service of humans.”<sup>20</sup> Those opposed to pesticide use (or overuse) promote a more ecologically-based strategy that relies on crop rotation, development of insect-resistant plants, use of predatory insects and integrated pest management, or “IPM”—an interdisciplinary approach that combines selected use of pesticides, natural enemies, crop rotation, and other combinations of biological, cultural, strategic, and chemical controls.<sup>21</sup>

The case of DDT best illustrates the reasons for widespread opposition to large-scale pesticide use. After the success of DDT during World War II, pesticide research was transferred to agricultural use, resulting in an explosion of commercial pesticides from the 1950s to the 1970s. During this time, pesticide use by farmers, including use of DDT, increased by an estimated fivefold.<sup>22</sup> DDT, however, did more than kill mosquitoes and agricultural pests. The same qualities that made it so effective in combating malaria resulted in this toxic substance spreading rapidly throughout the world’s air and water supply.<sup>23</sup> Rachel Carson’s 1962 book *Silent Spring* most effectively brought to light the significant impact of DDT. The book was a major factor, along with targeted lawsuits and political pressure, in causing EPA to ban production and use of DDT in 1973.<sup>24</sup> To this day, scientists and policymakers dispute whether it was the right decision to ban DDT in light of the benefits it provided.<sup>25</sup>

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20. See WILLIAM H. RODGERS, JR., 3 ENVIRONMENTAL LAW: PESTICIDES AND TOXIC SUBSTANCES § 5 at 6 (1988 & Supp. 2004) (citing Laurence H. Tribe, *Ways Not to Think About Plastic Trees*, 83 YALE L.J. 1315 (1974); Lynn White, *The Historical Roots of Our Ecological Crisis*, 155 SCIENCE 1203 (1967)).

21. See, e.g., RODGERS, *supra* note 20, at 6; Forney, *supra* note 11, at 184-87. In 1993, the Clinton Administration pledged that 75 percent of croplands would be managed with IPM systems by the year 2000. Forney, *supra* note 11, at 187 (citing U.S.D.A., PRESIDENTIAL ANNOUNCEMENT REGARDING IPM ADOPTION, (June 23, 1993)).

22. See RODGERS, *supra* note 20, §5.1 at 8.

23. By the late 1960s, estimates were that one billion pounds of DDT were circulating throughout the world’s air and water, and traces of DDT were found in birds and wildlife from Antarctica to the mid-Pacific Ocean, as well as in the body tissues of humans throughout the world, at what some believe are carcinogenic levels. *Id.* at 12.

24. See CHRISTOPHER J. BOSSO, PESTICIDES AND POLITICS: THE LIFE CYCLE OF A PUBLIC ISSUE 154-58 (1987) (recounting litigation and policy battles over DDT); THOMAS R. DUNLAP, DDT: SCIENTISTS, CITIZENS AND PUBLIC POLICY 129-245 (1981) (describing litigation and policy battles over DDT); Angus A. MacIntyre, *Why Pesticides Received Extensive Use in America: A Political Economy of Agricultural Pest Management to 1970*, 27 NAT. RES. J. 533, 572-73 (1987) (detailing political, social and legal activities leading up to the banning of DDT); *Toward a Noisier Spring: D.C. Circuit Upholds Cancellation of DDT Registrations*, 4 ENVTL. L. REP. 10013 (Summary and Comments 1974) (detailing litigation and political fight leading up to decision by Court of Appeals for the D.C. Circuit affirming EPA’s cancellation of DDT).

25. See RODGERS, *supra* note 20, § 5.1 at 12-13 (“the legal system has struggled for a decade to unravel this technological dilemma [over DDT], with the issue quite alive if not still in doubt”); Andrew P. Morriss & Roger E. Meiners, *Property Rights, Pesticides & Public Health: Explaining the Paradox of Modern Pesticide Policy*, 14 FORDHAM ENVTL. L.J. 1, 26 (2002) (“Today the scientific case against DDT is seen as ambiguous; there is no agreement among

As illustrated in the next sections, this struggle to balance the risks and benefits of pesticide use continues to pervade the core of FIFRA through each amendment, each EPA decision on pesticide registration, and each judicial decision considering whether to impose liability for pesticide damages.

### B. FIFRA Registration and Labeling: A Regulatory Balancing Act

The evolution of federal pesticide regulation reflects changing legislative conceptions of the risks and benefits of pesticide use. The first federal law attempting to regulate pesticide use was the Insecticide Act of 1910.<sup>26</sup> The primary purpose of the law was to protect consumers and farmers from deceptive labeling and ineffective products. It did not contain any registration requirements or safety standards, which is unsurprising based on the limited use of pesticides nationally during this period. In 1947, Congress passed the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).<sup>27</sup> The 1947 law, which differs significantly from the current version of FIFRA, required that pesticides distributed in interstate commerce be registered with the U.S. Department of Agriculture (USDA) and imposed some labeling requirements. This law continued the 1910 law's emphasis on product effectiveness as opposed to environmental health or safety, and gave the USDA little power to ensure pesticide safety. Indeed, the 1947 law did not provide for regulatory control preventing the use of a pesticide contrary to its label, and the Secretary of Agriculture could not refuse to register even a chemical he considered highly dangerous.<sup>28</sup>

However, in the late 1960s, after the growth of the environmental movement, environmental groups filed numerous lawsuits against the agency demanding the cancellation or suspension of major pesticides such

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scientists that a complete ban was the appropriate outcome.”) (citing George M. Gray & John D. Graham, *Regulating Pesticides*, in *RISK V. RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT* (John D. Graham & Jonathan Baert Wiener eds., 1995) and AARON WILDAVSKY, *BUT IS IT TRUE?* 55-78 (1995)); David Pimentel et al., *Environmental and Economic Costs of Pesticide Use*, 42 *BIO SCIENCE* 750 (Nov. 1992) (describing and attempting to quantify environmental and public health costs from pesticides and highlighting lack of good data and inability to conduct accurate cost-benefit analyses).

26. Insecticide Act, 36 Stat. 331 (1910).

27. Federal Insecticide, Fungicide, and Rodenticide Act, 61 Stat. 190 (1947).

28. Instead, the Secretary's only remedy against a hazardous product was a legal action for misbranding or adulteration in which the government had the burden of proof. Congress did not change the statute again until 1964, at which time it permitted the Secretary to refuse to register a new product or cancel an existing registration and shifted the burden of proof to the registrant. Marshall Lee Miller, *Pesticides*, in *ENVIRONMENTAL LAW HANDBOOK* 646-47 (Gov't Inst., 17th ed. 2003) (citing Act of May 12, 1964, Pub. L. No. 88-305, 78 Stat. 190 (1964); 73 Stat. 286 (1959); 75 Stat. 18, 42 (1961)).

as DDT on environmental and public health grounds.<sup>29</sup> These new demands on the USDA played a significant role in leading President Nixon to sign Reorganization Order No. 3, creating the U.S. Environmental Protection Agency (EPA) and assigning to EPA many of the functions and personnel formerly contained within the USDA and other agencies.<sup>30</sup> Many lawsuits now within EPA's jurisdiction resulted in holdings that the federal government had not sufficiently considered the health and environmental problems arising from pesticide use.<sup>31</sup>

Against the backdrop of this new agency organizational structure, Congress amended FIFRA through the Federal Environmental Pesticide Control Act (FEPCA) of October 1972, which was virtually a complete rewriting of existing law—the FIFRA of 1947 looks nothing like the FIFRA of today.<sup>32</sup> The 1972 FEPCA Amendments purported to strengthen the law's enforcement provisions, shift the regulatory emphasis from pesticide efficacy to the protection of human health and the environment, provide EPA with greater latitude to control dangerous chemicals, extend federal law to cover intrastate registrations and use, and streamline the administrative appeal process.<sup>33</sup> FIFRA was amended again in 1975, 1978, 1980, 1988, 1990 and 1996.<sup>34</sup>

FIFRA in its current form regulates pesticide registration, pesticide disposal, trade secrets, pesticide application through certification, removal of pesticides from the market, and the role of state and local governments in regulating pesticide use within their jurisdictions. The remainder of this Section briefly discusses each of these aspects of FIFRA. Significantly, FIFRA has been called one of the most "federal"

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29. *Id.* at 647. See also *Envtl. Def. Fund, Inc. v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973) (dismissing action challenging EPA's suspension of use of DDT); *Envtl. Def. Fund, Inc. v. EPA*, 465 F.2d 528 (D.C. Cir. 1972) (remanding decision by EPA not to suspend aldrin and dieldrin for consideration of additional scientific evidence); *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971) (requiring EPA Administrator to commence administrative proceedings to determine whether DDT registration should be canceled in the face of evidence concerning safety); *Envtl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1971) (holding environmental groups had standing to challenge Secretary of Agriculture's failure to take prompt action on request for suspension of DDT); *Envtl. Def. Fund, Inc. v. Finch*, 428 F.2d 1083 (D.C. Cir. 1970) (holding action on petitioners' proposal to establish zero tolerance level for DDT residues on raw agricultural commodities did not have to await action by USDA); *Morriss & Meiners*, *supra* note 25, at 24-25 (detailing lawsuits against USDA and EPA).

30. Reorganization Order No. 3 of 1970, § 2(a)(1), 1970 U.S.C.C.A.N. 2996, 2998.

31. *Miller*, *supra* note 28, at 648. See also cases cited at *supra* note 29.

32. Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 96-516, 86 Stat. 973 (1972). For judicial treatment of FIFRA's evolution, see, e.g., *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 601-02 (1991); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 992 (1984).

33. *RODGERS*, *supra* note 20, § 5.3 at 42-46; *Miller*, *supra* note 28, at 650.

34. Pub. L. No. 92-140, 89 Stat. 75 (1975); Pub. L. No. 95-396, 92 Stat. 812 (1978); Pub. L. No. 96-539, 94 Stat. 3194 (1980); Pub. L. No. 100-532, 102 Stat. 2654 (1988); Pub. L. No. 101-624, 104 Stat. 3627 (1990); Pub. L. No. 104-170, 110 Stat. 1489 (1996). See *RODGERS*, *supra* note 20, § 5.3(C) - (I) (discussing scope of amendments).

of the environmental laws. Unlike the Clean Air Act, Clean Water Act, and other laws that delegate much of their implementation to the states, FIFRA provides a lesser role for state and local governments, creating and maintaining a uniform national system of registering and labeling pesticides. The following discussion of the various aspects of FIFRA both highlights the centralized nature of the statute and explores some of the current tensions between federal and state interests surrounding pesticide registration and use.

### *1. EPA Registration and Cancellation: Setting the Balance of Reasonableness*

FIFRA's primary provisions create and administer a federal uniform system of registering pesticides.<sup>35</sup> A pesticide cannot be manufactured, distributed or imported until it is registered and approved by EPA.<sup>36</sup> In order to register a pesticide in the United States, the applicant (usually the manufacturer) must submit the name and address of the applicant that will appear on the label, the name of the pesticide, a proposed label for use, the complete formula of the pesticide, a full description of the tests made, the results upon which the claims are based, and a request that the pesticide be classified for general use, restricted use, or both.<sup>37</sup> EPA requires a separate registration for each specific crop or insect on which the pesticide will be applied, as well as separate registrations for different dosages, and each registration must be supported by research data on health, safety, efficacy, and other information describing the ability of the product to perform its intended function without unreasonable adverse effects on human health and the environment.<sup>38</sup> In 1978, however, EPA obtained permission from Congress in the 1978 FIFRA Amendments to waive data requirements relating to pesticide

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35. Pesticides are any substance intended to prevent, destroy, repel or mitigate any pest as well as substances used as a plant regulator, defoliant or dessicant. 7 U.S.C. § 136(u) (2000). "Pests" are defined as "insects, rodents, worms, fungus, weeds, plants, virus, bacteria, microorganisms, and other animal life" as well as virtually anything else EPA declares is a pest. See 7 U.S.C. § 136(t) (2000); 40 C.F.R. § 152.5 (2005).

36. See 7 U.S.C. § 136a(a) (2000).

37. 7 U.S.C. § 136a(c)(1) (2000). Restricted use pesticides (as opposed to general use pesticides) may only be applied by "certified applicators," which include both private and commercial applicators. A pesticide will be classified for general use if the Administrator determines that, when used according to the label, the pesticide will not generally cause unreasonable adverse effects on the environment. 7 U.S.C. § 136a(d)(B) (2000). If the Administrator determines that, even when used according to the label, the pesticide may generally cause unreasonable adverse effects on the environment without additional regulatory restrictions, the Administrator will classify the pesticide for restricted use. 7 U.S.C. § 136a(d)(C) (2000).

38. 7 U.S.C. § 136a(c)(1) (2000).

“efficacy” in order to better use its resources to evaluate health and environmental effects.<sup>39</sup>

The EPA Administrator approves the registration if the application meets the following conditions: (1) its composition warrants the proposed claim; (2) the labeling and other required materials comply with FIFRA; (3) it will perform its intended function without unreasonable adverse effects on the environment; and (4) when used in accordance with widespread or commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.<sup>40</sup>

FIFRA defines “unreasonable adverse effects on the environment” as “any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.. ..”<sup>41</sup> Both the phrase itself and its definition confirm that EPA is the ultimate arbiter of the law’s effort to simultaneously serve the agricultural community, public health interests, and the environment. Precisely because the purpose of pesticides is to kill living things that are part of the environment, EPA’s major policy function is to balance the “collateral damage” against the benefits of pesticide use.<sup>42</sup> As might be guessed, the pesticide registration process can take years and millions of dollars of testing, and several more years in the EPA registration process.<sup>43</sup>

There has been significant debate over how EPA should balance the benefits and harms of any particular pesticide during the approval process and what constitutes “unreasonable adverse effects on the environment.” Concerned citizens, policy-makers, and scholars ask, what is too much environmental damage? Based on what information does EPA calculate the benefits and the risks? Can EPA register a pesticide if it saves millions of lives through preventing disease or producing enough food to prevent starvation in developing countries, despite potential long-

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39. See 7 U.S.C. § 136a(c)(5) (2000). “Efficacy” refers to how well a product works, how well the product controls the specific target pest and the toxic effects on both desirable and undesirable plants in the target area. See *American Cyanamid Co. v. Geye*, 79 S.W.3d 21, 25 (Tex. 2002) (citing Bernard A. Schneider, *EPA Pesticide Assessment Guidelines, Subdivision G: Product Performance* 36 (1982) and Robert W. Holst & Thomas C. Ellwanger, *EPA Pesticide Assessment Guidelines, Subdivision J: Hazard Evaluation Nontarget Plants* 18 (1982)). After the 1978 FIFRA Amendments, EPA promulgated regulations stating that the agency had waived all requirements to submit efficacy data, subject to certain exceptions. See 40 C.F.R. §§ 158.540(b)(1) and 158.640(b)(1) (2005). For a discussion of recent case law on product efficacy claims and whether they are preempted by FIFRA in light of EPA’s express waiver of reviewing efficacy data, see *infra* notes 86, 117-121 and accompanying text.

40. 7 U.S.C. § 136(a)(c)(5) (2000).

41. 7 U.S.C. § 136(bb) (2000).

42. See Miller, *supra* note 28, at 653.

43. See *id.* at 651; Richard P. Hubner & Robert G. Tardiff, *Registration of Pesticides in the U.S.: Understanding the Process*, in PESTICIDES LAW HANDBOOK: A LEGAL AND REGULATORY GUIDE FOR BUSINESS 29-30 (Govt. Institutes 1999). The federal regulations setting forth data and testing requirements are at 40 C.F.R. pt. 158 (2005).

term risks to nearby native species or health risks to children or asthmatics in the area?<sup>44</sup> This public debate continues in each pesticide registration application and, in a more focused form, in each pesticide cancellation or suspension proceeding where more extensive evidence of unreasonable adverse effects on the environment is often presented.

In each case, however, Congress delegates to EPA the sole authority to balance these concerns, while allowing input from the applicant and the public to EPA's decision-making process. The Senate Report accompanying the 1972 FIFRA Amendments made clear the role of EPA as the entity to balance the benefits and harms:

[The Administrator] must consider hazards to farmworkers, hazards to birds and animals and children yet unborn. He must consider the need for food and clothing and forest products, forest and grassland cover to keep the rain where it falls, prevent floods, provide clear water. He must consider aesthetic values, the beauty and inspiration of nature, the comfort of health of man. All these factors he must consider, giving each its due. . . . For each pesticide the Administrator must ask the same question . . . . In each case the Administrator must take into account all relevant factors and decide whether it is better for man and the environment that this product be registered.<sup>45</sup>

Accordingly, for any particular pesticide, EPA has set the balance of reasonableness by approving the pesticide for certain uses and, as set forth below, under the conditions set forth in the label intended to prevent unreasonable harm.

FIFRA also authorizes EPA to take steps to cancel a pesticide registration if it appears that a substance "generally causes unreasonable adverse effects on the environment" even when used in accordance with

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44. See generally RODGERS, *supra* note 20, at 105-11 (discussing cost-benefit analysis and EPA oversight of registration process); Marshall Lee Miller, *Pesticides: An Overview of the Regulatory Framework*, in PESTICIDES LAW HANDBOOK, *supra* note 28, at 1, 2 (discussing difficulty of EPA's regulatory role and that EPA is constantly criticized by environmentalists for not doing enough to protect the environment and by others for ordering costly or extreme measures with both sides contending EPA's decisions are not based on sound science). See also SENATE COMM. ON COMMERCE, FED. ENVTL. PESTICIDE CONTROL ACT OF 1972, S. REP. NO. 92-970, at 11 (2d Sess. 1972) (adopting cost-benefit approach to pesticide registration and stating that "any adverse effects ought not to be tolerated *unless there are overriding benefits from the use of the pesticide.*") (emphasis added) (cited in RODGERS, *supra* note 20, at 107).

45. S. REP. NO. 92-838 (2d Sess. 1972), *reprinted* in 1972 U.S.C.C.A.N. 3993, 4032-33 (quoted in *Papas v. Upjohn Co.*, 926 F.2d 1019, 1022 (11th Cir. 1991), *vacated*, 505 U.S. 1215 (1992), *remanded* to 985 F.2d 516 (11th Cir. 1993), *cert. denied*, 510 U.S. 913 (1993)). See also *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1298-99 (8th Cir. 1989) ("The EPA, in reviewing registrations and applications for registration, strikes this balance [between economic, social and environmental costs and benefits] in each case. FIFRA contains the procedure the EPA must follow in granting, denying, or canceling registrations, and FIFRA provides for administrative and judicial review of those agency decisions."). The federal regulations relating to the registration process generally are at 40 C.F.R. pt. 155 (2005).

