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A POWERFUL TOOL TO KEEP AT HAND

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Introduction

Congress has established a powerful rebuttal to toxic tort exposure cases where the product is an insecticide, fungicide or rodenticide. Under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), any state tort claim challenging a registered product's EPA-approved label is preempted. This often-overlooked statute has been interpreted broadly by the courts so as to preempt not only direct challenges to a product's warning or instruction label, but also to preempt cases based on statements in promotional materials and Material Safety Data Sheets ("MSDS"), and even cases based on negligent testing practices.

This article will first outline the types of cases where it can be used. It will then briefly discuss how federal preemption under FIFRA arose, followed by representative cases for the different theories created by plaintiffs. FIFRA applies first and foremost to manufacturers, and the cases generally involve personal injury or crop/property damage. Although the preemption analysis runs the same for both types of cases, it occasionally diverges in the crop damage cases, allowing, for example, causes of action for express warranty (*See e.g., Malone v. American Cyanamid Co.*, 271 Ill. App. 3d 843 (1995)).

FIFRA preemption is a powerful tool. If wielded early in litigation, it can serve to narrowly focus the plaintiff's remaining cause of action; limit the kind of evidence allowed at trial; and, in some cases, preclude recovery altogether.

When Are We Going to Use FIFRA Preemption?

The fundamental question in an exposure case is, "Can I use FIFRA preemption?" The quick and dirty answer is, "Yes, you can use FIFRA preemption when the chemical is an insecticide, fungicide or rodenticide (generically referred to as "pesticides") *and* the product is registered with the EPA *and* the case challenges the product's warnings or labeling." All pesticides sold in the U.S. must be registered with the EPA under FIFRA before they can be sold to the public. As I discuss later, Congress has granted the EPA authority to review chemical toxicity data for pesticides and ultimately approve a label for the product that, if followed, will minimize hazardous exposure to persons and the environment.

So, are we limited to cases just challenging the wording on an EPA-approved label? No, the courts have found a variety of cases preempted under FIFRA, not just direct label challenges.

Preemption Basics

Federal preemption starts with the Supremacy Clause of the U.S. Constitution, which says, "the Laws of the United States… shall be the supreme Law of the Land… " U.S. Const. art. VI, §2. Under this clause, preemption occurs when Congress specifically states its intent to preempt any state regulation on a matter.

FIFRA, 7 U.S.C. §136 *et seq*., provides that the EPA has authority to conduct, administer and enforce extensive pre- and post-registration testing and documentation for pesticides. The culmination of the EPA review process is an approved label for the product. FIFRA expressly preempts state law claims at 7 U.S.C. §136v(b), which states:

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

This uniformity standard does not al-

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low a state to impose any different or additional labeling requirements on an EPA-registered insecticide, including through common law damages actions. "Labeling" under FIFRA is more than just the immediate label attached to the container; it is more comprehensive, including written material accompanying the product or referenced in the label. 7 U.S.C. §136(p).

Prior to 1992, the scattered decisions under FIFRA often found exceptions to preemption, or found that label-based "failure to warn" actions did not interfere with FIFRA's scheme. Courts reasoned, for example, that the considerations of the EPA in approving a label were different from those of a civil jury. The EPA considers cost benefit of product versus potential harm. The civil jury considers whether the label conforms to state common law to compensate a plaintiff. Courts found that even though the EPA found a label adequate based on FIFRA, this does not compel the finding that it was adequate under state law.

However, in 1992, the United States Supreme Court decided *Cipollone v. Ligget Group*, 505 U.S. 504. The Court found that a provision in the Cigarette Act that prohibited states from imposing labeling "requirements or prohibitions" on tobacco products also applied to common law damages actions. The Supreme Court reasoned that this phrase made no distinction between state-imposed statutes and common law damages actions. Thus, plaintiff's lawsuit alleging a failure to warn of the hazards of cigarette smoking was an attempted "requirement or prohibition" preempted by the 1969 amendment to the Cigarette Act. The *Cipollone* Court concluded that to the extent that plaintiff's failure to warn claims were based on an allegation that the labels "should have included additional, or more clearly stated, warnings, those claims are preempted." *See, Cipollone*, 505 U.S. at 524.

Starting with *Cipollone*, state and federal courts have consistently found that FIFRA likewise preempts state common law challenges to a registered product's labeling, because FIFRA prohibits states from imposing "requirements for labeling" in addition to or different from the EPA-approved label.

FIFRA Overview: What's It All About?

So what exactly is the purpose of FIFRA? I have found that *some* education to the court helps in understanding the complexity of the EPA's approval process, and shows that the EPA does not merely rubber-stamp a proposed pesticide label. I say *some* education because the regulations under the statute are complex, overwhelming, and not necessarily relevant to the express preemption issue.

