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MEMORANDUM

Via E-Mail

DATE: October 25, 2006

TO: Firm Clients and Friends

FROM: Bergeson & Campbell, P.C.

RE: EPA Issues Revised Guidance on Pesticide Label Warranty Statements

On October 20, 2006, the U.S. Environmental Protection Agency's (EPA) Office of Pesticide Programs (OPP) issued revised guidance addressing the type of language it wants registrants to incorporate in the warranty and disclaimer statements that appear on the labeling for registered pesticides. A copy of the guidance document, which reviewers are instructed to consult when determining if a pesticide label is acceptable under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), is available at <http://www.epa.gov/pesticides/regulating/labels/warranty.pdf>.

This marks the first time since 1997 that EPA has revisited its pesticide label warranty guidance. The stated impetus for these revisions is OPP's concern that some warranty and disclaimer language found on existing labels is overbroad or potentially misleading to consumers in obscuring the full extent of the relief that may be available to them against a manufacturer under state law for injury or damage resulting from the use of a pesticide product. These concerns are a result of the Supreme Court's decision last year in *Bates v. Dow Agrosciences*, which considerably narrowed the scope of the common law or other state law claims preempted under FIFRA. The *Bates v. Dow* Court narrowly interpreted the preemptive effect of FIFRA on "labeling or packaging" claims by construing those terms to exclude claims based on defective design, defective manufacture, negligent testing, or breach of the express warranty that a manufacturer elects to provide. Subsequent lower court decisions have broadened the impact of *Bates v. Dow* even further.

EPA's active oversight of the warranty portions of pesticide labels, which predated *Bates v. Dow*, has stepped up even more assertively in its wake, reflecting OPP's concern that manufacturers now have a stronger incentive to limit their express warranty provisions as far as possible. According to EPA, it is authorized to undertake such oversight -- and to refuse to approve labeling that fails to meet the specifics of the OPP guidance -- because



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non-complying labels render a pesticide product “misbranded,” in violation of a core provision of FIFRA. The breadth of FIFRA’s “misbranding” provision lends some support to EPA’s position, although it does not answer the threshold question of whether EPA properly has involved itself in what are matters of commercial and consumer law.

EPA’s ability to withhold its approval of a given label or label amendment, however, makes issues of authority somewhat academic for manufacturers trying to bring a product to market by a date certain. The examples of both recommended language and unacceptable wording contained in the recently-issued guidance document are quite specific and allow for only limited flexibility on the part of individual reviewers. This raises the issue of whether the guidance document is in effect a rule dressed in “policy” clothing, which should have been subject to notice and an opportunity for public comment under the Administrative Procedure Act (APA) before it could be implemented -- not an unprecedented shortcoming. Whether, or when, this vulnerability might translate into a successful challenge to the warranty guidance is still in the realm of conjecture. As matters now stand, pesticide registrants should consult with counsel in preparing language that is sufficiently protective under commercial law principles while satisfying the revised guidance, as applied by OPP’s reviewers.

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We hope that this discussion is helpful. As always, please let us know if you have any questions.