“widespread” and “commonly recognized” practice.<sup>46</sup> This process is subject to notice, a public hearing, scientific review, and judicial review.<sup>47</sup> If EPA determines that action is necessary to prevent “imminent hazard” during the cancellation process, it may issue a suspension order that allows for expedited hearing after filing the notice of cancellation, or if an emergency exists, it may issue an emergency order suspending the pesticide even prior to the notice of cancellation.<sup>48</sup>

## 2. FIFRA Labeling: Directions for Reasonable Use

EPA review of the label accompanying the pesticide is a major component of the pesticide registration process. FIFRA defines the term “label” as the written, printed, or graphic material attached to the pesticide or any of its containers or wrappers.<sup>49</sup> As the primary interface between pesticide users and manufacturers, the label is intended to maximize the beneficial use of the pesticide and minimize harm to human health and the environment. Labeling includes ingredient statements, warnings and precautionary statements, directions for use, statements of use classifications, hazardous signal words (such as “Danger” and “Poison”), and statements of practical treatment.<sup>50</sup> As courts have noted, “EPA has regulated almost every aspect of pesticide labeling.”<sup>51</sup> With

46. 7 U.S.C. § 136d(b) (2000). *See, e.g.*, *Ciba-Geigy Corp. v. EPA*, 874 F.2d 277 (5th Cir. 1989) (remanding cancellation decision to EPA because Administrator improperly read word “generally” out of FIFRA provision allowing cancellation where pesticide “generally causes unreasonable adverse effects on the environment” when used in conformance with widespread and commonly recognized practices); *Env'tl. Def. Fund, Inc. v. EPA*, 548 F.2d 998 (D.C. Cir. 1976) (affirming EPA’s decision to suspend registration for major uses of heptachlor and chlordane based on potential carcinogenic effects in humans); *Dow Chemical v. Ruckelshaus*, 477 F.2d 1317 (8th Cir. 1973) (affirming administrator’s decision to cancel registration for certain uses of 2,4,5-T pesticide); *Env'tl. Def. Fund, Inc. v. EPA*, 510 F.2d 1292 (D.C. Cir. 1972) (upholding suspension of aldrin and dieldrin); *Env'tl. Def. Fund, Inc. v. EPA*, 489 F.2d 1247 (D.C. Cir. 1972) (upholding EPA Administrator’s order to cancel registration for DDT); *Env'tl. Def. Fund, Inc. v. EPA*, 465 F.2d 528 (D.C. Cir. 1972) (remanding EPA decision to issue notices of cancellation for aldrin and dieldrin but refusing to order immediate suspension and stating that EPA should reconsider data regarding need for suspension); *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 591-92 (D.C. Cir. 1971); *Dow Chemical v. Blum*, 469 F. Supp. 892 (E.D. Mich. 1979); 51 Fed. Reg. 36634 (Oct. 14, 1986) (ordering the emergency suspension of all registered pesticide products containing dinoseb or any of its salts and announcing intention to cancel registration and deny all pending applications for registration of pesticide products containing chemical). *See also* GRAD, *supra* note 18, § 8.03[7] (discussing pesticide suspension and cancellation proceedings); RODGERS, *supra* note 20, § 5.18 (“Cancellation-Suspension-Special Review”).

47. 7 U.S.C. § 136d(b)-(c) (2000).

48. 7 U.S.C. § 136d(c)-(d) (2000).

49. 7 U.S.C. § 136(p) (2000).

50. 40 C.F.R. § 156.10.

51. *Papas v. Upjohn Co.*, 926 F.2d 1019, 1024 (11th Cir. 1991), *vacated*, 505 U.S. 1215 (1992), *remanded to* 985 F.2d 516 (11th Cir. 1993), *cert. denied*, 510 U.S. 913 (1993). *See also* *Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 608 (8th Cir. 1999) (noting EPA’s “extensive” review and approval of pesticide labels).

regard to the directions for use, EPA states that the directions must be stated in terms that can be easily read and understood by the average person likely to use or supervise use and, when followed, “must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.”<sup>52</sup> In this way, EPA and the registrant can use the data collected during the testing process to shape the language on the label to avoid unreasonable adverse effects on the environment.<sup>53</sup> For instance, if there is significant concern regarding the pesticide’s impact on non-target plants, crops or animals that are likely to be near, but not on, the crop for which the pesticide is registered, the label can prohibit use when the wind speed exceeds specified limits to minimize drift.<sup>54</sup> As the U.S. Court of Appeals for the Second Circuit has stated recently, the FIFRA label “thus encapsulates the terms on which a chemical is registered, and its requirements become part of FIFRA’s regulatory scheme.”<sup>55</sup>

Because the label sets the conditions under which the pesticide can be used without causing unreasonable adverse effects on the environment, any departure from label requirements constitutes pesticide misuse and is subject to enforcement.<sup>56</sup> FIFRA provides for civil and

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52. 40 C.F.R. § 156.10(i) (2005).

53. Of course, many are skeptical that users of pesticides actually read the label or that the label has any significant impact on human behavior. See, e.g., RODGERS, *supra* note 20, § 512, at 160 (“There is little in the theory of human behavior to suggest that labels can influence complex conduct in a serious way. Any label message is likely to be overwhelmed by other messages reaching the user. The notion that self-preservation will bring behavior into conformity with a label . . . doesn’t hold for the advice to avoid elaborate spillover damages that are inflicted on distant third parties.”).

54. See, e.g., 40 C.F.R. § 156.10(i)(2) (2005) (contents for direction for use include application sites; target pests; dosage rate; method of application; dilution; frequency and timing; worker protection; storage and disposal directions; and limitations or restrictions on use to prevent unreasonable adverse effects such as rotational crop restrictions, warnings against application on certain crops, animals, objects or in adjacent areas).

55. *No Spray Coalition v. New York*, 351 F.3d 602, 605 (2d Cir. 2003).

56. See, e.g., *Oregon Env’tl. Council v. Kunzman*, 714 F.2d 901 (9th Cir. 1983) (aerial spraying of carbaryl to control gypsy moth did not violate pesticide label restrictions and thus did not violate FIFRA where sufficient precautions had been taken to comply with label restrictions); *George’s Pest Control Serv. v. EPA*, 572 F.2d 204 (9th Cir. 1977) (affirming civil penalties against company that applied pesticides in food-handling area despite label prohibition to the contrary); *United States v. Tropical Fruit*, 96 F. Supp. 2d 71 (D.P.R. 2000) (affirming imposition of \$585,000 penalty against company for spraying pesticides in a manner that caused drift in violation of label); *United States v. Saul*, 955 F. Supp. 1073 (E.D. Ark. 1996) (upholding prosecution of defendants for using restricted use pesticide Furadan for purpose of killing blackbirds and white egrets in violation of the label); *United States v. Corbin Farm Servs.*, 444 F. Supp. 510 (E.D. Cal. 1978) (refusing to dismiss criminal misdemeanor charges against farmer and licensed pesticide advisor who assisted farmer in selecting pesticide where advisor informed farmer that label did not include warnings against use of pesticide where waterfowl might be endangered despite label warning to the contrary), *aff’d*, 578 F.2d 259 (9th Cir. 1978). See also *Henderson v. Dep’t of Agric.*, 875 P.2d 487, 491-92 (Or. Ct. App. 1994) (upholding civil penalties against pesticide applicator under Oregon law for applying pesticide contrary to EPA-approved pesticide label).



criminal penalties for violation of the law's prohibitions, including either fines of up to \$50,000 or imprisonment of up to a year, or both, for knowing violations by pesticide registrants or applicants, and somewhat lesser penalties for pesticide applicators and users.<sup>57</sup> The problem for injured plaintiffs, however, is that FIFRA does not contain a private right of action for damages, which compromises the optimal enforcement of the law (through private attorney general principles) and its ability to serve as a means of compensation for improper pesticide use.<sup>58</sup>

### 3. *Role of the States in the Federal Pesticide Framework*

As stated earlier, FIFRA grants EPA exclusive control over the labeling of pesticides and substantial control over many other aspects of pesticide regulation.<sup>59</sup> The reasons for this are obvious: unlike water discharges or contamination of lands which are closely tied to a particular piece of real estate, city or state, FIFRA regulates uniform products that are sold and used throughout the country, and a patchwork of city, county, and state regulations governing registration, sale, and use would be unworkable. On the other hand, to give guidance to local pesticide users and to be responsive to local environmental needs, there continues to be a role for state and local oversight to address areas of concern specific to local needs (i.e., protection of species in a particular area or the need to expand the crops on which pesticides can be used to combat a particular pest outbreak).<sup>60</sup>

State governments respond to these needs by regulating pesticide sale and usage, and by taking enforcement actions against violators of state and federal pesticide law. FIFRA provides that a state may regulate the sale or use of any federally-registered pesticide but may not permit any sale or use prohibited by FIFRA.<sup>61</sup> States may ban completely certain pesticides or place additional restrictions on use. For instance, the State of California has detailed regulations that prohibit completely the use of

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57. 7 U.S.C. § 136l(a)–(b) (2000) (enumerating civil and criminal penalties for registrants, applicants, commercial applicators and private applicators).

58. See, e.g., *Bates v. Dow Agrosiences*, 125 S. Ct. 1788, 1801 (2005) (FIFRA does not provide a federal remedy for persons injured as a result of a manufacturer's violation of FIFRA's labeling requirements); *No Spray Coalition v. City of New York*, 351 F.3d 602, 605 (2d Cir. 2003) (discussing absence of private right of action in FIFRA); *infra* note 68 and accompanying text.

59. See *N.Y. State Pesticide Coalition v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989) (the "states have joint control with the federal government in regulating the use of pesticides ... with the exception of the EPA's exclusive supervision of labeling").

60. See RODGERS, *supra* note 20, at 197-208 (discussing procedure for and circumstances under which states obtain "special local needs" exemptions to authorize use of registered pesticides for unregistered purposes to control localized pest outbreaks or protect certain crops and, conversely prohibit the use or method of dispersal of certain pesticides to protect the local environment).

61. 7 U.S.C. § 136v(a) (2000).

pesticides toxic to bees during the “citrus bloom period” in certain counties to protect bees that are assisting with pollination efforts in those counties.<sup>62</sup> States may also allow registration for additional uses of registered pesticides to meet a “special local need,” defined as an existing or imminent pest problem within a State for which an appropriate federally registered pesticide is not available, so long as the registration has not been previously denied, disapproved, or canceled.<sup>63</sup>

Moreover, the EPA Administrator is authorized to grant states primary enforcement responsibility for pesticide use violations through their own state laws if the Administrator determines that the state has adopted adequate pesticide use laws, regulations, enforcement procedures, and recordkeeping requirements.<sup>64</sup> Currently, all states except for Colorado and Wyoming have full primacy for enforcing pesticide use violations within their states with oversight from EPA.<sup>65</sup>

The primary area in which FIFRA prohibits state involvement is labeling. In a section entitled “Uniformity,” FIFRA provides 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.”<sup>66</sup> As discussed in Section II, the question of which state actions (whether actions by state agencies, jury verdicts, or judicial decisions) are or should be subject to preemption under this provision has fueled significant litigation. However, FIFRA’s statutory framework makes clear that apart from labeling, there is a significant role for states to address local needs and enforcement.

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62. See CAL. CODE REGS. tit. 3, § 6656 (2005). See also MINN. STAT. § 18B.115 (2004) (banning sale, use or application of chlordane or heptachlor beginning in 1989); WIS. STAT. § 94.707 (prohibiting sale or use of products containing aldrin, chlordane, dieldrin, heptachlor and certain other pesticides beginning in 1983).

63. 7 U.S.C. § 136v(c) (2000); 40 C.F.R. § 162.151(i) (2000). The regulations governing state registration of pesticide products are found at 40 C.F.R. pt. 162 and govern state registration authority and procedures and EPA disapproval or suspension of state registrations.

64. 7 U.S.C. § 136w-1(a) (2000). However, unlike many other environmental laws, the state pesticide laws may not be any *more* stringent than the federal law. *Id.*

65. E-mail from John Neylan, Chief, EPA Agriculture Branch, to Alexandra Klass, Associate Professor of Law, William Mitchell College of Law (July 22, 2004) (on file with author). Colorado splits its authority with the EPA Region 8 office, with Colorado handling commercial applicators and EPA handling the rest. *Id.* See also State Pesticide Regulatory Agencies, <http://npic.orst.edu/state1.htm> (last visited Sept. 1, 2005) (listing state agencies with authority regarding pesticides).

66. 7 U.S.C. § 136v(b) (2000). By contrast, states may impose additional requirements relating the sale or and use of pesticides. See, e.g., *Nat’l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 608 (8th Cir. 1999) (stating that FIFRA strikes a balance between state and federal control and “leaves ample room” for state regulation) (citing *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 613 (1991)); *Lowe v. Sporicidin Int’l*, 47 F.3d 124, 128 (4th Cir. 1995) (holding that while FIFRA preempts a state’s imposition of additional labeling requirements, it does not preempt a state’s authority to monitor requirements with labeling or other requirements imposed by FIFRA). See also *supra* notes 60-62 and accompanying text.

## II. PESTICIDE DAMAGE AND PREEMPTION

One consequence of FIFRA's balancing of benefits and unreasonable adverse effects on the environment is legally registered pesticides' adverse impacts on scores of individuals, companies, and natural areas. These injuries take the form of lost crops, loss of organic certification, loss of species, degradation of air, soil, and water, significant personal injury, and death. Some of these plaintiffs are pesticide users, others are third-parties impacted by pesticide drift or runoff. For these injured parties, what is the recourse? Certainly, if the damage is tied to a specific pesticide and is sufficiently widespread and publicized, efforts can be made to suspend or cancel the pesticide as was done with DDT.<sup>67</sup> However, obtaining such administrative relief is beyond the means of most victims of pesticide damage and is a long and generally unsuccessful process even with the best funding, political clout, and legal representation. Moreover, many pesticide injuries arise from one-time uses where a user violated label instructions, circumstances are unique, or additional precautions would have avoided the injury. In such cases, the more common option is a lawsuit against the pesticide manufacturer and/or user.

A large number of these cases are brought against the pesticide manufacturer, usually by a pesticide user who contends that additional warnings on the label or other actions taken by the manufacturer would have prevented the harm. The claims in these cases, whether heard in federal or state court, are almost always brought under various state tort theories because, unlike some other federal environmental statutes, FIFRA does not include a private right of action and thus a violation of the statute is only enforceable by the EPA or a delegated state agency.<sup>68</sup> Accordingly, these cases, referred to as the "FIFRA Preemption cases," all involve the question of whether a state lawsuit for pesticide damages is preempted by FIFRA's prohibition that a state shall not impose any requirement for labeling or packaging "in addition to or different from" that required under federal law.<sup>69</sup> The claims in these cases typically are

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67. For a discussion of the efforts that went into obtaining the ban on DDT and related judicial decisions, see *supra* notes 25 and 29 and accompanying text.

68. *No Spray Coalition v. City of New York*, 351 F.3d 602, 605 (2d Cir. 2003) (stating that unlike Clean Water Act, FIFRA does not provide for citizen enforcement suits; enforcement actions may only be brought by specified state and federal agencies); *Fiedler v. Clark*, 714 F.2d 77, 79 (9th Cir. 1983); *In re Agent Orange Prod. Liab. Litig.*, 635 F.2d 987, 992 (2d Cir. 1980); *In re StarLink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828 (N.D. Ill. 2002) (only EPA has standing to enforce FIFRA); *Lescs v. Dow Chem. Co.*, 976 F. Supp. 393, 401 (W.D. Va. 1997), *aff'd sub nom. Lescs v. Hughes*, 168 F.3d 482 (4th Cir. 1999); *Miller v. E.I. Du Pont de Nemours & Co.*, 880 F. Supp. 474, 479 (S.D. Miss. 1994); *Rodriguez v. Am. Cyanamid Co.*, 858 F. Supp. 127 (D. Ariz. 1994).

69. See 7 U.S.C. § 136v(b) (2000). By contrast, states may impose additional requirements relating to the sale or use of pesticides. See, e.g., 7 U.S.C. § 136v (2000) ("Authority of States"); 7

for failure to warn, breach of express and/or implied warranty, fraud, misrepresentation, and negligent testing, design or manufacture.<sup>70</sup> As shown below, courts have not only found preemption in the vast majority of these cases, but have used very strong language to uphold EPA's role as the final arbiter of what is reasonable in the world of pesticide labeling. On the other hand, the majority of circuits have held that states may provide a private right of action for violations of FIFRA or similar state provisions, thus striking a more appropriate balance between uniformity and environmental protection. Significantly, the Supreme Court has recently ratified such state authority creating new opportunities for enforcement of FIFRA's protections.

### A. *Setting the Stage: The Early FIFRA Cases*

The Supremacy Clause of the U.S. Constitution provides that "[t]his Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."<sup>71</sup> Thus, a federal law can preempt or render invalid a state law.<sup>72</sup> Preemption can be: (1) express, where the federal law specifically states that it preempts state law in that area;<sup>73</sup> (2) implied, where, although not expressly stated, it is clear that Congress intended to completely regulate a particular area;<sup>74</sup> and (3) resulting from actual conflict, where federal law controls if there is a conflict between federal and state law.<sup>75</sup>

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U.S.C. § 136w-1 (2000) ("State primary enforcement responsibility"); *New York v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989) ("The states have joint control with the federal government in regulating the use of pesticides, for the safety of its citizens and their environment . . . with the exception of EPA's exclusive supervision of labeling.").

70. See Andrew Barrett, Robert Wilson & John Wilson, *State and Local Regulation, in PESTICIDES LAW HANDBOOK*, *supra* note 43, at 197-98 (detailing and analyzing most common pesticide claims); Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 588-595 (1997) (discussing FIFRA preemption of state law claims for improper labeling, testing, and manufacturing); David G. Owen, *Federal Preemption of Products Liability Claims*, 55 S.C. L. REV. 411, 418-21 (2003) (same); Valerie Watnick, *Federal Preemption of Tort Claims Under FIFRA: The Erosion of a Defense*, 36 U. MICH. J.L. REFORM 419, 430-54 (2003) (discussing FIFRA preemption of state common law tort claims).

71. U.S. CONST. art. VI, cl. 2.

72. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824) ("In every such case [where state laws are contrary to federal law], the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.").

73. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

74. See *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

75. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143

The first federal cases to consider whether FIFRA preempted common law claims against manufacturers for pesticide damages arose in the 1980s. These cases rejected preemption arguments and held that the plaintiffs could recover damages based on failure to warn theories. In the most well-known case, *Ferebee v. Chevron Chemical Co.*,<sup>76</sup> the U.S. Court of Appeals for the D.C. Circuit held that state common law claims and FIFRA have separate functions, and that while FIFRA served to ensure a pesticide did not have unreasonable adverse effects based on a net benefit analysis, state tort law provided compensation for injury for failure to warn against a known and significant risk.<sup>77</sup> The court stated that if a pesticide manufacturer was faced with a damage award or multiple awards, it could assess whether to continue to sell the product or to change the label to limit its liability.<sup>78</sup> In rejecting preemption, the court also reasoned that even though FIFRA does not allow states to directly impose additional labeling requirements, it does allow states to impose more stringent constraints on the use of pesticides within its jurisdiction.<sup>79</sup>

### B. *The Move Towards Uniformity: Cipollone and FIFRA*

The FIFRA preemption landscape changed dramatically with the Supreme Court's 1992 decision in *Cipollone v. Liggett Group*.<sup>80</sup> In that case, the Court held that a smoker's claim for damages against a cigarette manufacturer under a failure to warn theory was preempted by section 5(b) of the federal Public Health Smoking Act of 1969. That section prohibited "any state requirement or prohibition" based on smoking and health "under state law" with respect to advertisement or promotion of

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(1963). See also LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1172 (3rd ed. 2000) (discussing the three categories of preemption).

