



MEMORANDUM

Via E-Mail

DATE: April 27, 2005

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: U.S. Supreme Court Issues Decision in *Bates v. Dow Agrosciences*

Today the U.S. Supreme Court issued its decision in *Bates v. Dow Agrosciences* (appended), reversing and remanding the Fifth Circuit's decision that Section 24(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) expressly preempts petitioners' state law claims because a judgment against Dow would induce it to alter its product label. The Court adopted a "parallel requirements" reading of FIFRA Section 24(b) and concluded that where state law labeling requirements are equivalent to the requirements under FIFRA, the state law requirements are not preempted by FIFRA. Justice Stevens delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined. Justice Breyer filed a concurring opinion. Justice Thomas filed an opinion concurring in part and dissenting in part, in which Justice Scalia joined. The implications of this decision for the agrichemical community will be felt for a long time. We will forward a more analytical memorandum.

Background

The petitioners in *Bates* are 29 Texas peanut farmers whose crops were allegedly severely damaged by application of Dow's Strongarm pesticide. The U.S. Environmental Protection Agency (EPA) issued Dow a conditional registration for Strongarm on March 8, 2000, and Dow then marketed Strongarm to Texas farmers, who usually plant their peanut crops around May 1. Petitioners argue that Dow knew or should have known that Strongarm would stunt the growth of peanuts in soils with pH levels of 7.0 or greater, such as those in Texas. The Strongarm label stated: "Use of Strongarm is recommended in all areas where peanuts are grown." After the 2000 growing season and petitioners' reports to Dow that Strongarm severely damaged their peanut crops, EPA approved a supplemental label for distribution and use only in New Mexico, Oklahoma, and Texas. The supplemental label stated: "Do not apply Strongarm to soils with a pH of 7.2 or greater."



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Petitioners gave Dow notice of their intent to sue under the Texas Deceptive Trade Practices-Consumer Protection Act (Texas DTPA). In response, Dow filed a declaratory judgment action in federal District Court, arguing that petitioners' claims were preempted by FIFRA. The petitioners filed counterclaims, including tort claims, fraud, breach of warranty, and violation of the Texas DTPA. The District Court granted Dow's motion for summary judgment, rejecting one claim on state-law grounds and dismissing the others as expressly preempted by FIFRA Section 24(b), which says that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." The Fifth Circuit affirmed the decision, finding that FIFRA Section 24(b) preempts any state law claim in which "a judgment against Dow would induce it to alter its product label."

The Court's decision states that the Fifth Circuit's decision was consistent with "those of a majority of the Courts of Appeals, as well of several state high courts, but conflicted with the decisions of other courts and with the views of the EPA set forth in an *amicus curiae* brief filed with the California Supreme Court in 2000." (Citations omitted.) The Court granted *certiorari* to resolve this conflict.

The Majority Opinion

The majority opinion notes that it was only after its 1992 decision in *Cipollone v. Liggett Group, Inc.*,¹ where the Court held that the Public Health Cigarette Smoking Act of 1969 phrase "requirement or prohibition" preempted certain tort claims against cigarette companies, "that a groundswell of federal and state decisions emerged holding that [FIFRA Section 24(b)] pre-empted claims like those advanced in this litigation." According to the Court, "[n]othing in the text of FIFRA" prohibits a state from making a violation of the federal labeling or packaging requirement a state offense, and states could impose their own sanctions on pesticide manufacturers who violate federal law.

The majority opinion states that, for a particular state rule to be preempted, 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 "in addition to or different from those required under" FIFRA. The opinion provides examples for each condition. Under the first condition, rules governing the design of a product would not be preempted. Under the second condition, a state regulation requiring the word "poison" to appear in red letters would not be preempted by FIFRA if an EPA regulation imposed the same requirement. The opinion states:

¹ 505 U.S. 504 (1992).



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It is perfectly clear that many of the common-law rules upon which petitioners rely do not satisfy the first condition. Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for “labeling or packaging.” None of these common-law rules requires that manufacturers label or package their products in any particular way. Thus, petitioners’ claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted.