FIFRA is a "comprehensive regulatory statute" governing the labeling, sale and use of pesticides. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). *Every* pesticide product sold in the United States must be registered with the EPA, and distributed with EPA-approved labeling. 7 U.S.C. §136a(a), (c)(5)(B); 40 C.F.R. §156.10(a)(1). Labeling has been the principal means by which the EPA ensures that all manufacturers communicate necessary health and safety information, including hazard warnings and precautionary measures, to individuals who use or may be exposed to a pesticide. *See, generally,* 1972 U.S.C.C.A.N. 3993.

Before granting registration under FIFRA, the EPA conducts a rigorous review process, in which it must determine that "its labeling… compl[ies] with the requirements of [FIFRA]" and that the product "will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. §136a(c)(5). The EPA weighs broad social, economic and environmental costs and benefits of the product: under FIFRA, "unreasonable adverse effects on the environment" means "an unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide." 7 U.S.C. §136(bb). FIFRA thus "establishes a complex process of EPA review that culminates in the approval of the label under which the product is to be marketed." *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993).

Labeling requirements are found at 40 C.F.R. part 156. Labeling under FIFRA must contain warnings, precautionary statements, and directions for use which are "designed to protect health and the environment." 7 U.S.C. §136(q)(1)(F), (G). To that end, the EPA has promulgated extensive and detailed regulations governing all aspects of pesticide labeling. *See, generally,* 40 C.F.R. subchapter E.

Finally, *only the EPA* can review and approve post-registration changes in labeling. 40 C.F.R. §§152.44, 152.46, 152.81(b)(4). The EPA can approve the proposed change, modify it, or reject it entirely. Under no circumstance can the registrant add, delete or modify warnings or precautionary statements, or make any other change to a product label, without EPA's review and approval. 7 U.S.C. §136j(a)(2)(A).

Now Here Are the Cases

The courts have found a variety of types of label challenges preempted. They can be classified as direct label challenges, indirect label challenges, and disguised failure to warn cases.

Direct Label Challenges

Starting with *Cipollone*, both federal and state courts have found express label preemption under FIFRA of common law damages claims based on failure to warn or defective warning. See, *e.g.*, *Shaw v. Dow Brands*, 994 F.2d 364 (7th Cir. 1993); *Traube v. Freund*, 333 Ill. App. 3d 198 (5th Dist. 2002).

In *Shaw*, the plaintiff alleged that he suffered lung damage when he used a mildew stain remover and Dow bathroom cleaner in his home. The essence of his complaint sounded in strict liability and negligence for failure to warn of the dangers associated with the use of these products. *Shaw*, 994 F.3d at 365.

Relying on *Cipollone*, the Seventh Circuit reasoned that where a federal law prohibits state regulation in an area, Congress intended to "wipe away common law attempts to impose liability on top of the federal regulation." *Shaw*, 994 F.2d at 370. Applying the *Cipollone* analysis, the court could "discern no significant distinction at all" between the preemption provision of §136v of FIFRA, and the Cigarette Act's ban on state-imposed labeling requirements. *Shaw*, 994 F.2d at 371. The court concluded, "[i]f common law actions cannot survive under the 1969 cigarette law, then common law actions for labeling and packaging defects cannot survive under FIFRA." *Shaw*, 994 F.2d at 371.

Likewise, in *Traube*, the Illinois Appellate Court found that, "FIFRA is a comprehensive federal statute that regulates the use, sale, and labeling of pesticides and requires the registration with the EPA of all pesticides sold in the United States [citations omitted]. The overwhelming authority holds that section 136v of FIFRA [] expressly preempts any state-law claim that directly or indirectly challenges the adequacy of the warnings or other information on a pesticide's approved product label [citations omitted]." The plaintiffs in *Traube* argued that rainfall run-off into their pond from the defendant's pesticide application killed a large number of fish. 333 Ill. App. 3d at 199. The plaintiff claimed that American Cyanamid's labeling should have warned of this hazard, and alternatively that American Cyanamid had participated in a nuisance by allowing its product to be used in this manner.

> The court found that:
> "FIFRA preemption clearly does not turn upon the name a plaintiff gives to his or her cause of action. Plaintiff's claims here fall within that category—they represent nothing more than state-law attacks on the adequacy of [the product's] labeling. Therefore, plaintiff's claims are also preempted." *Traube*, 333 Ill. App. 3d at 203.

At last count, over a dozen federal appellate and district courts have issued similar rulings; and multiple state courts have done so as well. FIFRA express label preemption is well settled in many jurisdictions.

Indirect Label Challenges

The plaintiff's bar, in an attempt to avoid express label preemption, began to challenge collateral documents associated with a pesticide. Nevertheless, so-called "indirect label challenges" are also preempted.

In *Papas v. Upjohn*, 985 F.2d 516, 519 (11th Cir. 1993), the court ruled that FIFRA's label preemption extended beyond the label affixed to the product, to "point of sale signs, consumer notices, or other informational material…If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends."