76. 736 F.2d 1529 (D.C. Cir. 1984).

77. *Id.* at 1540-41.

78. *Id.*

79. *Id.* at 1541. Several other courts in the 1980s and early 1990s followed the holding in *Ferebee*, allowing claims for personal injury damages from pesticide use to proceed against pesticide manufacturers under a failure to warn theory. See *Thorton v. Fondren Green Apartments*, 788 F. Supp. 928, 932 (S.D. Tex. 1992); *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F. Supp. 1339, 1343-44 (D. Mont. 1991), *aff'd on other grounds*, 993 F.2d 676 (9th Cir. 1993); *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.* 760 F. Supp. 1345 (S.D. Ind. 1990); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Wilson v. Chevron Chem. Co.*, No. 83 Civ. 762 (JFK), 1986 WL 14925 (S.D.N.Y., Dec. 17, 1986). *But see Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991) (holding state law claims impliedly preempted), *vacated*, 505 U.S. 1215 (1992), *remanded to* 985 F.2d 516 (11th Cir. 1993), *cert. denied*, 510 U.S. 913 (1993); *Herr v. Carolina Log Bldgs.*, 771 F. Supp. 958 (S.D. Ind. 1989); *Hurt v. Dow Chem. Co.*, 759 F. Supp. 556 (E.D. Mo. 1990); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987).

80. 505 U.S. 504 (1992).

cigarette packages labeled in conformance with the federal act.<sup>81</sup> In holding that the 1969 law preempted the plaintiff's failure to warn claim, the Court found that the phrase "[n]o requirement or prohibition":

sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules.... [State] regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potential method of controlling government policy.<sup>82</sup>

The Court went on to hold that the phrase "imposed under State law" similarly did not distinguish between positive enactments and common law and that all of the plaintiff's claims alleging that the defendant's advertisements or promotions should have included additional warnings beyond those required by federal law were preempted.<sup>83</sup>

*Cipollone* had an immediate impact on the FIFRA Preemption cases. Not only is the language of section 136v(b) of FIFRA very similar to section 5(b) of the Public Health Smoking Act, but the Supreme Court immediately granted certiorari in pending pesticide cases and issued remands with direction to the lower courts to reconsider the decisions in light of *Cipollone*.<sup>84</sup> Since the decision in *Cipollone*, the federal circuit courts and numerous state supreme courts have held overwhelmingly that state law tort claims challenging pesticide product labels are preempted by FIFRA.<sup>85</sup> There was nonetheless a recent split among the courts over

81. The operative language in the Public Health Cigarette Smoking Act of 1969 stated that "[n]o requirement or prohibition based on smoking and health shall be imposed under the State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." *Id.* at 515 (citing the Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1334(b) (2000)).

82. *Id.* at 521 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).

83. *Id.* at 522-23. By contrast, the Court held that claims relating solely to inadequate testing or research practices, express warranty, and claims for fraud and conspiracy, were not preempted and could go forward. *Id.* at 524-531.

84. See, e.g., *Ark.-Platte v. Van Waters & Rogers, Inc.*, 506 U.S. 910 (1993); *Papas v. Zoecon Corp.*, 505 U.S. 1215 (1992).

85. See, e.g., *Dow Agrosciences v. Bates*, 332 F.3d 323 (5th Cir. 2003), *vacated and remanded*, 125 S. Ct. 1788 (2005); *Netland v. Hess & Clark, Inc.* 284 F.3d 895 (8th Cir. 2002); *Lowe's Home Ctrs. v. Olin Corp.*, 313 F.3d 1307 (11th Cir. 2002); *Hawkins v. Leslie's Pool Mart*, 184 F.3d 244 (3d Cir. 1999); *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Grenier v. Vermont Log Bldgs.*, 96 F.3d 559 (1st Cir. 1996); *Taylor AG Indus. v. Pure Gro.* 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Ark.-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.* 959 F.2d 158, *aff'd after remand*, 981 F.2d 1177 (10th Cir. 1992); *Etcheverry v. Tri-Ag Serv.*, 993 P.2d 366 (Cal. 2000); *Banks v. ICI Americas*, 450 S.E.2d 671 (Ga. 1994); *Kawamata Farms v. United Agric. Prods.*, 948 P.2d 1055 (Haw. 1997); *Dow Chem. Co. v. Ebling*, 753 N.E.2d 633 (Ind. 2001); *Wright v. Am. Cyanamid Co.*, 599 N.W.2d 668 (Iowa 1999); *Jenkins v. Amchem Prods., Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995); *Hopkins v. Am. Cyanamid Co.*, 666 So.

whether claims related to product efficacy, non-label-related consumer fraud, and voluntary label statements (as opposed to those required by FIFRA) are preempted.<sup>86</sup>

What is most notable (although not surprising) about many of these decisions, however, is the focus on the role of EPA as the final arbiter of what risks to human health and the environment are reasonable when it comes to pesticides. As shown below, the courts strongly stated that when it comes to pesticide use, it is EPA, not state legislators, or state or federal judge and juries, that has the responsibility of reviewing the data, balancing the risks, and determining whether a pesticide should be registered and what restrictions on use through the label are appropriate.

2d 615 (La. 1996); *Hochberg v. Zoecon Corp.*, 657 N.E.2d 1263 (Mass. 1995); *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000); *Eyl v. Ciba-Geigy Corp.*, 650 N.W.2d 744 (Neb. 2002); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992); *Lewis v. Am. Cyanamid Co.*, 715 A.2d 967 (N.J. 1998); *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677 (R.I. 1999); *Eide v. E.I. Du Point de Nemours & Co.*, 542 N.W.2d 769 (S.D. 1996); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *Goodwin v. Bacon*, 896 P.2d 673 (Wash. 1995); *Gorton v. Am. Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995).

The only court that has not held that common law claims such as failure to warn, breach of warranty or other label-related claims are preempted by FIFRA is the Montana Supreme Court. In *Sleath v. West Mont Home Health Servs.*, 16 P.3d 1042 (Mont. 2000), the Montana Supreme Court overruled its prior precedent in *McAlpine v. Rhone-Poulenc Ag. Co.*, 947 P.2d 474 (Mont. 1997), and held that FIFRA preempted only legislative enactments and not common law claims for damages. The Court based its decision on the U.S. Supreme Court's decision in *Medtronic v. Lohr*, 518 U.S. 470 (1996), as well as the EPA's position, articulated in a California case, *Etcheverry v. Tri-Ag Servs., Inc.*, 993 P.2d 366 (2000), that FIFRA did not intend to preempt any common law damages claims. *Sleath*, 16 P.3d at 1047-1053. *See also* *Watnick*, *supra* note 70, at 419 (arguing that based on *Medtronic* and EPA position in *Etcheverry* that FIFRA preemption should be interpreted narrowly in favor of allowing more state law tort claims for pesticide damage). Since the *Sleath* case and publication of the *Watnick* article, however, EPA has stated in amicus briefs to the Supreme Court that it has "reexamined" its position in *Etcheverry* and has concluded that its prior position was "incorrect." *See, e.g.*, Brief of Amicus Curiae United States at 20, *Bates v. Dow Agroscience, cert. granted*, 124 S. Ct. 2903 (2004).

86. *Compare* *Dow Agrosciences v. Bates*, 332 F.3d 323 (5th Cir. 2003), *vacated and remanded*, 125 S. Ct. 1788 (2005) (holding FIFRA preempts claims for crop damage because even though EPA has chosen not to review product efficacy data, a judgment against the manufacturer would be an incentive for it to alter its label to avoid future liability); *Dahlman Farms v. FMC Corp.*, 240 F. Supp. 2d 1012 (D. Minn. 2002) (same) *with* *Nathan Kimmel v. DowElanco*, 275 F.3d 1199 (9th Cir. 2002) (holding claim for intentional interference with business advantage not preempted by FIFRA where claim was premised on manufacturer's change in label so that plaintiff's pesticide bags could no longer be used with the product); *Walker v. American Cyanamid Co.*, 948 P.2d 1123, 1128 (Idaho 1997) (finding no FIFRA preemption for voluntary label statements); *Kawamata Farms v. United Agri. Prods.*, 948 P.2d 1055, 1080 (Haw. 1997) (same); *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) (holding FIFRA did not preempt consumer fraud claim based on allegations that manufacturer's marketing of herbicides misled farmers into believing that another cheaper herbicide by same manufacturer could not be used on their crops); *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002) (holding FIFRA does not preempt state law claims for crop damage because EPA has chosen not to regulate product effectiveness). *See also* *Grey*, *supra* note 70, at 588-595 (discussing FIFRA preemption cases decided in the wake of *Cipollone v. Liggett Group Inc.*, and *Medtronic v. Lohr* and arguing as a general matter that courts should not find preemption of state tort claims in the absence of an unmistakably clear intent to preempt).

### C. *The FIFRA Preemption Spectrum in the Wake of Cipollone*

Although *Cipollone* significantly changed the FIFRA preemption landscape in favor of preemption of a broad range of common law claims, the jurisprudence in the various circuits developed in such a way as to allow some potential redress for violations of pesticide laws. One avenue of relief some courts raised was the possibility that states could create a statutory cause of action for violation of FIFRA provisions or similar state standards. As shown below, until the Supreme Court decided *Bates v. Dow Agrosciences*<sup>87</sup> in 2005, the circuits were split regarding whether there was in fact any role for the states to allow private parties to obtain redress for violation of federal pesticide laws in the absence of a private cause of action under FIFRA itself.

#### 1. *The Broad View: No Role for the States*

Prior to *Bates*, the Courts of Appeal for the Ninth, Tenth, and Eleventh Circuits had taken the broadest view of preemption, holding that EPA's paramount authority in regulating the labeling of pesticides must be preserved at all costs in order to maintain national uniformity. For instance, in *Papas v. The Upjohn Co.*,<sup>88</sup> the Court of Appeals for the Eleventh Circuit held that FIFRA preempted a worker's claims for damages due to pesticide exposure based on inadequate labeling on the pesticide product.<sup>89</sup> Based on *Cipollone*, the Court held that the claim the manufacturer failed to disclose to EPA that the product contained Benzene was preempted. The court reasoned that it was for the EPA Administrator, not the court or a jury to determine whether labeling and packaging information is incomplete or inaccurate and, if so, what label changes are necessary.<sup>90</sup> Moreover, the court made the very broad statement that "[w]e think FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures."<sup>91</sup> One month earlier, the Court of Appeals for the Tenth Circuit reached a similar conclusion in *Arkansas-Platte & Gulf Partnership v. Van Water & Rogers, Inc.*,<sup>92</sup> holding that FIFRA "simply deprives the state of power to adopt any regulation."<sup>93</sup>

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87. 125 S. Ct. 1788 (2005).

88. 985 F.2d 516 (11th Cir. 1993).

89. *Id.* at 518.

90. *Id.* at 518-19 (citing *Papas v. Upjohn Co.*, 926 F.2d 1019, 1026 n.8 (11th Cir. 1991), vacated, 505 U.S. 1215 (1992), remanded to 985 F.2d 516 (11th Cir. 1993), cert. denied, 510 U.S. 913 (1993)).

91. *Id.* at 519.

92. 981 F.2d 1177 (10th Cir. 1992).

93. *Id.* at 1179 (emphasis in original).



Next, the Court of Appeals for the Ninth Circuit adopted the Eleventh Circuit's broad view of preemption in *Taylor AG Industries v. Pure-Gro*,<sup>94</sup> holding that the plaintiff's claims for crop damage from use of a defoliant were preempted because allowing damages on the claim would "be tantamount to allowing the State of Arizona to regulate pesticide labeling indirectly, an action which is specifically prohibited by § 136v(b)."<sup>95</sup> To justify the result, the court focused on "the rigorous label-approval process under FIFRA" and EPA's "careful review of the product data and the draft label."<sup>96</sup> Despite the plaintiff's argument that court intervention was necessary to remedy EPA's inadequacies in reviewing pesticide data, the court refused to provide any oversight of EPA. The court held, consistent with the Eleventh Circuit, that the EPA Administrator has complete authority to regulate labeling and FIFRA leaves states with no authority to provide redress or oversight for any EPA shortcoming in that regard.<sup>97</sup>

This position, of course, had the harsh result of leaving private parties with no state remedy for any false or misleading statements or omissions in pesticide labeling and no state remedy for EPA's failure to adequately review and monitor representations on pesticide labels other than through the cancellation or suspension process. Although *Cipollone* suggested that claims relating to inadequate testing, misrepresentation, or fraud would not necessarily be preempted under the 1969 Public Health Smoking Act,<sup>98</sup> the FIFRA preemption cases just discussed appeared to hold that in the FIFRA context it was up to EPA alone to police such issues, leaving no role for the states at all.<sup>99</sup>

## 2. *The Rest of the Spectrum*

Other circuits did not take the same broad view of preemption as the Ninth, Tenth and Eleventh Circuits. Although the remaining circuits to consider the issue all squarely held that common law claims relating to statements on the pesticide label were preempted under *Cipollone*, some courts held that nothing in *Cipollone* or FIFRA preempts a state from creating a private right of action (i.e., a positive enactment) to recover damages for violation of FIFRA's requirements. In this way, those courts supported Congress's goals of EPA authority and national uniformity for labeling while allowing some redress for plaintiffs.

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94. 54 F.3d 555 (9th Cir. 1995).

95. *Id.* at 560.

96. *Id.*

97. *Id.* at 561 (citing *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993)).

98. *See supra* note 83.

99. *See, e.g.*, *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir. 1993) (holding that it is up to EPA alone to determine through the labeling process whether information or data is incomplete or incorrect).

For instance, in *Worm v. American Cyanamid Co.*,<sup>100</sup> the Court of Appeals for the Fourth Circuit held that FIFRA preempted farmers' claims for breach of warranty based on allegations that the defendant's herbicide product caused a "carryover effect" that damaged their crops.<sup>101</sup> However, the court went on to hold that "[i]f a state elects to recognize that a breach of a FIFRA-created duty forms the basis for a state remedy," such an enactment is permitted by section 136v(b).<sup>102</sup> The court also held that the plaintiffs' claims for negligent testing, formulation, and manufacture were not preempted.<sup>103</sup>

The Fourth Circuit elaborated on these issues a few years later, in *Lowe v. Sporidicin International*,<sup>104</sup> where a hospital worker sued a manufacturer of sterilizing solution alleging injuries as a result of inhaling the solution. In analyzing the preemption issue, the court reaffirmed that "while FIFRA does preempt a state's imposition of additional labeling requirements, it does not preempt a state's authority to monitor compliance with labeling or other requirements imposed by FIFRA."<sup>105</sup> The court recognized that such a ruling put it in conflict with the Tenth and Eleventh Circuits' broader view of FIFRA preemption, but reasoned that *Cipollone* supported the narrower view.<sup>106</sup> Joining the Fourth Circuit in this more limited view of FIFRA preemption was the Court of Appeals for the Fifth Circuit<sup>107</sup> and, to a lesser extent, the Courts of Appeal for the Second<sup>108</sup> and Eighth<sup>109</sup> Circuits. The Court of Appeals for the Seventh Circuit explicitly declined to take a position on the split.<sup>110</sup>

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100. 5 F.3d 744 (4th Cir. 1993).

101. *Id.* at 745-47. *But see* *Roberson v. E.I. DuPont de Nemours*, 863 F. Supp. 929, 934-35 (E.D. Ark. 1994) (disagreeing with *Worm v. American Cyanamid Co.* and finding breach of express and implied warranty claims against pesticide manufacturer based on statements in the label not preempted on grounds that *Cipollone* does not require broad preemption and because FIFRA does not "dictate the detail of these labels or test their accuracy in any stringent fashion.").

102. *Worm*, 5 F.3d at 748 (citing *Worm v. Am. Cyanamid Co.*, 970 F.2d 1301, 1308 (1992)).

103. *Id.* at 749. The court went on to hold, however, that the district court's dismissal of the negligent testing, formulation and manufacture claims on summary judgment for lack of evidence was supported by the record. *Id.*

104. 47 F.3d 124 (4th Cir. 1995).

105. *Id.* at 128.

106. *Id.* at 128-29. The court went on to affirm dismissal of the plaintiff's claims on the grounds that she failed to submit any evidence of causation on summary judgment and never actually contended that Maryland recognized a cause of action for negligent misrepresentation or negligent failure to warn based on advertisements contrary to an EPA-approved label. *Id.* at 131.

107. *See* *MacDonald v. Monsanto*, 27 F.3d 1021, 1024-25 (5th Cir. 1994) (FIFRA does not preempt common law claims unconcerned with herbicide labeling nor state laws concerned with herbicide labeling that do not impose requirements different than or in addition to FIFRA requirements) (citing *Worm v. Am. Cyanamid Co.*, 970 F.2d at 1307-08).

108. *See* *N.Y. State Pesticide Coalition v. Jorling*, 874 F.2d 115, 119 (2d Cir. 1989) (holding that because FIFRA labels are designed to be read and followed by the end user, state agency regulations requiring notification of the public at large of pesticide use in the area in the form of

D. *The Supreme Court Speaks: Bates v. Dow Agrosciences*

The Supreme Court agreed to address this issue for the first time in June 2004, when it granted certiorari in the case of *Bates v. Dow Agrosciences*.<sup>111</sup> In *Bates*, herbicide manufacturers sought a declaratory judgment against Texas peanut farmers who were threatening to sue for crop damage caused by the herbicide "Strongarm."<sup>112</sup> The plaintiffs brought counterclaims including negligence, strict liability, breach of warranties, and fraud.<sup>113</sup> The U.S. District Court for the Northern District of Texas found the plaintiffs' state law claims preempted by FIFRA and the Court of Appeals for the Fifth Circuit agreed.<sup>114</sup>

In reaching its decision, the Fifth Circuit started its analysis by stating "three clear principles."<sup>115</sup> First, FIFRA does not completely preempt all state or local regulation. Second, FIFRA does not preempt common law that is unconcerned with herbicide labeling nor does it preempt state laws concerned with herbicide labeling that do not impose any requirement in addition to or different from FIFRA requirements. Third, FIFRA preempts state laws that either directly or indirectly impose different labeling requirements.<sup>116</sup>

However, in finding the plaintiffs' claims preempted, the court rejected the argument that EPA's decision not to review product effectiveness data was relevant to FIFRA preemption.<sup>117</sup> Instead, the court held that even where EPA has not imposed a labeling requirement, for a state to create a labeling requirement by authorizing a claim would clearly impose a requirement "in addition to or different from those"

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cover sheets, signs, and newspaper advertisements "do not impair the integrity of the FIFRA label," are not preempted and "serve to further the purpose of the statute by enlisting state aid to prevent 'unreasonable adverse effects [of pesticide use] on the environment.'" (citing 7 U.S.C. § 136a(c)(5) (2000)).

109. See *Nat'l Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 609 (8th Cir. 1999) (holding that plaintiffs' claims for defective manufacture and design based on toxic impurities in the pesticide that were known to defendants were not preempted by FIFRA because such claims do not directly attack the EPA-approved label or packaging).

