Recent Developments regarding FIFRA Preemption of State Tort Claims

U.S. Amicus Brief to the Supreme Court

The United States recently filed an amicus brief with the Supreme Court in *Bates v. Dow Agrosciences LLC*, No. 03-388, urging the Court to deny a petition for certiorari seeking review of the Fifth Circuit's decision that FIFRA preempts farmers' state tort claims against herbicide manufacturers for crop damage. The United States filed this brief just one year after the filing of its amicus brief in *American Cyanamid Co. v. Geye*, No. 02-367, *cert denied*, 123 S.Ct. 2637 (2003), in which the United States announced that it had changed its position regarding FIFRA preemption. Prior to *Geye*, the United States had filed briefs as amicus curiae urging that FIFRA does not preempt state law actions seeking compensation for injuries from pesticide use, including claims arising from crop damage. In its briefs in *Geye* and in *Bates*, the United States has made clear its position that state law damages claims are preempted by applicable provisions of FIFRA "where the state-created legal duty on which the suit is predicated 'would impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].'" Brief for the United States as Amicus Curiae, *American Cyanamid Co. v. Geye*, No. 02-367 (filed May 2003), at 9 (*quoting* 7 U.S.C. § 136v(b)).

The *Bates* case began when Dow preemptively filed suit seeking a declaratory judgment against peanut farmers who were threatening to sue for damages caused by a Dow-manufactured herbicide, Strongarm. The district court granted Dow's motion for summary judgment, holding that FIFRA expressly preempted the farmers' state law claims. The Fifth Circuit affirmed the district court's decision on appeal.

Although FIFRA allows states to regulate the sale and use of federally registered pesticides, it does not allow states to impose labeling or packaging requirements that differ from federal requirements. *See* 7 U.S.C. § 136(v) ("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.") The farmers argued that claims based on product efficacy are not preempted because EPA decided not to regulate product labeling with respect to efficacy claims. The farmers relied on a recent Texas Supreme Court decision which reasoned that EPA regulations defined the scope of FIFRA preemption. *See American Cyanamid v. Geye*, 79 S.W.3d 21, 24 (Tex. 2002). The Fifth Circuit distinguished *Geye* and rejected the farmers' argument, finding that FIFRA's express preemption clause is self-executing and does not rely on EPA to impose labeling regulations concerning product effectiveness.

The farmers also argued that their state law claims were not sufficiently related to the content of the Strongarm label. To test this argument, the Fifth Circuit examined each of the farmers' claims to determine whether a judgment against Dow on any of the farmers' claims would induce Dow to alter its product label. The court determined that success on any of the farmers' claims (*e.g.*, breach of warranty, fraud, Texas Deceptive Trade Practices Act, defective design and negligence) would cause Dow to alter its product label and therefore the claims were preempted by FIFRA.

The United States argued in its amicus brief that the Eleventh Circuit decision in *Bates* and the Texas Supreme Court decision in *Geye* do not give rise to a conflict warranting the Supreme Court's review. The Texas Supreme Court has previously ruled, in the context of a personal injury suit, that FIFRA preempts all state tort suits against manufacturers which are based on claims relating to labeling. The *Geye* decision appears to carve out a limited exception to that rule for state law causes of action relating to product efficacy. The Texas Supreme Court is the only jurisdiction that has created such an exception.

Eleventh Circuit Decision

In *Oken v. Monsanto*, No. 02-15943 (11th Cir. June 4, 2004), the plaintiff claimed that he read the warning label on Dursban, applied the product to his lawn, and then suffered a reaction requiring hospitalization and treatment. Oken brought an action for monetary damages against the seller (Home Depot) and manufacturers (Monsanto and Dow) of Dursban, alleging that the manufacturers were negligent in their product design, manufacture, and labeling, and that the seller and manufacturers were strictly liability for dispensing an unreasonably dangerous product. The district court found that Oken's claims were controlled by *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (*Papas II*), in which the Eleventh Circuit held that "FIFRA expressly preempts state common law actions against manufacturers of EPA-registered pesticides to the extent that such actions are predicated on claims of inadequate labeling or packaging." *Papas II* at 520.

On appeal, the Eleventh Circuit determined that Oken's claims, like Papas's, were based at least in part on inadequate labeling. Oken argued that the Supreme Court's ruling in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (*Medtronic*) required the court to reevaluate its decision in *Papas II* and find that Oken's claims were not preempted by FIFRA. The court noted that it had already reaffirmed *Papas II* in light of *Medtronic* in its decision in *Lowe's Home Center v. Olin Corp.*, 313 F.3d 1307 (11th Cir. 2002) (*Lowe's*). Since an Eleventh Circuit panel is not free to reconsider an issue decided by a prior panel, the court determined that it was bound by its decisions in *Lowe's* and *Papas II*, and affirmed the district court's finding that Oken's state tort claims are preempted by FIFRA.