The Court rejected the Fifth Circuit’s decision, which found that petitioners’ claims were preempted by FIFRA because finding otherwise would “induce Dow to alter [its] label.” The majority opinion describes the Fifth Circuit’s decision as an “effects-based test” that “finds no support in the text of [FIFRA Section 24(b)], which speaks only of ‘requirements.’” The opinion continues, stating: “A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement.”

Unlike their other claims, according to the Court, petitioners’ fraud and negligent failure-to-warn claims are premised on common law rules that qualify as “requirements for labeling or packaging.” The majority opinion distinguishes the preemption clause at issue in *Cipollone* and FIFRA Section 24(b), noting that FIFRA prohibits “only state-law labeling and packaging requirements that are ‘in addition to or different from’ the labeling and packaging requirements under FIFRA.” The Court found that a state law labeling requirement is not preempted by FIFRA if the requirement is “equivalent to, and fully consistent with,” FIFRA’s misbranding provisions.

Petitioners argued that their claims based on fraud and failure-to-warn are not preempted because these are common-law duties that are equivalent to FIFRA’s requirements that a pesticide label not contain false or misleading statements or inadequate instructions or warnings. The Court agreed with petitioners “insofar as we hold that state law need not explicitly incorporate FIFRA’s standards as an element of a cause of action in order to survive preemption.” The Court remanded the case to the Court of Appeals to decide whether these particular common law duties are equivalent to FIFRA’s misbranding standards, emphasizing that “a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption.” In the Court’s example, if the Court of Appeals determines that the element of falsity in Texas’ common law definition of fraud imposes a broader obligation



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than FIFRA's requirement that labels not contain "false or misleading statements," then the state law cause of action would be preempted by FIFRA "to the extent of that difference."

According to the Court, its "parallel requirements" reading of FIFRA Section 24(b) "finds strong support in *Medtronic, Inc. v. Lohr*," where the Court found that "[n]othing in [21 U.S.C.] § 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements."² The *Bates* majority opinion states that "although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in [FIFRA Section 24(b)] precludes States from providing such a remedy."

Breyer's Concurring Opinion

Breyer wrote his concurring opinion "to stress the practical importance of the Court's statement that state-law requirements must 'be measured against'" the relevant EPA regulations "that give content to" FIFRA's misbranding standards. The concurring opinion states:

As suggested by *Medtronic*, the federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements. Thus, the EPA may prove better able than are courts to determine whether general state tort liability rules simply help to expose "new dangers associated with pesticides," or instead bring about a counterproductive "crazy-quilt of anti-misbranding requirements." (Citations omitted.)

According to Breyer, within "appropriate legal and administrative constraints," EPA can act accordingly.

Thomas's Opinion

Thomas, joined by Scalia, concurred in part and dissented in part. Thomas agreed that the term "requirements" in FIFRA Section 24(b) "includes common-law duties for labeling or packaging." Thomas also agreed that "state-law damages claims may not impose requirements 'in addition to or different from' FIFRA's."

² 518 U.S. 470, 495 (1996).



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According to Thomas, the majority opinion omitted a step in its reasoning that should be made explicit, however: “A state-law cause of action, even if not specific to labeling, nevertheless imposes a labeling requirement ‘in addition to or different from’ FIFRA’s when it attaches liability to statements on the label that do not produce liability under FIFRA.” Thomas agreed that the fraud claims are properly remanded to determine whether the state and federal standards for liability-incurring statements are, in their application to this case, the same. Thomas disagreed with the majority opinion’s treatment of two sets of petitioners’ claims. Thomas’s opinion states that the petitioners’ breach-of-warranty claims should be remanded for preemption analysis, because “[t]o the extent that Texas’ law of warranty imposes liability for statements on the label where FIFRA would not, Texas’ law is pre-empted.” The opinion also states that the Texas DTPA claim “is also (and, in fact, perhaps exclusively) a claim for false or misleading representations on the label” and all aspects of the DTPA claim should be remanded.

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

[Attachment](#)