110. See *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997). See also *In re Starlink Corn Prod. Liab. Litig.*, 212 F. Supp. 2d 828, 836-37 (N.D. Ill. 2002) (holding claims that pesticide manufacturers sold corn seeds without the EPA-approved label or otherwise failed to comply with registration terms as well as claims based on voluntary statements beyond the label were not preempted).

111. 125 S. Ct. 1788 (2005).

112. *Id.* at 1793.

113. *Id.*

114. *Id.*

115. *Dow Agrosciences v. Bates*, 332 F.3d 323, 329 (5th Cir. 2003), *vacated and remanded*, 125 S. Ct. 1788 (2005).

116. *Id.* (citing *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *MacDonald v. Monsanto*, 27 F.3d 1021 (5th Cir. 1994)).

117. *Dow Agrosciences*, 332 F.3d at 329-331. See also *supra* note 39 (discussing EPA's decision not to review product efficacy data).

required under FIFRA.<sup>118</sup> As part of its analysis, the Fifth Circuit expressly rejected the holding of the Texas Supreme Court in *American Cyanamid Co. v. Geye*, which had held that because EPA had chosen not to regulate how well the product works, state law claims regarding target area crop damage were not preempted.<sup>119</sup> The Fifth Circuit went on to reason that although *Geye* assumed that the claims at issue did not relate to product labeling, in fact, the claims at issue had the effect of imposing a labeling requirement because they were related to the contents of the label.<sup>120</sup>

Although the Fifth Circuit's analysis may have appeared similar to that in the various preemption cases decided in other circuits, the plaintiffs' arguments in *Bates* were in fact quite different. In the typical situation, the label language the defendant relies upon for preemption is based on data submitted to EPA as part of its regulatory review. In *Bates*, however, EPA had expressly declined to review data relating to pesticide efficacy, including the potential adverse impact on species that are both desirable (the plaintiffs' peanut crop) and undesirable (weeds).<sup>121</sup> It was this lack of regulation and oversight by EPA that the Texas Supreme Court relied upon in *Geye* to find the plaintiffs' claims were not preempted and distinguish the case from other precedent around the country.<sup>122</sup>

The Supreme Court released its opinion in the *Bates* case in April 2005.<sup>123</sup> The decision, authored by Justice Stevens, soundly rejected the broad view of FIFRA preemption. The Court began by stating clearly that nothing in FIFRA itself would prevent a state "from making the violation of a federal labeling or packaging requirement a state offense, thereby imposing its own sanction on pesticide manufacturers who violate federal law."<sup>124</sup> The Court acknowledged that under *Cipollone*, the term "requirements" in section 136v(b) of FIFRA "reaches beyond positive enactments" such as statutes or regulations to embrace judge-made rules or jury verdicts, but that it is crucial to determine the scope of that preemption.<sup>125</sup> According to the Court, in order for a "requirement" to be preempted it must be a requirement for labeling or packaging and must be "in addition to or different from" those required under FIFRA.<sup>126</sup> Thus, in defining the scope of preemption, the Court held that

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118. *Id.* at 331 (citing 7 U.S.C. § 136v(b) (2000)).

119. *Id.* at 330 (citing *Am. Cyanamid Co. v. Geye*, 79 S.W.3d 21, 23 (Tex. 2002)).

120. *Id.* 333-31.

121. See *supra* note 39 and accompanying text.

122. *American Cyanamid Co. v. Geye*, 79 S.W.3d 21, 29 (Tex. 2002).

123. 125 S. Ct. 1788 (2005).

124. *Id.* at 1797.

125. *Id.* at 1798.

126. *Id.* (citing 7 U.S.C. § 136v(b) (2000)).

the Fifth Circuit was “quite wrong when it assumed that any event, such as a jury verdict, that might ‘induce’ a pesticide manufacturer to change its label should be viewed as a requirement.”<sup>127</sup>

In reviewing the plaintiffs’ state law claims, the Court held that the common law claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not requirements for “labeling or packaging” and thus were not preempted.<sup>128</sup> Even if a verdict in favor of the plaintiffs on such claims might induce the manufacturer to alter its label, the Court rejected such an “effects-based” test, choosing instead to focus on whether the elements of the common law claim impose labeling or packaging requirements more burdensome than federal law.<sup>129</sup> Indeed, the Court stated that the threat of damages may give manufacturers an additional cause to comply with federal requirements, and that private remedies that enforce federal misbranding requirements “would seem to aid, rather than hinder, the functioning of FIFRA.”<sup>130</sup> The Court made clear that although FIFRA does not provide a federal remedy to those injured by manufacturers’ violations of FIFRA’s requirements, “nothing in § 136v(b) prevents States from providing such a remedy.”<sup>131</sup>

The Court concluded by confirming that FIFRA did preempt competing state labeling standards as well as “any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations.”<sup>132</sup> The Court then remanded the case to the court of appeals to determine whether the elements of the plaintiffs’ state law fraud and failure to warn claims imposed a broader obligation than FIFRA’s requirement that labels not contain “false or misleading” statements based not only on the language

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127. *Id.*

128. *Id.*

129. *Id.* at 1799. For instance, if state law claims for fraud and failure to warn are equivalent to FIFRA’s requirements that a pesticide label not contain “false or misleading” statements (see 7 U.S.C. § 136(q)(1)(A) (2000)) or inadequate instructions or warnings (see 7 U.S.C. § 136(q)(1)(F)–(G) (2000)), such claims would not be preempted. *Id.* at 1800.

130. *Id.* at 1800-02. The Court noted that the United States’ argument in favor of broad preemption in this case “was particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today.” *Id.* at 1801 & n.24 (citations omitted).

131. *Id.* at 1801. For its conclusion that state law tort claims that imposed “parallel requirements” to FIFRA’s labeling provisions were not preempted, the Court relied on its earlier decision in *Medtronic v. Lohr*, 518 U.S. 470 (1996), in which the Court held that a federal medical device preemption provision similar to FIFRA did not preempt Florida’s right to provide a traditional damages remedy for violation of common law duties that were “parallel” to the federal requirements. *Id.* at 1800. The Court also noted with approval that common law tort suits could spur manufacturers to “gain more information about their products’ performance in diverse settings.” *Id.* at 1802 (citing *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984)).

132. *Id.* at 1803.

of the statute but “any relevant EPA regulations that give content to FIFRA’s misbranding standards.”<sup>133</sup>

The Court’s decision included a concurring opinion by Justice Breyer and a partial concurrence and partial dissent by Justice Thomas, joined by Justice Scalia. In his concurrence, Justice Breyer emphasized EPA’s important role in overseeing FIFRA’s future implementation and stated that “EPA may prove better able than are courts” to determine whether general state tort liability rules merely help expose the dangers associated with pesticides or bring about a counterproductive “crazy-quilt” of anti-misbranding requirements.<sup>134</sup> In his partial concurrence and partial dissent, Justice Thomas agreed that states are free to impose liability based on a violation of federal law, but disagreed that the plaintiffs’ failure to warn and breach of warranty claims could go forward without a remand to determine whether those claims contain any requirements beyond those encompassed by federal law.<sup>135</sup>

The Supreme Court’s decision in *Bates* thus expressly permits state legislatures and courts to create statutory and common law damage remedies for violations of federal labeling requirements or for violation of state law requirements unrelated to labeling. The decision has significant implications for plaintiffs seeking relief against manufacturers in the FIFRA Preemption cases. Moreover, it provides additional clarity in the ongoing debate between the need for uniformity in pesticide labeling and the desire to ensure manufacturer accountability for their products. First, the Court confirmed that Congress has invested in EPA the authority to balance which risks to humans and the environment are reasonable through the pesticide registration process, which culminates in corresponding authority over which representations, warnings, and directions will be placed on the label for use of that pesticide. This favors uniformity among the states and predictability for manufacturers.

Second, the Court recognized an important role for the states in policing manufacturers’ compliance with EPA labeling and registration protocol.<sup>136</sup> As a result, all states may create private causes of action to recover damages for violation of federal pesticide laws.<sup>137</sup> Capitalizing on this newly-confirmed state authority provides a path for state legislatures, judges, and juries to continue to serve a role in regulating pesticide use and misuse through statutes, regulations, judicial decisions and jury

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133. *Id.* at 1803-04.

134. *Id.* at 1804-05 (Breyer, J., concurring).

135. *Id.* at 1805-06 (Thomas, J., concurring in part and dissenting in part).

136. *Id.* at 1801-02 (noting presumption against preemption of state law and historic importance of state law tort litigation against pesticide manufacturers).

137. See *infra* notes 254-261 and accompanying text for a discussion of state laws that have created private rights of action for damages arguably broad enough to include pesticide-related claims.

verdicts. This role is particularly critical in light of EPA's limited resources and abilities to govern the vast range of economic poisons being released into the environment.

### III. THE PESTICIDE LAND USE CASES

In addition to clarifying the scope of FIFRA preemption, the *Bates* decision's reaffirmation of FIFRA's core uniformity principles both illuminates the shortcomings of the Pesticide Land Use cases and represents the possibility of a more sophisticated pesticide land use jurisprudence. The Pesticide Land Use cases involve state law claims for damages by non-pesticide users against pesticide users, manufacturers, and distributors. Lawsuits by third parties against pesticide users for pesticide-related damages have been with us since the early part of the twentieth century. These claims increased exponentially after World War II with the explosion of farm use of the new pesticides developed during the war, and the increased use of airplanes for aerial spraying of pesticides on crops. Generally, plaintiffs in these cases sought damages for lost crops, loss of organic certification, loss of bees and other animals, and personal injury. Not surprisingly, in the absence of strong federal pesticide laws prior to 1972, these cases were analyzed exclusively under the state common law—negligence,<sup>138</sup> private nuisance,<sup>139</sup> trespass or conversion,<sup>140</sup> strict liability for abnormally dangerous activities,<sup>141</sup> and

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138. Negligence is generally defined as breach of a duty of care toward a person that proximately results in damages. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 at 164 (5th ed. 1984). The standard of conduct to which the person must conform to avoid a breach of a duty of care is "that of a reasonable man under like circumstances." See RESTATEMENT (SECOND) OF TORTS § 283 (1965).

139. A private nuisance is conduct that is the legal cause of an invasion of another's interest in the private use and enjoyment of land and that is: (a) intentional and unreasonable; or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities. RESTATEMENT (SECOND) OF TORTS § 822 (1979).

140. Trespass to land is any intentional invasion of another's property without authorization or privilege by law. See PROSSER AND KEETON, *supra* note 138, § 13 at 70. Trespass to chattels and conversion are defined as the intentional interference with chattel so as to result in loss, transfer of ownership, or destruction, with the difference between the two torts one mainly of degree. *Id.* at 85, 86, 90. See also RESTATEMENT (SECOND) OF TORTS § 158 (Liability for Intentional Intrusions on Land), §§ 217-18 (Elements of Trespass to Chattels), §§ 222A-226 (Conversion) (1965).

141. The Restatement (Second) of Torts provides that a person who carries on an abnormally dangerous activity is liable to a person harmed by that activity even if the utmost care is exercised to prevent the harm (i.e., strict liability). The court is directed to consider the following six factors in determining whether an activity is abnormally dangerous: (1) existence of a high degree of risk of harm to the person, land or chattel of others; (2) likelihood that the harm that results from it will be great; (3) inability to eliminate the risk of harm by the exercise of reasonable care; (4) extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to the place where it is carried on; and (6) extent to which its value to the community is outweighed by its dangerous attributes. RESTATEMENT (SECOND) OF

vicarious liability theories,<sup>142</sup> with significant variability within and between jurisdictions.

However, with some exceptions, cases after the 1972 FEPCA amendments do not look significantly different than cases that preceded the amendments. Although some cases do make reference to the pesticide label as either relevant evidence of the standard of care or as a means in itself to set the standard of care, there is little discussion in the context of FIFRA and EPA authority why that should be the case. What is most surprising though is that the vast majority of both the pre- and post-1972 cases focus on negligence rather than nuisance as the legal framework. Even though nuisance has historically been seen as the signature claim for resolving competing land use disputes, it is noticeably absent from the Pesticide Land Use cases.

#### A. Pre-1972 FIFRA Cases

Prior to 1972, the primary issue for courts and commentators was whether crop dusting or other application of pesticides should be considered abnormally dangerous for purposes of applying strict liability, or whether it was at least inherently dangerous, meaning there was a nondelegable duty for purposes of imposing vicarious liability on a landowner for actions of a sprayer. Where courts declined to find pesticide spraying to be abnormally dangerous or inherently dangerous (which was the majority of the time), the cases were decided under a negligence theory; scholarly discussion of cases from this area contain virtually no discussion of nuisance claims at all.<sup>143</sup>

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TORTS §§ 519-20 (1977). See also *Fletcher v. Rylands*, L.R. 3 H.L. 330 (1868) (early English case involving bursting reservoir which provided foundation for American doctrine of strict liability).

142. An employer is generally "vicariously liable" at common law for the acts of his or her contractor for injury caused by work that is considered "inherently dangerous." PROSSER AND KEETON, *supra* note 138, § 71 at 512-15.

143. Several law review articles from this time period discuss the increasing number of cases dealing with pesticide damage from spraying of crops, and provide a fairly comprehensive treatment of the various theories courts were using to analyze these claims, namely negligence, strict liability, trespass and vicarious liability. See, e.g., Richard S. Jensen, Note, *Crop Dusting: Two Theories of Liability*, 19 HASTINGS L.J. 477 (1968) (analyzing crop dusting cases and arguing that crop dusting is abnormally dangerous and should be subject to strict liability); Note, *Crop Dusting: Legal Problems in a New Industry*, 6 STAN. L. REV. 69 (1953) (discussing the conflict of land use interests posed by aerial pesticide spraying and calling for need to develop standards of care which strike a balance between the interests involved in the negligence context); Note, *Liability for Chemical Damage From Aerial Crop Dusting*, 43 MINN. L. REV. 531 (1959); Note, *Regulation and Liability in the Application of Pesticides*, 49 IOWA L. REV. 135 (1963) (analyzing recent legislation to control and regulate application of pesticides and theories of liability—negligence, strict liability and vicarious liability). Significantly, none of these articles contain any discussion of nuisance as a potential theory of recovery and little discussion of trespass. See also RODGERS, *supra* note 20, § 5.26 (discussing claims for negligence, strict liability, and breach of warranty with no mention of nuisance and noting lack of trespass cases).



In their analyses, most of these early cases focus primarily on causation and damages, with little discussion of what duty is actually owed to those harmed by pesticide use and, if a duty is owed, what actions constitute a deviation from the standard of care.<sup>144</sup> Generally in negligence law, duty is a critical element of the analysis. Those cases that do provide a more thorough analysis of the issues of duty and breach fall into two categories: those that look to general standards in the community to set the standard of care, and those that look to the pesticide label or promotional material to set the standard of care.

The 1949 California case of *Lenk v. Spezia* expressly refers to community standards for evidence of reasonable care.<sup>145</sup> In that case, the plaintiff was a commercial owner of honeybees who alleged that 518 of his beehives were destroyed when the defendants sprayed insecticides on nearby tomato plants.<sup>146</sup> The district court had found that none of the

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144. See, e.g., *Motor Ins. Corp. v. Aviation Specialties*, 304 F. Supp. 973 (W.D. Mich. 1969) (involving damage to automobile finishes on lot allegedly resulting from negligent spraying); *Sanders v. Beckwith*, 283 P.2d 235 (Ariz. 1955) (involving negligent trespass arising from alleged overspray of DDT and other pesticides poisoning plaintiffs' cattle); *W.B. Bynum Cooperage Co. v. Coutler*, 244 S.W.2d 955 (Ark. 1952) (alleging use of pesticide 2,4-D resulted in damage to nearby cotton crop); *Kennedy v. Clayton*, 227 S.W.2d 934 (Ark. 1950) (claim for damage to cotton crop resulting from negligent pesticide drift from nearby rice field); *Burns v. Vaughn*, 224 S.W.2d 365 (Ark. 1949) (same); *Hammond Ranch Corp. v. Dodson*, 136 S.W.2d 484 (Ark. 1940) (claim to recover for injury and death to livestock from alleged arsenic poisoning); *Parks v. Atwood Crop Dusters*, 257 P.2d 653 (Cal. 1953) (negligence claim for damage to plaintiffs' cotton crop based on alleged improper use of defoliants across roadway); *Adams v. Henning*, 255 P.2d 456 (Cal. 1953) (action for damage to potato crop allegedly caused by pesticide 2,4-D sprayed by aircraft over adjacent land); *Nizzi v. Laverty Sprayers*, 143 N.W.2d 312 (Iowa 1966) (action to recover for personal injuries and property damage allegedly resulting from aerial spraying of DDT nearby); *Kentucky Aerospray v. Mays*, 251 S.W.2d 460 (Ky. 1952) (action to recover for destruction of minnows allegedly resulting from pesticide spraying on nearby tobacco crop); *Rose v. Buffalo Air Serv.*, 104 N.W.2d 431 (Neb. 1960) (action for damage to sugar beet crop against spray service for allegedly spraying a pesticide containing 2,4-D instead of one not harmful to beets); *Cole v. New England Tree Export Co.*, 163 A. 742 (R.I. 1933) (holding in arsenate of lead overspray case that defendant's failure to give notice of spraying to nearby landowners may be evidence of negligence); *McPherson v. Billington*, 399 S.W.2d 186 (Tex. Ct. App. 1966) (action to recover for death of plaintiff's hogs caused by alleged aerial arsenic spraying of adjacent cotton field); *Gamblin v. Ingram*, 378 S.W.2d 941 (Tex. Ct. App. 1964) (action for damage to cotton crop for alleged negligent spraying of 2,4-D on adjacent farm land); *Bruenger v. Burkett*, 364 S.W.2d 453 (Tex. Ct. App. 1963) (action for damage to cotton crop resulting from alleged negligent spraying of herbicide harmful to cotton); *Aerial Sprayers v. Yerger, Hill & Son*, 306 S.W.2d 433 (Tex. Ct. App. 1957) (action for damage to cotton crop from alleged negligent spraying of 2,4-D nearby); *Schultz v. Harless*, 271 S.W.2d 696 (Tex. Ct. App. 1954) (action to recover damage to cotton crop allegedly caused by drift during spraying of nearby crops). See also Robert F. Blomquist, *Applying Pesticides: Toward Reconceptualizing Liability to Neighbors for Crop, Livestock and Personal Damages from Agricultural Chemical Drift*, 48 OKLA. L. REV. 393, 399-411 (1995) (discussing cases relying on negligence theory); *Liability for Injury Caused by Spraying or Dusting of Crops*, 37 A.L.R.3d 833 (1971) (collecting cases from each jurisdiction). See also *supra* note 138 for a discussion of the elements of negligence.

145. 213 P.2d 47 (Cal. Ct. App. 1949).

