



MEMORANDUM

Via E-Mail

DATE: January 10, 2008

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: District Court Rules That Brochures Constitute Labeling Under FIFRA

On December 20, 2007, the United States District Court for the District of New Jersey issued its decision in *Indian Brand Farms v. Novartis Crop Protection*,¹ in which it considers preemption under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in light of the 2005 U.S. Supreme Court decision in *Bates*.² The court ruled that a product brochure need not literally “accompany” a product to qualify as labeling as defined by FIFRA. The court also determined that the plaintiffs’ failure-to-warn claims, if successful, would impose a labeling requirement in addition to those required under FIFRA, and rejected the claims.

Background

The plaintiffs are blueberry farms and farmers who claim that Diazinon AG600 WBC damaged their blueberry plants and crops. On August 21, 2003, the court, using an inducement test, granted summary judgment in favor of the defendant, holding that plaintiffs’ claims were preempted by FIFRA. The plaintiffs appealed.³ In considering the appeal, the Third Circuit followed *Bates*, which rejected use of the inducement test as a means of determining preemption in favor of a two-part test. Under *Bates*, to determine whether a state rule is preempted by FIFRA, the state rule must satisfy two conditions: (1) it must be a requirement “for labeling or packaging”; and (2) it must impose a labeling or packaging requirement that is

¹ *Indian Brand Farms v. Novartis Crop Protection* (Civil Action No. 99-2118).

² *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005), available at <http://www.supremecourtus.gov/opinions/04pdf/03-388.pdf>.

³ *Mortellite v. Novartis*, 460 F.3d 483 (3d Cir. 2006), available at <http://www.ca3.uscourts.gov/opinarch/033847p.pdf>.



Memorandum to Firm Clients and Friends
January 10, 2008
Page 2

“in addition to or different from those required under” FIFRA. The Third Circuit, in applying *Bates* to claims of negligent misrepresentation, fraud, and breach of the New Jersey Consumer Fraud Act, determined that, to the extent the claims were based on oral representations, they are not preempted. Claims that rely on written materials, however, are preempted if the materials qualify as “labels” or “labeling” under FIFRA. Because the parties did not brief the issue of whether the written materials qualify as labels or labeling, the Third Circuit remanded the issue for further consideration. The Third Circuit also held that, as to whether any claim of failure-to-warn was preempted by FIFRA, the first prong under *Bates* was satisfied, but remanded the issue of whether the second prong was satisfied.

Decision

The issues before the court were: (1) whether the written materials relied upon by the plaintiffs qualify as labels or labeling under FIFRA; and (2) whether plaintiffs’ failure-to-warn claim, if successful, would “create requirements in addition to or different from those under FIFRA. The court notes that, because the Third Circuit identified several discrete issues for consideration on remand and “explicitly directed the application of *Bates* and consideration of these claims under the auspices of FIFRA,” it will not consider plaintiffs’ argument that *Bates* and FIFRA are inapplicable to the case.

The Third Circuit directed dismissal of plaintiffs’ claims of negligent misrepresentation, fraud, and breach of the New Jersey Consumer Fraud Act if the written materials relied upon by plaintiffs fall within the definition of labels or labeling under FIFRA. The written materials at issue are the product label and a brochure, which is where plaintiffs contend the relevant misrepresentations were contained. Neither the plaintiffs nor the defendants cited any authority relating to the brochure’s potential inclusion in the FIFRA definition of labeling. FIFRA defines labeling as:

all labels and all other written, printed, or graphic matter, (A) accompanying the pesticide or device at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.



Memorandum to Firm Clients and Friends
January 10, 2008
Page 3

The parties agreed that the brochure was not issued concomitant with the product. Plaintiffs contend that, because the brochure did not literally “accompany” the product, by definition it cannot qualify as labeling. The court rejected plaintiffs’ argument, however, and found “that the brochure qualifies as labeling as defined by FIFRA and the fact that it did not necessarily accompany the product in a literal sense does not undermine this finding.” The court continues that the Third Circuit directed that, insofar as they are based on the written representations in the brochure, plaintiffs’ claims of negligent misrepresentation, fraud, and breach of the New Jersey Consumer Fraud Act are preempted by FIFRA.

Plaintiffs’ failure-to-warn claim seeks to impose liability on defendants for failing to warn against tank mixing and/or failing to warn about the presence of an inert ingredient in the product. The Third Circuit concluded that plaintiffs’ failure-to-warn claim creates a requirement for labeling, thus satisfying the first requirement of the *Bates* test, and directed the court to consider whether success on any such claim would “create requirements in addition to or different from those under FIFRA.” The court states that this directive “implies that [p]laintiffs’ failure to warn claim is subject to FIFRA preemption.” The court notes that, in Pesticide Registration (PR) Notice 82-01, EPA states, “in cases where the pesticide labels are silent on the matter of tank mixing, applicators [are] permitted to use tank mixes *at their own risk.*” (Court’s emphasis.) The court continues, stating that “EPA does not require registrants to identify individual inert ingredients, such as surfactants, that are not highly toxic on the product label.” The court concludes:

Success on the failure-to-warn claims would impose a labeling requirement in addition to the requirements set forth in FIFRA. As a result, the Court finds that the second prong of *Bates* is satisfied, directing preemption of any claim of failure-to-warn found in Count I or Count II. Summary judgment is granted as to this claim.

* * * * *

We hope this information is helpful. As always, please call if you have any questions.