prop•65
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Bates v. Dow: Are Pesticides Now Subject to Regulation under Prop. 65

By Fred Ufkes
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Bates had an inauspicious start. Originally, twenty West Texas peanut farmers filed a lawsuit claiming that Dow Agrosciences pesticide called "Strong- arm" damaged their crops.

Since its passage, Proposition 65 notices and placards have become ubiquitous with one exception: pesticides, fungicides and rodenticides. The Federal Insecticide, Fungicide and Rodenticide Act[1], (commonly referred to as "FIFRA"), has provided federal preemption on all warnings and other labeling instructions and information for many years. The chemical and pesticide industry has also used FIFRA preemption as a means to defeat claims for property damage and personal injury throughout the United States. The recent US Supreme Court decision in *Bates v. Dow Agrosciences*[2] limiting the preemptive effect of FIFRA on damage claims, raises questions regarding the scope of the preemption for other state actions, including Proposition 65.

FIFRA Background

FIFRA was originally enacted in 1947[3]. It was not until 1972, however, that FIFRA became a labeling, registration, and potentially preemptive law for state regulations. In that year, §136v became law. It provides:

> "A state may regulate the sale or use of any federally registered pesticide or devise in the State, but only if and to the extent that the regulation does not permit any sale or use prohibited by this sub-chapter.
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging *in addition to or different from* [emphasis added] those required under this sub-chapter."[4]

It was the addition of section 136v(b), providing that states may not impose regulations or requirements "in addition to or different from" those of the chapter, which provided the statutory basis for preemption.

Before *Bates*, in the 23 years since the enactment of section 136v(b), courts throughout the country struggled with the question of whether all state actions, including product liability cases involving crop damage or personal injury, were preempted. Most state and federal courts held that FIFRA preemption included any state law actions, including product liability claims, as those claims might have an effect upon the "labeling and packaging" that was "different from or in addition to" those approved by EPA. The California Supreme Court in *Etcheverry v. TRI-AG Service, Inc.*[5] determined that any claims for damages which were based on any purported failure to provide proper warnings or instructions for use, were barred by FIFRA preemption.

Bates v. Dow Agroscience

Bates had an inauspicious start. Originally, twenty West Texas peanut farmers filed a lawsuit claiming that Dow Agrosciences pesticide called "Strong-arm" damaged their crops. The District Court granted summary judgment, ruling that the plaintiffs' claims were preempted by the language of section 136v(b). The Fifth Circuit Court of Appeals affirmed. The Supreme Court accepted the case on writ of certiorari to resolve the question of the preemptive effect of section 136v(b). After reciting the facts of the case, and the history of the Act, the Court went through a detailed analysis of Congress' intent and specifically why the 1972 amendments might restrict or eliminate state law claims which had an effect upon a manufacturer's decision to include language "different from or in addition to"

The only logical interpretation of this holding of the Court is that once the label has passed muster with EPA and the product has been properly registered, no further additional warnings, instructions for use, or other labeling changes can be made.

that in federally mandated label and packaging. The Court noted:

> "The prohibitions in section 136v(b) apply only to 'requirements.' An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore 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."[6]

The Supreme Court then remanded the case back to the District Court for further proceedings. In its decision, however, the Court noted that the preemptive language of section 136v(b) was not nearly as broad as most courts had previously determined, and should be read more narrowly to be consistent with Congressional intent and the power of the states.

The Effect of *Bates* on Prop. 65 Enforcement

At first blush, it appears that *Bates* might allow enforcement of Proposition 65 in California against manufacturers, distributors, and applicators of products subject to FIFRA. However, a close reading of *Bates* provides no authority for that view, and, conversely, affirms that Congress meant what it said when it enacted section 136v(b). The Court adopted a test to determine whether FIFRA preemption applied calling it the "parallel requirements test." In that test, FIFRA preemption applies to any state law requirement, including statutes and regulations, which are not fully consistent with federal requirements.

> "In sum under our interpretation, section 136v(b) retains a narrow, but still important, role. In the main, it preempts competing state labeling standards—imagine fifty different labeling regimes prescribing the color, font size, and *wording of warnings*—that would create significant inefficiencies for manufacturers. The provision also preempts any statutory or common law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations. It does not, however, pre-empt any state rules that are fully consistent with federal requirements."[7]

The only logical interpretation of this holding of the Court is that once the label has passed muster with EPA and the product has been properly registered, no further additional warnings, instructions for use, or other labeling changes can be made. Any attempt by the state to do so would be preempted by FIFRA. Consequently, for those FIFRA regulated products which have already been properly registered, Proposition 65 enforcement against those labels and products would be inappropriate.

What is clear from the *Bates* decision is that the preemption of FIFRA exists, but common law claims for property damage and personal injury are now viable against the pesticide industry. Furthermore, it is clear that once the FIFRA regulated product has been registered, the state may impose no different labeling requirements other than those approved by the EPA.

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1 7 USC § 135 et seq.

2 *Bates v. Dow Agrosciences LLC* (2005) 544 U.S., 161 L. Ed. 2d 687, 125 S. Ct.

3 Ch. 125, 61 Stat. 163

4 7 U.S.C. § 136v(a), (b)

5 *Etcheverry*, (2000) 22 Cal.4th 316.

6 *Bates, supra*, 161 L. Ed. 2nd at 702-3.

7 Id. At 708.