146. *Id.* at 48-49.

pesticides sprayed by the defendants drifted onto the property where the plaintiff's bees were kept. Therefore, the plaintiff's bees must have traveled to the defendant's property in order for the harmful contact to occur.<sup>147</sup>

In holding that the defendants were not liable for the deaths of the bees, the California Court of Appeals stated that it was the plaintiff's burden to prove, among other things, that the defendants were negligent "on account of the manner in which they dusted the adjacent tomato fields...."<sup>148</sup> The court noted that the defendants had dusted other nearby properties in a similar manner, putting the plaintiff on notice of insecticide use in the area and, more importantly, that "other operators also dusted other crops in that vicinity in a similar manner."<sup>149</sup> Moreover, the defendants testified that they had personally notified the plaintiff in advance that they would be spraying a pesticide in that area and offered to help the plaintiff move his bees, but the plaintiff refused to move them.<sup>150</sup>

Not only did the court find the plaintiff was contributorily negligent for failing to move his bees during the spraying, but the court distinguished other cases involving bees the plaintiff cited because they all involved situations where the pesticide had drifted off the target site onto the property where the hives were located.<sup>151</sup> The court concluded that although a defendant who is spraying a dangerous pesticide may be liable for damages to others if the spraying is done negligently, or the pesticide drifts off the property, there is no duty to bees "trespassing" on the sprayed property other than to avoid malicious or wanton conduct.<sup>152</sup>

In *Lenk*, the court recognized the importance of pesticides to agricultural productivity but held that a pesticide user must act reasonably to avoid harming other landowner interests. In order to determine whether a duty was breached, the court appeared to look to

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147. *Id.* at 49.

148. *Id.* at 50. See also *Faire v. Burke*, 252 S.W.2d 289 (Mo. 1952) (stating that although farmers have the right to use beneficial sprays and dusts, due care must be exercised with regard to weather conditions and landowners may be liable "for spreading poisons and dusts negligently.") (quoting F.G. Madara, *Liability for Injury Consequent Upon Spraying or Dusting of Crop*, 12 A.L.R.2d 438 (1950), *superseded by* 37 A.L.R.3d 833 (1971)).

149. *Lenk*, 213 P.2d at 52.

150. *Id.* at 53.

151. *Id.* at 50-53 (distinguishing *Miles v. A. Arena & Co.*, 73 P.2d 1260 (Cal. Ct. App. 1938); *Lundberg v. Bolon*, 194 P.2d 454 (Ariz. 1948)).

152. *Lenk*, 213 P.2d at 51-52. See also *Jeanes v. Holtz*, 211 P.2d 925 (Cal. Ct. App. 1949) (no duty to trespassing bees except to avoid intentional harm); *Miles v. A. Arena & Co.*, 73 P.2d 1260 (Cal. Ct. App. 1938) (holding sprayer and landowner liable for death of nearby bees when pesticide drifted off the target site on grounds that defendant knew or should have known pesticides would float in the air and travel under current wind conditions); *Dupre v. Roane Flying Serv.*, 196 So. 2d 835 (La. Ct. App. 1967) (finding defendant negligent for applying herbicide to plaintiff's crop at ratio far in excess of that recommended by county specialist).

general standards of reasonableness such as ensuring proper weather and wind conditions, following directions by the county agent as well as what was reasonable in the community regarding pesticide spraying. For instance, the *Lenk* court noted that the sprayer had notified the beekeeper when the spraying would occur, offered to help the beekeeper move his bees, and checked the wind speed and direction prior to spraying the field.<sup>153</sup>

Other cases from this pre-1972 period, however, looked to evidence of reasonableness tied somewhat more closely to the pesticide itself, such as manuals and "circulars" that described the uses and risks of the pesticides. For instance, in *Lawler v. Skelton*,<sup>154</sup> the Mississippi Supreme Court held that the defendant aerial crop sprayer was liable for the plaintiff's illness when he sprayed pesticides in close proximity to the plaintiff who was working in the area.<sup>155</sup> In reversing a judgment for the defendants, the court relied on the pesticide labels and the state aerial applicators' safety manual to support a finding of negligence.<sup>156</sup> The court found that because both the labels and manual urged extreme caution in using pesticides because of the risk to human health, the defendant had not met that standard of care when he sprayed the plaintiff at close range.<sup>157</sup>

Similarly, in *Andreen v. Escondido Citrus Union*,<sup>158</sup> the California Court of Appeals held that the defendants were negligent in fumigating a citrus orchard because they applied the fumigation gas when weather conditions were not appropriate and at excessive rates.<sup>159</sup> In affirming the negligence judgment, the court of appeals held that it was appropriate for the lower court to consider testimony showing that the defendants did not have the license required for engaging in fumigation services.<sup>160</sup> The court found that the lack of the license was legitimate evidence tending to show negligence because the foreman in charge had testified that he was not familiar with the fumigation regulations adopted by the county horticultural commissioner nor with any of the documents or circulars on the subject issued by the U.S. Department of Agriculture or the University of California.<sup>161</sup> The court reasoned that if the defendant sprayer had gone through the licensing process, he would have been required to familiarize himself "with the well-recognized methods of

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153. *Lenk*, 213 P.2d at 52-53.

154. 130 So. 2d 565 (Miss. 1961).

155. *Id.* at 567-68.

156. *Id.* at 568.

157. *Id.*

158. 269 P. 556 (Cal. Ct. App. 1928).

159. *Id.* at 557.

160. *Id.* at 558.

161. *Id.*

fumigation work” before being licensed to do the work.<sup>162</sup> Accordingly, the defendant’s failure to follow the required process was negligence.<sup>163</sup>

In these early cases, by using spray manuals and agricultural circulars to act as evidence of reasonableness, the courts in *Lawler* and *Andreen* foreshadowed the current structure of pesticide law embodied by FIFRA, as well as the use of a negligence per se theory, both of which arose after the 1972 changes to the law.

### B. Post-1972 FIFRA Cases

Litigation between third parties impacted by pesticide use and pesticide users continued unabated after the 1972 FEPCA Amendments.<sup>164</sup> For the most part, pesticide damage cases were still decided under state common law and focused primarily on negligence (and to a lesser extent strict liability), with little discussion of FIFRA or pesticide labels and virtually no reliance on nuisance or trespass theories.<sup>165</sup>

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162. *Id.*

163. *Id.* But see *Yasukochi, Inc. v. McKibbin*, 312 P.2d 770, 773 (Cal. Ct. App. 1957) (affirming lower court’s refusal to allow into evidence department of agriculture circulars warning of harms of not cleaning spray tank before filling with a new pesticide in case where plaintiff alleged that ineffective cleaning of tank resulted in harm to his crops).

164. Scholarly commentary in this area has also continued, with several published articles since 1972 detailing the various claims and theories brought in these cases. See, e.g., Blomquist, *supra* note 144; Theodore A. Feitshans, *An Analysis of State Pesticide Drift Laws*, 9 SAN JOAQUIN AGRIC. L. REV. 37 (1999); Craig A. Kennedy, *Liability in the Aerial Application of Pesticides*, 22 S.D. L. REV. 75 (1977) (considering case law developments in aerial application of pesticides and reviewing new statutory requirements); Robert W. Luedeman, *A Tale of Three States: Liability for Overspray and Chemical Drift Caused by Aerial Application in Arkansas, Louisiana and Mississippi*, 10 SAN JOAQUIN AGRIC. L. REV. 121 (2000).

165. See, e.g., *Farm-Aero Serv. v. Henning Produce*, 532 P.2d 181 (Ariz. Ct. App. 1975) (action by produce growers against crop-dusting firm to recover for damage to lettuce fields allegedly caused by negligent spraying of defoliant over nearby fields); *Hamlin Flying Serv. v. Breckinridge*, 628 S.W.2d 312 (Ark. 1982) (action for negligent spraying for alleged damage to cotton resulting from overspray of 2-4D and 2-4-5T on nearby rice field); *Mulford Hickerson Corp. v. Asgrow-Kilgore Co.*, 282 So. 2d 19 (Fla. Ct. App. 1973) (negligence action for damage to caladiums from alleged drift of 2,4D), *quashed*, 301 So.2d 441 (Fla. 1974); *DeVane v. Smith*, 268 S.E.2d 711 (Ga. Ct. App. 1980) (jury properly charged on *res ipsa loquitur* for action to recover damage to cotton crop allegedly due to negligent spraying of 2-4-D); *Binder v. Perkins*, 516 P.2d 1012 (Kan. 1973) (holding aerial sprayer had high duty of care to prevent escape of herbicides harmful to nearby alfalfa crop); *D&W Jones, Inc. v. Collier*, 372 So. 2d 288 (Miss. 1979) (farmer and sprayer jointly liable for damage to nearby catfish farm for alleged drift of pesticides from spraying of nearby cotton and soybean fields); *Mid-Continent Aircraft Corp. v. Whitehead*, 357 So. 2d 122 (Miss. 1978) (defendant sprayer had duty to ascertain wind speed and fly in proper conditions to avoid harm to nearby cotton crop); *Watkins v. Johnson*, 606 S.W.2d 493 (Mo. Ct. App. 1980) (action for negligence for spraying of pesticide that allegedly damaged red clover); *Muston v. Ealy*, 266 N.W.2d 730 (Neb. 1978) (action for negligent spraying for alleged overspray that sickened plaintiffs’ cows and calves). See also RODGERS, *supra* note 20, § 5.26 (discussing cases relying on negligence, strict liability and breach of warranty with no discussion of nuisance); Blomquist, *supra* note 144, at 399-411 (discussing cases relying on negligence theory and stating that “[d]uring the last quarter century, the pattern of pre-1970

However, some courts did attempt to incorporate concepts relating to FIFRA, the directions for use on the pesticide labels, and the role of EPA in making the determination of negligence, resulting in a more principled and predictable analysis of the appropriate duty of care for negligence claims. Some of these cases focused on whether the label or state regulations could act merely as relevant evidence of negligence, while others went further and used the label to set the standard of care, thus conducting a classic negligence per se analysis.

One of the early cases that looked to labels or state regulations for relevant evidence on the issue of negligence was *J. L. Wilson Farms v. Wallace*.<sup>166</sup> In that case, the Arkansas Court of Appeals held it was proper for the lower court to allow the jury to consider state plant board regulations restricting commercial aerial application of 2-4-D in determining whether the defendant was liable for using that pesticide without plant board authorization.<sup>167</sup> The court held that the state regulation prohibiting use of the pesticide without special authorization was intended to prevent damage to others in the vicinity when applying the pesticide aerially, and that it was proper for the jury to consider the defendant's failure to comply with the regulation when the damage that resulted was the type of damage the regulation was aimed at preventing.<sup>168</sup> In relying on state regulation to set the standard of care, the court essentially conducted a negligence per se analysis in the context of a common law negligence claim.

However, the first significant Pesticide Land Use case to conduct a true negligence per se analysis and focus on the interrelationship between

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cases remained intact: 'the vast majority of actions brought against [pesticide] applicators and their employees [were] grounded in negligence.'") (citing Kennedy, *supra* note 164, at 78); Kennedy, *supra* note 164, at 83 (stating that a few early cases imposed liability on aerial applicators under a private nuisance theory based primarily on strict liability) (citing *Miles v. A. Arena & Co.*, 73 P.2d 1260 (1937); *Gainey v. Folkman*, 114 F. Supp. 231 (D. Ariz. 1953)); *Liability for Injury Caused by Spraying or Dusting of Crops*, 37 A.L.R.3d 833 (1971) (collecting cases). *But see* *Hall v. Phillips*, 436 N.W.2d 139 (Neb. 1989) (analyzing pesticide land use case based on private nuisance).

166. 590 S.W.2d 42 (Ark. Ct. App. 1979).

167. *J. L. Wilson Farms*, 590 S.W.2d at 44.

168. *Id.* See also *A. R. Boroughs v. Joiner*, 337 So. 2d 340 (Ala. 1976) (holding that aerial spraying of pesticides is inherently dangerous for purposes of imposing vicarious liability based in large part on fact that Alabama Legislature had adopted laws governing sale and distribution of pesticides to avoid adverse impacts of pesticides); *McCorkle Farms v. Thompson*, 84 S.W.3d 884 (Ark. Ct. App. 2002) (applying *J.L. Wilson Farms* and holding it was error for district court to refuse to instruct jury that sprayer's failure to comply with label requirements of 2,4-D was evidence of negligence); *Frazier v. Moeller*, 665 S.W.2d 155 (Tex. Ct. App. 1984) (relying heavily on labels for 2,4,-D and 2,4,5-T to hold that an aerial applicator was negligent in spraying pesticides under wind and weather conditions prohibited by the label). *But see* *Hager v. Romines*, 913 S.W.2d 733 (Tex. Ct. App. 1995) (reversing judgment for plaintiff and holding that plaintiff could not recover on negligence claim against sprayer for overspray in the absence of expert testimony establishing the standard of care for expert applicators and containing no discussion of the pesticide label as a means of setting the standard of care).

FIFRA, the EPA-approved pesticide label, and state common law claims was the Wisconsin Supreme Court's 1984 decision in *Bennett v. Larsen*.<sup>169</sup> In that case, the plaintiff beekeepers sued the defendant farmer who grew sweet corn on the property, and had hired the defendant aerial applicator to control pests by spraying pesticides that were toxic to bees. Specifically, the defendant sprayed the pesticide Sevin in 1977 and the pesticide Lannate in 1978.<sup>170</sup> Like in the *Lenk* case, there was no evidence that any pesticide drifted off the defendant's property; instead, the bees were injured when they foraged on the farmer's property. The plaintiffs alleged the defendants were negligent under the common law and under a theory of negligence per se because they failed to follow the "bee caution" language on the pesticide labels as well as state regulations prohibiting application of pesticides in a manner contrary to label directions.<sup>171</sup>

In analyzing the negligence claims, the supreme court first discussed common law negligence. The court analyzed existing authority and agreed that a landowner's right to make use of his or her land is qualified by "due regard for the interests of others who may be affected by the landowner's activities on the property." The court went on to adopt the *Lenk* court's conclusion that landowners are not responsible for bees that forage on the landowner's property, and that they have *no* common law duty of care toward such bees except to avoid "intentionally or wantonly" destroying them.<sup>172</sup>

The court did hold, however, that even in the absence of a common law duty of care, the Wisconsin laws and regulations prohibiting

169. 348 N.W.2d 540 (Wis. 1984).

170. *Id.* at 545-46.

171. The pesticide label for Sevin stated in part:

This product is highly toxic to bees exposed to direct treatment or residue on crops....Do not use when the value of honeybees as pollinators is more important than insect control. Before applying, warn beekeepers to locate hives beyond bee flight range until one week after application or to take other equally effective precautions.

*Id.* at 545. The label for Lannate included the following language: "This product is toxic to bees and should not be applied when bees are actively visiting the area. Apply late in evening or early morning where honey bees visit fields. . . ." *Id.* at 546. The Wisconsin administrative regulations in question for 1977 provided in part that "[n]o person shall use . . . pesticides contrary to label directions or in a careless or reckless manner." *Id.* at 548. In 1978, a new Wisconsin statute was created which provided that "[n]o person may: . . . [u]se any pesticide in a manner inconsistent with its labeling." *Id.*

172. *Id.* at 547. However, the court rejected the trespass analogy used by *Lenk v. Spezia* and other courts, because there is no way to prevent bees from entering the property or keep them from foraging, and traditional trespass theories "must include the notion that the trespasser can be kept off the property" and it is the "uninvited entry" that constitutes the trespass. *Id.* at n.3 (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 58 (4th ed. 1971)). The court's rejection of the trespass analogy did not alter its conclusion that no common law duty of care was owed to bees on the landowner's property. *Id.*

application of pesticides contrary to the label established a duty of care for pesticide users to follow label directions, and failure to fulfill that duty of care constituted negligence per se.<sup>173</sup> The court reasoned that to conclude no duty of care was owed to bees on the property “would be contrary to the legislature’s intent to protect certain species from the harmful effects of improperly used pesticides.”<sup>174</sup> The court further stated that because the standard of care “is strictly defined by the label,” if the pesticide user follows the label, there is no liability for damage to bees on the property at the time of spraying or to bees that enter the property later unless the pesticide user harms the bees intentionally or wantonly.<sup>175</sup>

The court also rejected the plaintiffs’ arguments that pesticide spraying was an abnormally dangerous activity subject to strict liability, on the grounds that the application of pesticides is a necessary and beneficial activity to ensure the production of adequate and healthy food, its value outweighs the potential for harm, and the risks of spraying can be reduced by exercising reasonable care.<sup>176</sup>

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173. *Id.* at 548-49. Based on the Restatement (Second) of Torts § 285 and Wisconsin precedent, the court held that violation of the law constituted negligence per se only if the statute was designed to protect a class of persons from a particular type of harm, and the alleged violation resulted in that type of harm to someone in the protected class. *Id.* at 548. The court then held that the Wisconsin pesticide law was intended to provide protection to people, animals and plants from improper pesticide use and thus the failure to comply with the law constituted negligence per se. *Id.* at 549.

174. *Id.* at 550.

175. *Id.* The court rejected the defendants’ argument that establishing a negligence per se rule for label violations permits private parties (i.e., manufacturers) to set the standard of care for the rest of society. The court reasoned that the pesticide registration process at both the state and federal level constitutes a “governmentally adopted” standard for the safety and protection of the public and “ensures that the standard is tailored to the effects and uses of the individual pesticide.” *Id.* at 550 n.5.