Likewise, OSHA regulations combined with FIFRA, preempt any state common law action challenging the MSDS' contents. MSDS are created by the OSHA "Hazard Communication" regulation, 29 C.F.R. §1910.1200(a)(2), which sets out the required contents for MSDS. There is no common law requirement mandating the existence of MSDS; they are strictly a creation of federal law, and their contents are controlled only by federal law. The OSH Act and the Hazard Communication regulation contain preemption clauses and work with FIFRA to preempt damages actions.

Accordingly, the courts have determined that an MSDS is considered a "label" under FIFRA. So, in *Helms v. Sporicidin*, 871 F. Supp. 837 (E.D. N. Car. 1994) (cold sterilizing solution), the court reasoned that FIFRA and the "HazCom" regulation must "be read in conjunction with one another." 871 F. Supp. at 839. The court found that "violations of the OSHA [MSDS] standards do not establish a state law cause of action for failure to warn." 871 F. Supp. at 839. Rather, the broad definition of "label-

ing" under FIFRA includes an MSDS. Therefore, any state tort law challenge to the sufficiency of the MSDS for a FIFRA-registered product is preempted under FIFRA's express preemption provision.

The policy behind the preemption of such lawsuits is that MSDS regulations and FIFRA labeling standards must be read in conjunction with each other, because they are all are part of "a detailed scheme of federal statutes and regulations govern[ing] the handling and labeling of hazardous substances." *Torres-Rios v. LPS Laboratories*, 152 F.3d 11, 13 (1st Cir. 1998). The *Torres-Rios* court determined, "these provisions are designed to set a comprehensive standard for workplace safety… and 'to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject' [29 C.F.R.] at §1910.1200(a)(2)." 152 F.3d at 13.

In another form of "indirect" label challenge, plaintiff attorneys seek to impose warnings "to the general public through 'signs, flags, newspaper notices, etc.'" *Eyl v. Ciba-Geigy*, 264 Neb. 582, 599 (2002); *Also Akee v. Dow Chemical*, 272 F. Supp. 2d 1112 (D. Haw. 2003). The courts have held that this clever end-around is merely an obtuse way of saying that the manufacturer failed to warn the end user in some way. As noted in *Papas*, the duty to warn begins and ends with affixing the EPA-approved label to the product.

Disguised Failure to Warn

The final class of preempted label challenges, "disguised failure to warn," facially appears to allege a cause of action such as negligent testing, or defectively designed product. However, the courts have found that these cases are in effect saying, "if you had tested the product properly you would have put a different label on the product to warn of the hazard," which of course brings us back to express label preemption.

Here's an example of how it works: the court in *Akee v. Dow Chemical* found that an alleged "negligent testing" of a product was merely a disguised failure to warn claim. The plaintiffs in that case claimed that Dow Chemical had failed to test for "EDB" vapor in occupied areas such as where the product was used. The *Akee* court reasoned that:

> "Behind these claims lies the assertion that if Shell had properly tested…, it would have discovered information regarding exposure that could have been conveyed, in the form of warnings, to the users and/or Plaintiffs. In other words, the claims are not an attack on Shell's research or testing practices… but rather they are claims based on a failure to warn theory." 272 F. Supp. 2d at 1129.

The court reasoned that a negligent testing claim will be deemed a disguised failure to warn "if the manufacturer could remedy the problems… with alterations to the product's label" rather than to the product itself. *Id* at 1128. This "alteration" test comes from the ironically named case of *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993).

Such claims are preempted because they are merely another way of arguing that the product's labels should have contained different or additional information. *Schuver v. E.I. DuPont*, 546 N.W.2d 610 (Iowa 1996). Where the plaintiff alleged that the product was negligently tested because the manufacturer did not test it on the type of soil used by plaintiff, such a claim was preempted as a disguised failure to warn. *Anderson v. Dow Agrosciences*, 262 F. Supp. 2d 1280 (W.D. Okla. 2003).

Keep in mind that this is by far a cut and dry issue. Many courts have allowed negligent testing cases to proceed, for example the Iowa Supreme Court in *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208 (1998). That court found that other courts have allowed negligent design and testing cases (at 215, collecting cases). The plaintiff there alleged a defect during the design of the product itself that was then rushed to market before proper testing was done. The court found that with proper testing the product defect, carryover of the herbicide from one season to the next, would have been found *and the product itself would have been altered* because it was not fit for its intended purpose. In other words, the product in the bottle did not match what was advertised on the label.

Conclusion

Any civil lawsuit, whether personal injury or crop or property damage, that alleges the use of a pesticide should immediately be reviewed for whether it is subject to FIFRA preemption of all or part of the allegations. Use of this tool early on in litigation will save costs in the long run, help to limit discovery and evidence at trial, and may ultimately lead to favorable dispositions on behalf of your client.