176. *Id.* at 552-53. Courts are split over whether pesticide spraying is an abnormally dangerous activity subjecting a defendant to strict liability. *Compare* *Roberts v. Cardinal Servs., Inc.*, 266 F.3d 368, 380 (5th Cir. 2001) (aerial crop dusting is classified as ultrahazardous as a matter of law in Louisiana); *J.L. Wilson Farms v. Wallace*, 590 S.W.2d 42, 45 (Ark. Ct. App. 1979) (holding application of herbicide on rice field in the vicinity of cotton plants abnormally dangerous); *Russell v. Windsor Props.*, 366 So. 2d 219, 222 (La. Ct. App. 1978) (holding property owner and sprayers strictly liable for damage to nearby crops); *Young v. Darter*, 363 P.2d 829 (Okla. 1961) (applying *Rylands* doctrine and holding defendant sprayer strictly liable for damage to cotton crop); *Bella v. Aurora Air, Inc.*, 566 P.2d 489 (Or. 1977) (holding aerial spraying of pesticide abnormally dangerous and defendant liable without proof of negligence); *Langan v. Valicopters*, 567 P.2d 218 (Wash. 1977) (applying Restatement (Second) of Torts §§ 519-20 (1977) and holding that although pesticides are socially valuable, the users of pesticides should bear the risk of harm and thus strict liability should apply in case alleging loss of organic certification due to pesticide overspray) *with* *Traube v. Freund*, 775 N.E.2d 212, 216-17 (Ill. Ct. App. 2002) (holding that simply because pesticide poses certain hazards does not render its application an ultrahazardous activity); *Binder v. Perkins*, 516 P.2d 1012 (Kan. 1973) (holding sprayer to high duty of care but refusing to impose strict liability); *Ligocký v. Wilcox*, 620 P.2d 1300 (N.M. Ct. App. 1980) (reversing judgment based on strict liability and clarifying distinction between “inherently dangerous” activities resulting in vicarious liability and abnormally dangerous activities resulting in strict liability); *Sun Pipe Line Co. v. Kirkpatrick*, 514 S.W.2d

*Bennett* is significant for several reasons. First, it made a clear distinction between common law negligence and negligence per se, and concluded for the first time that the only duty of care a landowner owed to bees or other animals on the landowner's property was a duty to follow the EPA-approved pesticide label. Second, although it did not say it clearly, the court essentially held that the tort of negligence per se is the only negligence-based tort that is actionable where the FIFRA-approved label supplies a regulatory standard of care; the only other common law causes of action available for damages would be for intentional or wanton destruction of the bees or, presumably, other intentional torts such as trespass or nuisance. Finally, the court's justification for this framework was solidly grounded in the EPA-approved label with reference to EPA's (and the states') significant role in setting the standard of care in a manner "tailored to the effects and use of the individual pesticide."<sup>177</sup>

Three court of appeals cases from Minnesota have also used the EPA-approved label for the pesticide in question to help set the standard of care, although none of these opinions explained whether they were conducting a common law negligence or negligence per se analysis. In *Red River Spray Service v. Nelson*,<sup>178</sup> the Minnesota Court of Appeals held that a defendant sprayer was liable for damage to a landowner's soybeans when it sprayed a pesticide on a corn crop nearby. The court found that the label for the pesticide, Banvel, expressly prohibited aerial application if wind was in excess of five miles per hour whenever sensitive crops such as soybeans were in the vicinity.<sup>179</sup> The court held that based on evidence that wind speeds at the time of spraying were in excess of

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789, 791-94 (Tex. Ct. App. 1974) (refusing to apply strict liability to oil pipeline and its herbicide applicator and requiring plaintiff to prove negligence); *Bennett v. Larson*, 348 N.W.2d 540, 552-53 (Wis. 1984). Courts appear to be more willing to find that pesticide spraying is "inherently dangerous" subjecting a landowner to liability for the negligent (or otherwise wrongful) actions of his or her independent contractor sprayer. See *Emelwon v. United States*, 391 F.2d 9, 11-12, n.3 (5th Cir. 1968) (holding United States could be liable for negligent spraying of contractor under Federal Tort Claims Act and noting that "[n]umerous jurisdictions have concluded that aerial spraying of a dangerous chemical which is likely to drift constitutes an inherently dangerous activity for purposes of holding an employer liable for the negligence of an independent contractor."); *Boroughs v. Joiner*, 337 So. 2d 340, 342-43 (Ala. 1976) (holding aerial application of pesticides intrinsically or inherently dangerous subjecting landowner to liability for actions of sprayer); *McKennon v. Jones*, 244 S.W.2d 138, 140 (Ark. 1951) (holding pesticide spraying that resulted in death of bees was inherently dangerous subjecting landowner to vicarious liability); *McCorkle Farms v. Thompson*, 84 S.W.3d 884, 891-92 (Ark. Ct. App. 2002) (applying *McKennon* and holding landowner liable for acts of pesticide sprayer); *Ligocky v. Wilcox*, 620 P.2d 1300 (N.M. Ct. App. 1980) (finding pesticide spraying inherently dangerous for purposes of vicarious liability but not abnormally dangerous for purposes of strict liability); *Loe v. Lenhardt*, 362 P.2d 312 (Or. 1961) (holding pesticide spraying is inherently dangerous); *Foust v. Estate of Walters*, 21 S.W.3d 495, 507-08 (Tex. Ct. App. 2000) (aerial application of herbicide inherently dangerous when done under conditions favoring drift).

177. *Bennett v. Larsen*, 348 N.W.2d 540, 550 n.5 (Wis. 1984).

178. 404 N.W.2d 332 (Minn. Ct. App. 1987).

179. *Id.* at 333.



five miles per hour, the defendant was negligent because the manner in which the pesticide was applied “was specifically forbidden by the EPA.”<sup>180</sup>

The court of appeals reached a similar conclusion in *Dosdall v. Smith*,<sup>181</sup> upholding a jury verdict of negligence where the defendant sprayer testified he did not read the pesticide label and applied the pesticide EVIK to corn during a stage of growth harmful to the corn and prohibited by the pesticide label.<sup>182</sup> By contrast, in *Honek v. Kovar*,<sup>183</sup> the Minnesota Court of Appeals affirmed a verdict of no negligence on the part of the defendant and distinguished *Red River*, because in *Honek* the evidence was that the defendant followed the pesticide label directions.<sup>184</sup> Federal courts in California, New York, Indiana, and Arkansas have similarly relied on the pesticide label to set the standard of care for purposes of a negligence claim.<sup>185</sup>

Although the three Minnesota cases reached a result similar to *Bennett*, the reasoning was not sufficiently detailed to create a framework for resolving future negligence claims in Pesticide Land Use cases in Minnesota. Not only do these cases fail to indicate whether the proper analysis is one of common law negligence or negligence per se, it is also unclear whether compliance with the label acts as complete protection for defendants in all negligence-based claims. For instance, in the *Honek* case, the court based its findings of non-negligence in part, but not entirely, on the defendants' compliance with the label, citing other indicia of reasonable care separate and apart from the label directions.<sup>186</sup>

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180. *Id.* at 334.

181. 415 N.W.2d 332 (Minn. Ct. App. 1987).

182. *Id.* at 334.

183. No. C7-96-480, 1996 WL 722085 (Minn. Ct. App., Dec. 17, 1996).

184. *Id.* at \*2-3. The label for the pesticide at issue prohibited application if wind was 10 miles per hour or more and sensitive crops were downwind. The evidence at trial was that the wind speed was less than 10 miles per hour at the time of spraying and the defendant took additional precautions to determine wind speed and otherwise prevent drift. *Id.* at \*3.

185. See, e.g., *Jensen v. Santa Clara County*, 32 Fed. App'x 203 (9th Cir. 2002) (stating that although there was no private right of action under federal or state pesticide control regulations, violation of such regulations establish “a presumption of negligence” in an action against liable parties); *Dewing v. Orkin Exterminating Co.*, 897 F. Supp. 44 (N.D.N.Y. 1995) (holding pesticide label was “some evidence” establishing standard of care for pesticide application and was sufficient to sustain jury verdict); *Bradley v. Brown*, 852 F. Supp. 690 (N.D. Ind. 1994) (defendant's non-justified failure to comply with pesticide label ventilation requirements constituted negligence per se); *Roberson v. E.I. DuPont de Nemours & Co.*, 863 F. Supp. 929, 934-35 (E.D. Ark. 1994) (agreeing with plaintiffs that FIFRA creates a standard of care and that violation of pesticide label provision is evidence of negligence, although not negligence per se, under Arkansas law).

186. The court cited evidence of the defendant's decision to spray only a portion of the target field, use of smoke to test wind speed, and use of a spray retardant to prevent drift as other indicia of non-negligence. *Id.*

Although the Minnesota Court of Appeals cases and the Wisconsin Supreme Court's decision in *Bennett* appeared to be the start of a trend toward replacing common law negligence with negligence per se, a 2005 Minnesota Supreme Court case, *Anderson v. Minnesota Department of Natural Resources*,<sup>187</sup> departs significantly from *Bennett*. In *Anderson*, the Minnesota Supreme Court held that while the label provides the standard of care for a negligence per se claim, pesticide sprayers and landowners owe an independent common law duty of care toward animals or others who might be present on the landowners property during pesticide spraying. While *Anderson* is not binding outside of Minnesota, it certainly is significant in an area of the law where few cases have been decided in recent years and state courts thus often look to decisions in other states for guidance.

*Anderson*, like *Bennett*, involved alleged damage to bees in the absence of overspray or drift off the target site.<sup>188</sup> The defendants, Minnesota Department of Natural Resources (DNR) and International Paper Company, both hired various sprayers to spray a pesticide, Sevin XLR Plus, on hybrid poplar trees in west-central Minnesota.<sup>189</sup> The plaintiffs brought claims of negligence, negligence per se, and nuisance, alleging that their bees foraged in the tree groves, picked up the pesticides there, and brought the pesticides back to their hives, ultimately destroying the hives.<sup>190</sup> The district court granted the defendants' motion for summary judgment on all of the plaintiffs' claims, with the exception of one spray incident involving one of the DNR's sprayers.<sup>191</sup>

On appeal, the court of appeals affirmed the district court's dismissal of the plaintiffs' claims. With regard to the negligence per se claim, the court first cited language in FIFRA and the Minnesota Pesticide Control Act prohibiting pesticide use that is inconsistent with its label.<sup>192</sup> The court went on to find there was no evidence that the defendants or their sprayers had violated the bee caution language on the Sevin XLR Plus label.<sup>193</sup> With regard to the common law negligence claim, the court

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187. 693 N.W.2d 181 (Minn. 2005).

188. *Id.* at 187.

189. *Id.* at 185.

190. *Id.*

191. *Id.* at 185-86. The court held that disputes of fact prevented summary judgment on the plaintiffs' negligence claim against the DNR because there was evidence that one of the DNR's sprayers directly sprayed one of the plaintiffs' bee hives as a result of pesticide drift off the target site. *Id.*

192. *Anderson v. Minn. Dep't of Nat. Res.*, 674 N.W.2d 748, 753 (Minn. Ct. App. 2004). See also 7 U.S.C. § 136j(a)(G) (2000); Minn. Stat. § 18B.07, subd. 2(a)(1) (2002).

193. The relevant label language reads:

For maximum honey bee hazard reduction, apply from late evening to early morning or when bees are not foraging. Do not apply this product or allow it to drift to blooming crops or weeds if bees are foraging in the treatment area. However, applications may be made during foraging periods if the beekeeper takes one of the

expressly adopted the Wisconsin Supreme Court's analysis in *Bennett* that a landowner does not owe any common law duty of care to bees that forage on its land, other than to avoid wantonly or intentionally destroying the bees, and found no evidence of such wanton or intentional conduct in this case.<sup>194</sup> The court dismissed the plaintiffs' nuisance claim on grounds that because they did not own, rent or otherwise have an interest in the land where their beehives were located, they did not have a sufficient basis for a nuisance claim.<sup>195</sup>

On review, however, the Minnesota Supreme Court rejected the Wisconsin Supreme Court's label-based negligence per se rationale in *Bennett* and held that under Minnesota law, a pesticide sprayer always owes a common law duty of care toward trespassing bees or other animals when the sprayer or landowner is on notice of their presence and the potential danger.<sup>196</sup> Here, because the defendants had actual knowledge that there were bees in the area that might forage on their properties, "they may have come under a duty of reasonable care," and summary judgment on the common law negligence claims was inappropriate.<sup>197</sup> In reaching this decision, the supreme court assumed, without explicitly deciding, that FIFRA did not preempt such claims.<sup>198</sup>

The court went on to reverse the grant of summary judgment on the negligence per se claim, holding that no deference was owed to label interpretation provided by the head of enforcement for the Minnesota Department of Agriculture because his interpretation was not made in a contested case or enforcement proceeding.<sup>199</sup> Finally, the court affirmed the grant of summary judgment on the nuisance claim on the grounds that the plaintiffs did not have a sufficient interest in land to assert such a

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following precautionary measures prior to bee flight activity on the day of treatment: (1) confine the honey bees to the hive by covering the colony or screening the entrance or; (2) locate hives beyond bee flight range from the treated area. Precautionary measures may be discontinued after spray residues have dried.

*Anderson*, 674 N.W.2d at 753.

194. *Id.* at 757-58.

195. *Id.* at 759-760. Each of the plaintiffs had permission from various landowners to keep their beehives on the landowners' property but did not pay rent and could be asked to leave at any time. Although the district court had also dismissed the nuisance claim, it did so on the alternative ground that the defendants' pesticide spraying in a heavily agricultural area was not an unreasonable use of land. *See Anderson v. Minn. Dep't of Nat. Res.*, slip op. at 14-15 (Douglas County District Court, May 15, 2003). With regard to the remaining negligence claim against the Department of Natural Resources (DNR), the court of appeals reversed the district court's denial of summary judgment on the ground that the DNR was not vicariously liable for the actions of its sprayer. *Anderson*, 674 N.W.2d at 758-59.

196. *Anderson*, 693 N.W.2d at 187.

197. *Id.*

198. *See id.* at 188 (discussing FIFRA regulatory scheme but stating that common law claim "is a viable one").

199. *Id.* at 190-91.

claim because they did not own or lease any of the property on which their beehives were located.<sup>200</sup>

In light of FIFRA's current regulatory scheme, the *Anderson* decision is troubling on several levels. First, as pointed out in a partial dissent to the opinion, an expansive and undefined common law duty of care separate and apart from the pesticide label greatly expands the duty landowners owe to trespassing bees and other animals, and is unnecessary in light of the express duty to comply with the pesticide label.<sup>201</sup> Moreover, because this common law duty is undefined and apparently is not based on the label, it will be difficult, if not impossible, for landowners and sprayers to determine the parameters of that duty since the label is no longer a sufficient source of guidance. Finally, the decision runs directly contrary to the purpose behind the uniformity principles that underlie FIFRA's labeling scheme, because compliance with the pesticide label for Sevin XLR Plus is sufficient to avoid negligence liability in states like Wisconsin, but insufficient to avoid negligence liability in Minnesota.

The *Anderson* decision results in less uniformity and more uncertainty in this area of the law. At least under our current federal labeling framework, a better result would have been to focus on the pesticide label to resolve the negligence claim (even if further proceedings in the district court were necessary to resolve the label compliance issue) and leave available in appropriate cases common law claims for intentional or wanton conduct as well as other intentional torts such as trespass and nuisance.<sup>202</sup>

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200. *Id.* at 191-92.

201. *Id.* at 192-93.

202. Reasonable care is irrelevant when it comes to an *intentional* nuisance. According to Dean Prosser, any intentional but nontrespassory interference with the use and enjoyment of property through spraying would constitute a private nuisance if it were substantial and unreasonable. In the case of an intentional nuisance (which arguably includes most instances of pesticide spraying) "reasonableness" does not center on whether the defendant acted with reasonable care, but whether the activity is reasonable based on the location and circumstances of the conduct in question. See PROSSER & KEETON, *supra* note 138, at 629-630 ("Confusion has resulted from the fact that the intentional interference with the plaintiff's use of property can be unreasonable even when the defendant's conduct is reasonable."). See also *infra* notes 226-27 and accompanying text. By contrast, a nuisance based on *unintentional* conduct must be negligent, reckless, abnormally dangerous or otherwise wrongful. See RESTATEMENT (SECOND) OF TORTS § 822 (1979) (defining private nuisance as conduct that is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities). Thus, for an unintentional nuisance based on negligence to show "wrongful" conduct, compliance with the label would raise a presumption that the conduct itself was non-negligent.

## IV. A NEW PATH TO RESOLVING PESTICIDE LAND USE DISPUTES

The development of pesticide use and litigation in this country over the past century reveals that although efforts are being made to reduce pesticide use, large amounts of pesticides will likely be used in agriculture and other industries for some time. The current regulatory framework is highly centralized—Congress has authorized the EPA Administrator to determine what pesticide-related risks to human health and the environment are unreasonable and how to balance those risks through the warnings, restrictions, and directions for use embodied in the pesticide label. Courts have recognized this central authority in the FIFRA Preemption cases by overwhelmingly holding that any claims that have the intent or effect of challenging the label requirements approved by EPA are preempted under FIFRA. This has recently been confirmed by the *Bates* decision. In these circumstances, a plaintiff's remedy appears to be limited to petitioning EPA to change the label language or seek suspension or cancellation of the pesticide.

However, for a plaintiff seeking damages for a limited-duration pesticide use that caused harm, such a remedy is both far more than is necessary (there may be many other appropriate applications of the pesticide) and far less than is necessary (the plaintiff is seeking damages for personal injury or lost profits, not injunctive relief against all uses of the pesticide). Although *Bates* provides significant opportunities for plaintiffs to obtain relief for under state law for label violations and non-label based torts, until Congress revises FIFRA to provide for less centralized authority over the registration and labeling of pesticides, *Bates* will likely not improve significantly the ability of plaintiffs to recover for failure to warn and other claims based on a theory that warnings or information beyond those contained in the EPA label would have prevented the harm.

However, as set forth below, there is significant room for a new approach to resolve Pesticide Land Use cases as a result of *Bates* and even based on the law as it existed in many jurisdictions prior to *Bates*. This can be accomplished by collapsing most negligence-based claims against pesticide users into a label-based, negligence per se analysis, relying more heavily on claims for intentional trespass and private nuisance, and by better utilizing federal and state statutory causes of action to obtain relief for pesticide damages.

#### A. *Using the Label to Raise a Presumption of Reasonable Conduct*

Although cases involving conflicting land uses related to pesticides are typically areas reserved for state courts drawing on their own state's jurisprudence, it is a mistake to ignore FIFRA and EPA's delegated role in setting the standard of care for pesticide registration and use. Relying

on an amorphous common law negligence standard apart from the pesticide label provides little guidance to pesticide sprayers and landowners attempting to use legal pesticides on their own property and also gives insufficient information to plaintiffs and their attorneys regarding what types of expert testimony<sup>203</sup> or other evidence will be necessary to establish liability.

By contrast, using the label to establish the standard of care for negligence claims against pesticide users provides predictability for both sides and is consistent with EPA's delegated role under FIFRA. If a plaintiff is harmed by another party's pesticide use, the plaintiff can build his or her negligence case around the requirements of the label; to the extent the weather conditions were inappropriate for spraying or directions relating to how, when, and where the pesticide should be sprayed were ignored, the defendant would be liable under a theory of negligence per se. To the extent the defendant followed all relevant label directions, it would be entitled to a presumption that its conduct was reasonable. This presumption could be rebutted by a showing that the label did not expressly regulate the conduct in question. This approach would have no impact on a court's analysis of claims for intentional torts or strict liability that do not turn on reasonable conduct. In this way, the parties and the court can look to the label to help set the standard of care, providing uniformity and predictability among users and victims of the same pesticide nationwide and fulfilling FIFRA's goals.

Significantly, this position is generally consistent with the rationale of the Restatement (Second) of Torts and the draft Restatement (Third) of Torts addressing statutory and regulatory violations in the context of negligence and negligence per se claims.<sup>204</sup> Section 285 of the Restatement (Second) of Torts governing "How Standard of Conduct is Determined" provides that one way to determine the standard of conduct of a reasonable person is with reference to a "legislative enactment or administrative regulation."<sup>205</sup> A comment to the Restatement explains

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203. For instance, in *Hager v. Romines*, 913 S.W.2d 733 (Tex. Ct. App. 1995), the Texas Court of Appeals reversed a jury verdict for the plaintiffs on grounds that expert testimony was required to establish the standard of care for the aerial sprayer in that case, and that the plaintiffs' pesticide specialists did not offer any testimony regarding what techniques should have been used during spraying. *Hager*, 913 S.W.2d at 734-785. Although the court did not discuss the label requirements for the pesticide in question (Grazon P + D), and it is unclear whether plaintiffs even attempted to use the label in their case, there does not appear to be any reason the case could not have been resolved very simply with reference to the pesticide label. Indeed, that is precisely what the same court did eleven years earlier in *Frazier v. Moeller*, 665 S.W.2d 155 (Tex. Ct. App. 1984), cited at *supra* note 168.

204. RESTATEMENT (SECOND) OF TORTS §§ 285, 286, 288B, 288C (1965); RESTATEMENT (THIRD) OF TORTS § 14 (Tentative Draft No. 1, 2001).

205. The full text of section 285 reads as follows:

The standard of conduct of a reasonable man may be (a) established by a legislative enactment or administrative regulation which so provides, or (b) adopted by the court

that even when a legislative enactment contains no express provision or implication that its violation shall result in tort liability (i.e., no private right of action), the court *may* adopt its requirements as the standard of conduct necessary to avoid liability for negligence.<sup>206</sup> Section 288B then states that the unexcused violation of a legislative or administrative regulation “adopted by the court as defining the standard of conduct of a reasonable man” is negligence itself (i.e., negligence per se).<sup>207</sup> However, section 288C provides that the reverse is not true: “Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.”<sup>208</sup>

Section 14 of the corresponding draft Restatement (Third) of Torts is entitled “Statutory Violations As Negligence Per Se.” Unlike the Restatement (Second), which states that the court may, but need not, use an enactment or regulation to set the standard of care, section 14 is much more directive: “An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”<sup>209</sup> In the comments, the Reporter recognizes the large numbers of statutes that declare conduct unlawful but do not provide for a private right of action, and concludes that courts should regard the statutory violation as not just evidence of negligence, but as actually determining negligence or negligence per se.<sup>210</sup>

As a rationale for this revised position, comment (c) to the draft Restatement points out that as a matter of “institutional comity” it would be awkward for a court to commend as reasonable behavior that which the legislature has condemned as unlawful.<sup>211</sup> Moreover, the comment

from a legislative enactment or an administrative regulation which does not so provide, or (c) established by judicial decision, or (d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision.

RESTATEMENT (SECOND) OF TORTS § 285 (1965). See also RESTATEMENT (SECOND) OF TORTS app. § 286, Reporter’s Note (1966) (court is under no compulsion to adopt the requirements of the enactment or regulation as the standard of care in absence of express or implied private right of action).

206. RESTATEMENT (SECOND) OF TORTS § 286, cmt. d (1965).

207. RESTATEMENT (SECOND) OF TORTS § 288B (1965).

208. RESTATEMENT (SECOND) OF TORTS § 288C (1965). The Comment to this Section provides that the legislation or regulation is considered the minimum standard sufficient for the occasion, “but if for any reason a reasonable man would take additional precautions, the provision does not preclude a finding that the actor should do so.” *Id.* at cmt. a.

209. RESTATEMENT (THIRD) OF TORTS § 14 (Tentative Draft No. 1, 2001).

210. Compare RESTATEMENT (SECOND) OF TORTS § 286 with RESTATEMENT (THIRD) OF TORTS § 14, cmt. c (Tentative Draft No. 1, 2001).

211. RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (Tentative Draft No. 1, 2001). Comment d goes on to recognize that although the doctrine of negligence per se has always been significant in American tort law “its significance has expanded in recent decades, as the number of statutory and regulatory controls has substantially increased.” *Id.* at cmt. d (Tentative Draft No. 1, 2002).

states that “when the legislature has addressed the issue of what conduct is appropriate, the judgment of the legislature, as the authoritative representative of the community, takes precedence over the views of any one jury.”<sup>212</sup> Finally, the comment points out that in dealing with problems of recurring conduct, when each jury makes up its own mind on negligence “there are serious disadvantages in terms of inequality, high litigation costs, and failing to provide clear guidance to persons engaged in primary activity.”<sup>213</sup> Because statutes generally address recurring conduct, negligence per se “replaces decisionmaking by juries in categories of cases where the operation of the latter may be least satisfactory.”<sup>214</sup>

Thus, the draft Restatement (Third) of Torts presents a framework where a statute or regulation provides the standard of care in cases where conduct is sufficiently recurring that the legislature has opted for consistency and predictability as a higher value. It is precisely this value that is embodied in FIFRA, which directs EPA to set the standard of care for pesticide directions and use rather than having a jury do so in any particular case. However, the current version of the Restatement makes clear that while a statute or regulation sets the minimum standard of care, it does not set the maximum; a plaintiff always has the option of attempting to prove that a reasonable person would have taken additional precautions and failure to do so constitutes negligence.<sup>215</sup>

While this structure make sense in many situations, such as a case where a defendant complied with a speed limit but was otherwise driving negligently as a result of inappropriate lane changes or other hazardous activity, courts have not applied it in the FIFRA Preemption cases. Significantly, those same principles have at least some currency for the Pesticide Land Use cases.<sup>216</sup> Unlike a speed limit or other traffic safety law that governs only a small portion of safe transportation, FIFRA has been interpreted as creating a more comprehensive, regulatory system, setting the standard regarding which pesticide effects and conditions for use are reasonable.<sup>217</sup>

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212. *Id.* at cmt. d.

213. *Id.*

214. *Id.*

215. RESTATEMENT (SECOND) OF TORTS § 288C (1965).

216. The bulk of cases involving § 288C deal with traffic laws and building safety codes. See, e.g., RESTATEMENT (SECOND) OF TORTS § 288C (1965) (illustrations and case citations). The same is true for the other Restatement provision discussing negligence per se generally.

217. See, e.g., Specimen Label, Bayer CropScience, Sevin® brand XLR Plus Carbaryl Insecticide, EPA Reg. No. 264-333, EPA Est. # 264-MO-02 (pesticide label at issue in *Anderson* that is thirteen pages long in small print containing specific directions for use, storage and disposal of the pesticide, including directives and prohibitions regarding overexposure, contact with humans, drift, preharvest and grazing restrictions, and the “bee caution” discussed at *supra* note 193).



In order to give the weight to the label intended by FIFRA, pesticide user violations of the label should constitute negligence per se and compliance with the label should raise a presumption of reasonableness for those aspects of pesticide use addressed expressly in the label, or else the standard for using a pesticide will be different in every state. As stated earlier, claims for intentional torts such as trespass to land, trespass to chattel (including bees and animals), conversion, nuisance or any other state law claims not based in negligence against pesticide users would still be available.<sup>218</sup> Moreover, claims for strict liability could still be available in those jurisdictions that have held that pesticide spraying is abnormally dangerous because the elements of strict liability do not require a finding of breach of a duty of reasonable care.<sup>219</sup>

### B. *Reviving Claims for Trespass and Nuisance*

Despite the benefits of the above approach, turning common law negligence claims against pesticide users into negligence per se claims may at first glance seem to place too much faith in EPA's ability to adequately balance benefits and risks on a global basis. One may argue that a federally-approved pesticide label is a poor substitute for local courts which can balance duty, benefits, and risks on a case-by-case basis relying on individual circumstances and local standards. Indeed, for years there has been strong criticism of EPA for failing to take health and environmental concerns adequately into account in their registration of pesticides and enforcement of pesticide laws.<sup>220</sup>

However, such local balancing in the context of a negligence claim against a pesticide user is complicated by FIFRA's mandate of a uniform

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218. For instance, Dean Prosser defines trespass to land as any intentional invasion without authorization or privilege by law and without regard to harm. PROSSER AND KEETON, *supra* note 138, § 13 at 70. If a pesticide sprayer intended to spray the pesticide and it was substantially certain to migrate to the plaintiff's property, that action would constitute intentional trespass and label compliance would be irrelevant. The same would be true for conversion or trespass to chattels as a result of pesticide use. *See id.* at 85-86 and 90 (defining trespass to chattels and conversion as intentional interference with chattel as to result in loss, transfer of ownership, or destruction, with difference between the two torts one mainly of degree). By contrast, if the sprayer did not intend to spray the pesticide at all, or entry on the neighbor's property was not substantially certain to result, compliance or noncompliance with the label would determine whether the action was negligent per se.

219. *See supra* notes 141 and 176 and accompanying text. Moreover, claims for vicarious liability could still be determined based on whether a state deems the pesticide use to be "inherently dangerous." If it is "inherently dangerous," violation of the label would subject the landowner to vicarious liability coupled with the negligence per se of the sprayer; if it is not "inherently dangerous," only the sprayer would be liable. *See also supra* note 142 and accompanying text.

220. *See, e.g.,* RODGERS, *supra* note 20, § 5.1, at 4-21 (discussing "pandemic uncertainty that hinders choice at every level" in the registration and use of pesticides); Carlucci, *supra* note 18, at 203-09 (pointing out deficiencies in data and analysis relating to risks to human health and environment used by EPA in registering pesticides).

label to govern pesticide use. For negligence claims, it seems appropriate to allow the sprayer to rely on the label to govern its conduct, and to then allow the plaintiff to rebut a presumption of reasonableness as a result of label compliance by arguing that the conduct complained of was not covered by the label. At the very least, the negligence per se framework described above strikes a better balance between compensating plaintiffs and providing predictable results than does either today's patchwork approach in the states or any argument in favor of complete preemption of common law claims many federal circuits previously embraced in the FIFRA Preemption cases.

More important, stepping away from litigants' historic reliance on negligence allows one to posit that traditional claims of intentional trespass and private nuisance are better suited than negligence to balance benefits and harms of pesticide use on a local level. Trespass, of course, is any intentional invasion of another's property without authorization or privilege by law.<sup>221</sup> Under the Restatement (Second) of Torts, the plaintiff need not prove that the defendant intended to commit a trespass, but only that the defendant intended to commit the act (i.e., the spraying of the pesticide) and the act was done with knowledge to a substantial certainty that it would result in the introduction of the substance onto the plaintiff's property.<sup>222</sup>

Thus, the only elements necessary to establish a claim for intentional trespass are that the plaintiff has a possessory interest in the land subject to the trespass, that the defendant's intentional act causes an invasion of property (that was intended to result or substantially certain to result) without the plaintiff's consent, and that actual harm results.<sup>223</sup> Courts have held that even invasions of particles not visible to the eye can still satisfy the invasion requirement for purposes of a trespass.<sup>224</sup> Thus, there

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221. See PROSSER AND KEETON, *supra* note 138, § 13 at 70; RESTATEMENT (SECOND) OF TORTS § 158 (1965).

222. See BOSTON & MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS 19 (2d ed. 2001) (citing RESTATEMENT (SECOND) OF TORTS § 826, cmt. i (1979) which states that in order for there to be a trespass, it "is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter."). See also *Rushing v. Hooper-McDonald*, 300 So. 2d 94 (Ala. 1974) (finding intentional trespass may lie where the defendant's dumping of waste on land contiguous to plaintiff's fish pond eventually caused pollution in the pond).

223. See PROSSER & KEETON, *supra* note 138, at 70-78.

224. See, e.g., *Nieman v. NLO, Inc.* 108 F.3d 1546 (6th Cir. 1997) (release of uranium and radiation from nuclear processing facility into air, groundwater and aquifer constitutes trespass); *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996) (finding intentional trespass could be based on release of barium on defendant's property which ultimately leached to plaintiff's property on grounds that defendant had good reason to know or expect the barium particles would pass through soil and groundwater to lower elevation of plaintiff's property); *Bradley v. American Smelting & Ref. Co.*, 709 P.2d 782 (Wash. 1985) (allowing intentional trespass claim for release of pollutants not visible to the eye where it was "reasonably foreseeable" that release could result in invasion of plaintiff's property miles away); BOSTON & MADDEN, *supra* note 222, at 23,

is no reason that evidence of pesticide residues on neighboring land cannot constitute an intentional trespass where it is shown that, based on wind or other conditions, the pesticide was substantially certain to invade the plaintiff's property. Despite limited case law in this area, facts tending to show that the pesticide left the target site and invaded the property of the plaintiff support a claim for intentional trespass. In such cases, the pesticide user's compliance with the label is irrelevant—no breach of a duty of care is required for liability.<sup>225</sup>

Moreover, in the many cases in which a plaintiff alleges pesticide-related damages in the absence of a trespass (e.g., the *Lenk, Bennett, Anderson*, and other cases where the bees enter the defendant's property rather than the pesticide directly entering the plaintiff's property), private nuisance is a better vehicle than negligence to balance individual circumstances without detracting from the nationally uniform label standards mandated by FIFRA. An intentional nuisance is actionable when (1) the harm caused is substantial, and (2) the gravity of the harm outweighs the utility of the defendant's enterprise and makes its continuance unreasonable.<sup>226</sup> The famous quote from Justice Sutherland in *Euclid v. Ambler Realty Co.* is particularly apt in the context of competing land uses involving pesticides: a "nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."<sup>227</sup> Thus, intentional nuisance is actionable even in the face of

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30-31. *But see* *Martin v. Amoco Oil Co.*, 679 N.E.2d 139 (Ind. 1997) (finding no intentional trespass in case where defendant's oil refining operations resulted in contamination migrating to plaintiffs' property because mere intent to refine oil was not sufficient to show intent and no evidence defendant had knowledge of substantial certainty of migration); *United Proteins v. Farmland Indus.*, 915 P.2d 80 (Kan. 1996) (finding no intentional trespass for contaminating aquifer under plaintiff's property because no evidence defendant should have known chemicals were substantially certain to enter plaintiff's property).

225. *See, e.g.*, *Neil Bassetti Farms v. Tierra AG Spraying, Inc.*, No. F040302, 2003 WL 22079510 (Cal. Ct. App., Sept. 9, 2003) (affirming jury verdict awarding damages to plaintiff for pesticide drift caused by defendant on trespass theory even in absence of negligence); *New York v. Fermenta ASC Corp.*, 656 N.Y.S.2d 342 (App. Div. 1997) (FIFRA does not preempt claim for trespass against herbicide manufacturer brought by state water authority in connection with contamination of groundwater because trespass claim had nothing to do with the pesticide label); *Gallagher v. Grant-Lafayette Elec. Coop.*, 637 N.W.2d 80 (Wis. Ct. App. 2001) (reversing motion to dismiss and holding that plaintiffs can make out a claim of intentional trespass against power company using herbicide to clear trees and brush in easement on plaintiff's farmland). *But see* *Plourde v. Gladstone*, 69 Fed. App'x 485, (2d Cir. 2003) (affirming dismissal of plaintiff's claims for trespass based on application of herbicide to neighbor's crops because no evidence to suggest defendants were substantially certain that herbicide sprayings would result in injury). *See, also* RODGERS, *supra* note 20, § 5.26 at 336-37 (stating that "one might suspect that classical trespass law would be strongly accounted for in the drift damage cases" but only a "few cases of this sort can be found."); *Blomquist, supra* note 144, at 402-03 (same).

226. *See* RESTATEMENT (SECOND) OF TORTS § 826 (1979). The utility of the defendant's conduct includes both its utility to the community and its utility to the defendant. *See generally* Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 127 (1998).

227. 272 U.S. 365, 388 (1926).

reasonable care (here, compliance with the label), if, because of nearby residential areas, endangered species, protected waters, or other local factors the court may consider, the use of the pesticide is simply not appropriate.

Although cases relying on private nuisance theory to resolve Pesticide Land Use case are rare,<sup>228</sup> one Nebraska case that does use such a theory is illuminating. In *Hall v. Phillips*,<sup>229</sup> the plaintiff sued a neighbor who had applied the herbicide Atrazine to a corn crop when, several days later, strong winds carried the Atrazine-contaminated soil to the plaintiff's property resulting in damage to his bean crop. In reversing the district court's dismissal of the plaintiff's private nuisance claim and remanding the case for trial, the Nebraska Supreme Court began its discussion by stating that the defendant's application of Atrazine was free from negligence and without drift from his tract.<sup>230</sup> The court thus focused on whether the claim of private nuisance was actionable and whether the defendant's action was both intentional and unreasonable.

The court did not decide the issues but provided two analyses for remand. On the issue of whether it was intentional, the court found that, based on the Restatement (Second) of Torts and Nebraska law, a nuisance is "intentional" if the actor (1) acts for the purpose of causing the interference or (2) knows that it will result or is substantially certain to result from his conduct.<sup>231</sup> As to whether the spraying was unreasonable, the court framed the question with reference to both the Restatement (Second) of Torts and Nebraska law and said the question was whether the gravity of the harm outweighs the utility of the defendant's conduct, or whether the defendant's conduct causes serious harm but payment of damages would render the defendant's continued conduct unfeasible.<sup>232</sup> The court went on to say that due care was not a defense to a claim based on nuisance.<sup>233</sup>

The court ended its analysis by stating that although this structure complicates the fact-finder's task, it "takes into account the various property rights of all parties to a law action based on tortious private nuisance."<sup>234</sup> The court then remanded the case to the trial court to determine whether the blowing of Atrazine on the plaintiff's property

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228. See *supra* notes 143 and 165 and accompanying text.

229. 436 N.W.2d 139 (Neb. 1989).

230. *Id.* at 141.

231. *Id.* at 142, 145 (citing RESTATEMENT (SECOND) OF TORTS § 825 (1979); *Cline v. Franklin Pork, Inc.*, 313 N.W.2d 667 (Neb. 1981)).

232. *Id.* at 143-44 (citing RESTATEMENT (SECOND) OF TORTS §§ 826-28 and cmt. c (1979)).

233. *Id.* at 144-45.

234. *Id.* at 145.

was substantially certain to follow from its application (i.e., intentional) and whether the invasion was unreasonable.<sup>235</sup>

Although so-called “right-to-farm” statutes that exist in most states will provide some roadblocks to nuisance claims for pesticides applied in connection with farming activities (the vast majority of pesticide damage cases), these laws contain exceptions that will allow many nuisance claims for pesticide damages to remain viable.<sup>236</sup> For instance, many right-to-farm statutes allow nuisance claims to proceed against farming operations where: (1) the defendant did not establish its agricultural activities before the residential use of the plaintiff’s property; (2) the defendant’s pesticide use is an expansion of its original farming activities; (3) the farming operation has been in use less than one or two years; (4) the plaintiff is itself part of an agricultural operation and is not a residential plaintiff that has “come to the nuisance”; and (5) the defendant’s activity represents a substantial adverse effect on public health and safety.<sup>237</sup> Notably, the Iowa Supreme Court invalidated the nuisance-protection provisions in the Iowa right-to-farm law as an unconstitutional taking of private property without just compensation.<sup>238</sup> The court reasoned that the provisions of the law offering immunity from nuisance suits in effect

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235. *Id.* at 145-46.

236. Right-to-farm statutes were enacted during the 1970s and 1980s in most states to address a growing concern that urban sprawl was overtaking too much farmland and that nuisance lawsuits by these new residents threatened the existence of many farms by frustrating farmers and encouraging them to sell to developers. Many of these statutes codified the “coming to the nuisance” defense, and provided insulation for existing farming operations (including pesticide use) from nuisance lawsuits where the farming operation pre-dated the surrounding nonagricultural activities; the farming operation was being conducted consistent with good agricultural practices, laws and rules; and the farming operation had been in operation, without significant increase of scale, for a specified period of time (generally one to two years). See, e.g., *Town of Enfield v. Enfield Shade Tobacco*, 32 Conn. L. Rptr. 240 (Conn. Super. Ct. 2002) (discussing Connecticut right-to-farm law); *Pasco County v. Tampa Farm Serv., Inc.*, 573 So. 2d 909 (Fla. Ct. App. 1990) (discussing Florida right-to-farm statute); *Holubec v. Brandenberger*, 111 S.W.3d 32 (Tex. 2003) (interpreting Texas right-to-farm law); *Trickett v. Ochs*, 838 A.2d 66 (Vt. 2003) (discussing right-to-farm laws in Vermont and other states in pesticide damage case); *Kanna v. Benton County*, 95 Wash. App. 1011 (Ct. App. 1999) (discussing Washington right-to-farm law and history of such laws generally); Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95; Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694 (1998); Lisa N. Thomas, Comment, *Forgiving Nuisance and Trespass: Is Oregon’s Right-to-Farm Law Constitutional?*, 16 J. ENVTL. L. & LITIG. 445 (2001).

237. See, e.g., *Finlay v. Finlay*, 856 P.2d 183 (Kan. Ct. App. 1993) (right-to-farm act did not apply where plaintiff’s residence was a farm home and not a nonagricultural use which had moved into an agricultural area); *Trickett v. Ochs*, 838 A.2d 66 (Vt. 2003) (allowing nuisance action to proceed against orchard for storage and use of pesticides on grounds that state right-to-farm statute did not apply where the plaintiff’s property had been used as a residence before the defendant’s property was established as an orchard); *Buchanan v. Simplot Feeders Ltd. P’ship*, 952 P.2d 610 (Wash. 1998) (holding right-to-farm law did not apply where plaintiffs used their land as farmland).

238. *Bormann v. Kossuth County*, 584 N.W.2d 309 (Iowa 1998). See also *Gacke v. Pork Xtra*, 684 N.W.2d 168 (Iowa 2004).

gave the defendant farm operation the right to create and maintain a nuisance, thereby creating an easement in favor of the agricultural landowners on neighboring properties.<sup>239</sup>

Thus, a theory of private intentional nuisance allows the fact-finder to take into account local concerns and balance the equities between the parties without setting a new standard of reasonable care that conflicts with the uniformity principles for label compliance set forth in FIFRA. Accordingly, while the label can raise a presumption of reasonable use for purposes of a negligence claim if the defendant can show compliance, the plaintiff can rebut that presumption and also establish liability and recover damages or an injunction in the case of trespass (which in many cases will also be evidence of a label violation) and private intentional nuisance.

### C. *Using Existing Federal Law to Recover for Pesticide Misuse and Creating State Private Rights of Action*

Another complementary means to pursue claims for pesticide damage is to utilize other federal environmental laws to obtain injunctive or compensatory relief, and to utilize both existing and newly-created state private rights of action to recover damages for pesticide label violations.

First, there are federal environmental laws other than FIFRA that contain citizen suit provisions or other private party action provisions that allow for injunctive relief and, in some cases, cost recovery.<sup>240</sup> Litigants are just now beginning to use these other federal laws in pesticide cases, with some success. For instance, in *No Spray Coalition v. City of New York*,<sup>241</sup> a coalition of environmental groups sued the City of New York under the citizen suit provision of the Clean Water Act

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239. *Bormann*, 584 N.W.2d at 321. *But see* *Moon v. North Idaho Farmers Ass'n*, 96 P.2d 637 (Idaho 2004) (statute extinguishing liability for smoke arising from grass seed burning did not grant an easement to grass seed growers and did not constitute an unconstitutional taking); *Overgaard v. Rock County*, No. Civ. A. 02-601 (DWF/AJB), 2003 WL 21744235 (D. Minn., July 25, 2003) (upholding Minnesota's right-to-farm law and distinguishing *Bormann* on grounds that Minnesota law maintains the neighboring landowners' right to sue for nuisance for two years after the commencement of the farming operation). *See also* *Lucas v. S.C. Coastal Council*, 503 U.S. 1003 (1992) (defining categories of state regulatory action that must be compensated as actions that involve a permanent physical invasion of the property or deny the owner all economically beneficial or productive use of the land); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (holding that requiring property owner to give easement of access across property to obtain a building permit was a physical taking of property that required just compensation); *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (holding no categorical taking had occurred because the regulations had only a temporary impact on the petitioners' fee interest in the property).

240. Amending FIFRA to add an express private right of action is another obvious solution but one that does not appear likely in the near future.

241. 351 F.3d 602 (2d Cir. 2003).

(CWA) to enjoin ground and aerial spraying of malathion, resmethrin, and sumithrin within the city to prevent the spread of the mosquito-borne West Nile virus beginning in the summer of 1999.<sup>242</sup> It was undisputed that New York did not seek the permit the CWA requires as a prerequisite to the discharge of a pollutant into a navigable waterway, and the plaintiffs produced evidence that the pesticides had in fact been sprayed over lakes, streams, ponds, and marshes at various times in connection with the spraying program.<sup>243</sup>

The U.S. District Court for the Southern District of New York dismissed the CWA citizen suit action on the grounds that the plaintiffs could not circumvent the absence of a private right of action under FIFRA through the CWA citizen suit provision without a “substantial” violation of FIFRA.<sup>244</sup> On appeal, the U.S. Court of Appeals for the Second Circuit reversed and remanded the case. The court of appeals held that the lower court’s ruling impermissibly modified the CWA’s express citizen suit provision and that “each statute stands on its own, and means what it says.”<sup>245</sup> The court reasoned that:

The question in this case is not whether to read into FIFRA a remedy Congress omitted from it. The question is rather whether to eliminate from CWA a remedy which it expressly provides, merely because another related statute does not similarly provide such a remedy. We can see no reason to do so.<sup>246</sup>

This result is consistent with decisions from the Ninth Circuit holding that a discharge permit is required under the CWA for pesticide spraying resulting in the discharge of pesticides into navigable waters,<sup>247</sup> although the EPA has recently issued a proposed rule and interpretive statement to the contrary.<sup>248</sup> Thus, unless a court adopts the current EPA position

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242. *Id.* at 603.

243. *Id.*

244. *Id.* at 604.

245. *Id.* at 605.

246. *Id.* The court also rejected the defendants’ alternative argument that spraying in substantial compliance with FIFRA must be deemed to also comply with the CWA, choosing to remand that issue in the first instance to the district court. *Id.* at 606.

247. See *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (holding U.S. Forest Service pesticide spraying project resulting in the discharge of pesticides to rivers was a “point source” requiring a National Pollution Discharge Elimination System (NPDES) permit under the CWA); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 530-32 (9th Cir. 2001) (holding that a NPDES permit is required for discharge of a pesticide into waters of the United States despite the existence of an EPA-approved pesticide label under FIFRA because of the different purposes and requirements of the two statutes). See also *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024, (9th Cir. 2005) (holding EPA registration of pesticide under FIFRA does not exempt the agency from complying with separate environmental review requirements for use of the pesticide under the Endangered Species Act).

248. See EPA Interpretive Statement on Application of Pesticides to Waters of the United States in Compliance with FIFRA, 70 Fed. Reg. 5093, 5097-5100 (Feb. 1, 2005) (explaining EPA

or Congress amends FIFRA or the CWA, the CWA may be available to plaintiffs to obtain injunctive relief to prevent future spraying of pesticides over lakes, rivers, and other waters of the United States. Under the CWA, plaintiffs may also recover attorneys' fees, although there is no provision to recover monetary damages other than civil penalties payable to the government.<sup>249</sup>

However, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)<sup>250</sup> provides a somewhat broader basis for financial recovery in the form of costs taken to remediate any pesticide contamination that resulted from the "release" of a "hazardous substance."<sup>251</sup> Although CERCLA contains a pesticide exemption,<sup>252</sup> federal courts generally have read that exemption narrowly to hold that private parties may recover cleanup costs associated with pesticide spraying that is not in compliance with the pesticide label.<sup>253</sup>

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position taken in amicus brief filed in *Talent* case and stating that, contrary to the Ninth Circuit's decision in that case, the CWA does not require NPDES permits for the application of pesticides directly to waters of the United States to control pests in compliance with FIFRA requirements). See also Meghan Rhatigan, Note, *Legislation Overlap: Should the Clean Water Act or the Federal Insecticide, Fungicide and Rodenticide Act Prevail When Pesticides End Up in U.S. Waters?*, 79 NOTRE DAME L. REV. 2183, 2204 (2004) (arguing that *Forsgren* and other similar cases have created an unacceptable degree of uncertainty for those who use and regulate the use of pesticides and that current EPA guidance providing for no CWA violation for application of pesticides in compliance with FIFRA should prevail).

249. See 33 U.S.C. § 1365(a) (2000) (providing for citizen suit against any person alleged to be in violation any effluent standard or limitation under the CWA); 33 U.S.C. § 1365(d) (2000) (providing for recovery of costs of litigation, including reasonable attorneys fees and expert witness fees, to any prevailing or substantially prevailing party whenever court determines award is appropriate).

250. 42 U.S.C. §§ 9601-9675 (2000). CERCLA allows state and federal governments and private parties to recover "costs of response" associated with the release of hazardous substances. See 42 U.S.C. § 9607(a) (2000).

251. See 42 U.S.C. § 9601(14) (2000) (defining hazardous substance) and § 9601(22) (2000) (defining release). The term "hazardous substance" is defined broadly and includes a wide range of pesticides. See, e.g., *United States v. Tropical Fruit*, 96 F. Supp. 2d 71, 84-85 (D.P.R. 2000) (detailing numerous pesticides that defendants did not dispute were hazardous substances under CERCLA).

252. See 42 U.S.C. § 9607(i) (2000) (providing for no recovery of response costs or damages under CERCLA "resulting from the application of a pesticide product under [FIFRA]").

253. See, e.g., *United States v. Tropical Fruit*, 96 F. Supp. 2d 71 (D.P.R. 2000) (reading CERCLA pesticide exemption narrowly and holding that pesticides applied in violation of label's prohibition on pesticide drift resulted in CERCLA liability for defendant); *Cameron v. Navarre Farmers Union Coop. Assoc.*, 76 F. Supp. 2d 1178, 1182-83 (D. Kan. 1999) (holding that fact dispute over whether defendant applied pesticide to their property in a "customary manner" precluded dismissal of landowners' claim for recovery of response costs related to the spraying); *Beers v. Williams Pipeline Co.*, No. 93-C-2189-EEO, 1994 WL 477187 at \*5 (D. Kan., Aug. 24, 1994) (holding defendant not exempt from CERCLA liability simply because the pesticide sprayed was registered and that plaintiff seeking to recover response costs raised genuine issue of fact over whether pesticide was applied "in the customary manner."). See also *Jordan v. S. Wood Piedmont Co.*, 805 F. Supp. 1575, 1581-82 (S.D. Ga. 1992) (holding that the pesticide exemption in 42 U.S.C. § 9607(i) is to be interpreted narrowly, and is meant to prevent the



Thus, while the CWA is available to obtain injunctive relief to prevent future spraying (and thus future crop damage, personal injury or other damages), CERCLA provides the additional remedy of recovering any costs to remediate soil, surface water or groundwater contaminated by the improper use of pesticides.

In addition to these federal remedies, some states have existing causes of action to recover for damages, and efforts should be made to both utilize existing statutory claims and create new ones. *Bates* has now confirmed that FIFRA is not a preemptive bar to raising state statutory claims for violation of pesticides labels—thus giving plaintiffs a clean cause of action to recover damages that does not detract from FIFRA's goal of uniformity and significantly enhances FIFRA's goal of protecting human health and the environment.

Although no states currently appear to have provisions in their pesticide laws allowing for private rights of action to recover pesticide-related damages,<sup>254</sup> there does not appear to be any reason why plaintiffs cannot rely on more general state hazardous waste laws that contain private rights of action. For instance, the Alaska Supreme Court has interpreted the state's hazardous waste law to allow private parties to recover damages (including injuries to persons or property, real or personal, and loss of income), and response costs from parties responsible for the release of a hazardous substance.<sup>255</sup> Washington's Hazardous Waste Management Act<sup>256</sup> specifically includes a private cause of action for damages resulting from "dangerous wastes," which include most pesticide waste products.<sup>257</sup> Similarly, Minnesota's state superfund law, the Minnesota Environmental Response and Liability Act (MERLA),<sup>258</sup>

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typical pesticide user from incurring CERCLA liability for doing nothing more than applying pesticide in "the customary manner").

254. Currently, Arizona's pesticide law contains a citizen suit provision to enforce the state's pesticide law and obtain injunctive relief and attorneys' fees. Ariz. Rev. Stat. § 3-367 (2004) (allowing for any person with an interest adversely affected to commence a civil action against anyone alleged to be in violation of state's pesticide laws after giving sixty days' notice to the state director so long as the attorney general is not already diligently prosecuting an action).

255. Fed. Deposit Ins. Corp. v. Laidlaw Transit, 21 P.3d 344, 346-49 (Alaska 2001) (interpreting Alaska Stat. §§ 46.03.822(a), (m), and 46.03.824). Hazardous substances are defined broadly under Alaska law to include any element or compound which "when it enters into the atmosphere or in or upon the water or surface or subsurface land of the state, presents an imminent and substantial danger to the public health or welfare, including but not limited to fish, animals, vegetation, or any part of the natural habitat in which they are found." Alaska Stat. § 46.03.826 (2004).

256. Wash. Rev. Code § 70.105.097 (2005).

257. See, e.g., *Hickle v. Whitney Farms*, 29 P.3d 50, 55-56 (Wash. Ct. App. 2001) (confirming private right of action for damages under the Hazardous Waste Management Act (HWMA)), *aff'd and remanded*, 64 P.3d 1244 (Wash. 2003); *DeYoung v. Cenex*, 1 P.3d 587, 591 (Wash. Ct. App. 2000) (considering private right of action under HWMA for pesticide damage but dismissing claim under principles of *res judicata*).

258. Minn. Stat. § 115B (2005).

is much broader than CERCLA in that it allows a private party to recover not only response costs (i.e., cleanup costs) but also damages for economic loss and personal injury associated with the release of hazardous substances, including pesticide products.<sup>259</sup> As a result, MERLA would appear to provide a viable state law cause of action for damages in Pesticide Land Use cases to the extent the defendant failed to comply with the requirements of the pesticide label or state law.<sup>260</sup> Finally, Florida law contains a private right of action for damages resulting from a discharge of pollution, with pollution defined to include pesticides.<sup>261</sup>

However, a much more comprehensive and straightforward means of providing compensation for pesticide-related damages would be for states to create a private right of action within their state pesticide laws stating that a violation of the label is negligence per se and creating a damages remedy. This would allow courts and litigants the opportunity to conduct a more streamlined analysis under the state's statute, and it would provide notice to potential plaintiffs and their counsel of a label-based claim. Such a result would also allow EPA and state agencies to enlist private citizens to help enforce the state and federal pesticide programs, thus bringing new life to the state's pesticide laws and providing more appropriate relief for injured parties. Such suits could thus work in tandem with state legislatures and agencies, which have express authority

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259. See Minn. Stat. § 115B.05, subd. 1 (2005). The statute allows recovery for "economic loss" which includes loss to real property, personal property, or profits and for "death, personal injury, or disease," including medical expenses, past and future income and earning capacity, and pain and suffering. *Id.* See also *Allied-Signal v. Hopkins Agric. Chem.*, Civ. No. 4-91-281, 1991 WL 238999 at \*1 (D. Minn., Nov. 8, 1991) (discussing hazardous substances as including pesticide formulation waste products, including DDT, aldrin, toxaphene, malathion and lindane); *Gopher Oil v. Union Oil*, 757 F. Supp. 988, 992 (D. Minn. 1990) (discussing contamination from pesticide blending, including blending of DDT, that led to hazardous substance contamination), *aff'd in part, remanded in part on other grounds*, 955 F.2d 519 (8th Cir. 1992). Claims for damages under Minn. Stat. § 115B.05, as opposed to claims for recovery of response costs under Minn. Stat. § 115B.04, are only available if the hazardous substance was placed or came to be located on the site after July 1, 1983. See Minn. Stat. § 115B.06 (2005); *Soo Line R.R. Co. v. Ashland, Inc.*, No. Civ. 01-1628 ADM/AJB, 2004 WL 533936 at \*4-5 (D. Minn., March 16, 2004) (dismissing claim for economic damages under Minn. Stat. § 115B.06 because any hazardous substances attributable to the defendant would have been placed or located on the property prior to July 1, 1983); *Soo Line R.R. Co. v. B.J. Carney & Co.*, 982 F. Supp. 1365, 1367-68 (D. Minn. 1997) (same). For most Pesticide Land Use cases, this limitation is not a problem because the damage usually results from current harm to crops or human health, rather than cleanup liability for contamination that occurred many years ago.

260. Although Minnesota law provides that a landowner is not liable for cleanup costs or damages associated with pesticide contamination in groundwater, that protection applies only if the pesticide was applied in compliance with state law and applicable labeling. See Minn. Stat. § 18D.101 (2005) (no liability for cleanup costs associated with agricultural chemicals in groundwater if application was done in compliance with state law and labeling requirements).

261. See *Cunningham v. Anchor Hocking Corp.*, 558 So. 2d 93, 98-99 (Fla. Ct. App. 1990) (stating that Fla. Stat. § 376.30-376.391 allows an action for damage resulting from discharge of pollutant, and noting that pollutants include pesticides, among other things).

under FIFRA to restrict or ban completely certain pesticides or limit their use in sensitive areas or during certain times of the year.<sup>262</sup>

These types of statutes, taken together with common law trespass and nuisance claims and existing statutory actions for pesticide harm, can provide plaintiffs with powerful tools to combat pesticide misuse, while retaining a more unified, federal structure governing use of pesticides. This framework promotes FIFRA's dual goals of providing federal control over pesticide labeling and allowing FIFRA itself to be used as a tool to obtain relief for pesticide misuse and prevent continuing pesticide damage to human health and the environment. By allowing FIFRA principles to work with other state and federal causes of action, clarity and predictability can be brought to the Pesticide Land Use cases in a way that is absent in much of today's jurisprudence in this area.

#### CONCLUSION

This Article discusses the history of pesticide regulation and litigation for the purpose of creating a new framework for analyzing Pesticide Land Use cases in a manner that provides relief for plaintiffs injured by the use and misuse of pesticides while preserving uniform pesticide labeling under the current FIFRA regulatory scheme. With the Supreme Court's recent decision in *Bates v. Dow Agrosciences*, plaintiffs in the FIFRA Preemption Cases can now bring a much larger range of common law claims to recover damages for fraud, improper testing, and other claims unrelated to pesticide labeling. Moreover, this Article argues that by reaffirming the importance of uniform labeling, *Bates* should encourage litigants and judges in Pesticide Land Use cases to rely more heavily on the label language in litigating negligence claims against pesticide users and to look more broadly to nuisance and trespass claims to obtain relief for pesticide use that complies with the label but nevertheless results in harm. Finally, this Article suggests greater emphasis be placed on new and existing state and federal statutes to obtain relief for pesticide related harm.

In the end, FIFRA, like all other environmental laws, attempts to set a balance that protects both economic interests and the environment. Although it often does not succeed (and is, of course, criticized by most stakeholders as giving too much to the other side), in each individual litigated case, clarity and predictability would allow parties on both sides to better understand what claims may be available and the likelihood of success. This in turn would give the litigants better tools to try the case and negotiate settlements and provide the courts with better tools to reach a just result.

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262. See *supra* notes 62 and 66 and accompanying text.