Warning to Trial Lawyers: Read the Law -- The *Federal* Law -- Before Proceeding

*By Douglas T. Nelson and Lawrence S. Ebner**

In the world of toxic tort suits, "failure to warn" can be a trial lawyer's fastest road to success. A plaintiff, with the aid of an attorney, files a state court suit alleging that use of some toxic chemical, let's say a pesticide, caused his chronic illness. The boilerplate complaint alleges that the pesticide's manufacturer is liable under state law because it failed to warn him about the risks of using the product. At trial, a well paid expert testifies that the warnings and precautions on the pesticide product's labeling were inadequate. The sympathetic jury, with the benefit of hindsight ("if only the plaintiff had been warned, he would not have used the product"), awards hundreds of thousands of dollars in compensatory and punitive damages.

There is plenty wrong with this picture, too much to discuss here. One *crucial* omission is the fact that the pesticide and its labeling, including the warnings that accompany the product, are extensively regulated by the United States Environmental Protection Agency ("EPA") pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), the federal pesticide statute. Originally enacted in 1947, Congress rewrote the act in 1972 to "transform FIFRA from a labeling law into a comprehensive regulatory statute."[1] The legislation was enacted for the "protection of man and the environment."[2] The revised statute "establishe[d] a coordinated Federal-State administrative system to carry out the new program."[3] Indeed, one of the statute's key features is the carefully balanced allocation of regulatory authority between the federal government and the states.

FIFRA requires all pesticide products to be granted a registration by EPA, and to be distributed with EPA-approved product labeling.[4] But there is no blanket "field preemption" of state regulatory authority over pesticides.[5] Instead, FIFRA "specifies several roles for state and local authorities,"[6] and expressly confirms that the states can further regulate the "sale or use" of pesticides.[7] This means, for example, that a state agency, pursuant to a state pesticide regulatory statute, can ban the sale or use of a FIFRA-registered pesticide. Under §136v(b) of FIFRA, however, *EPA alone* has the authority to regulate the content and format of each pesticide product's labeling, which must be nationally uniform and accompany the product at all times.[8]

Congress wanted a single federal regulatory agency, possessing the necessary scientific resources, expertise, and data, as well as the national perspective and experience, to determine what warnings, precautionary measures, and directions for use, should accompany each pesticide product's own, nationally uniform, federally approved labeling. Thus, FIFRA's legislative history indicates that "[i]n dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program [Congress] adopted language which is intended to *completely preempt* State authority in regard to labeling and packaging."[9] Section 136v(b), entitled "Uniformity," accomplishes this objective by mandating that a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]."[10] As the Supreme Court confirmed in *Wisconsin Public Intervenor v. Mortier*, although the states possess the residual authority to regulate pesticides, "labeling . . . fall[s] within an area that FIFRA's 'program' pre-empts."[11]

The FIFRA Preemption Defense Gains Widespread Judicial Approval

In 1984, the D.C. Circuit held in a now widely repudiated decision, *Ferebee v. Chevron Chemical Co.*, that despite the language of §136v(b), FIFRA does not expressly or impliedly preempt state law damages claims that attack the adequacy of the warnings on a pesticide's labeling.[12] Beginning in the early 1990s, however, federal and state courts around the nation began to recognize that allowing individual juries to second guess EPA by imposing state tort liability on pesticide manufacturers for inadequate labeling or failure to warn would interfere with Congress' goal of maintaining a system of nationally uniform product labeling regulated exclusively by EPA. For example, in a seminal FIFRA tort preemption case, *Papas v. Upjohn Co. ("Papas I")*, the Eleventh Circuit held that

> [a] jury determination that a label was inadequate would require that the manufacturer change the label or risk additional suits for damages. Such a change, if permitted by the EPA, would *destroy the uniformity that Congress and the EPA seeks to achieve in pesticide labeling* . . . This case-by-case, state-by-state outside pressure on the regulatory process would hinder the development of an orderly, systematic, and uniform nationwide labeling scheme.[13]

Similarly, in another early case, *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.* ("*Arkansas-Platte I*"), the Tenth Circuit held that "State court damage awards based on failure to warn . . . would hinder the accomplishment of the full purpose of §136v(b), which is to ensure uniform labeling standards."[14] Accordingly, these courts of appeals held that state law failure-to-warn claims are impliedly preempted by FIFRA because they conflict with the statute's goal of national labeling uniformity.

In June 1992, the Supreme Court held in *Cipollone*

v. Liggett Group, Inc., a landmark tort preemption case involving federal cigarette advertising and labeling legislation, that a federal statute which expressly preempts the states from imposing their own "requirement[s] . . . sweeps broadly and suggests no distinction between positive enactments and common law . . . '[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.' "[15] Shortly after deciding *Cipollone*, the Supreme Court vacated and remanded *Papas I* and *Arkansas-Platte I* to the courts of appeals for further consideration in light of *Cipollone*. On remand, both courts held that § 136v(b), which prohibits the states from imposing additional or different "requirements" for labeling, *expressly* preempts state tort claims for inadequate labeling or failure-to-warn.[16]

Since that time, all nine federal circuits that have considered the subject of FIFRA tort preemption in light of *Cipollone* have held that §136v(b) expressly preempts failure-to-warn and other claims which implicate the adequacy of EPA-approved product labeling.[17] This is because such claims have the unavoidable effect of imposing state law requirements for labeling which are "in addition to or different from" those imposed under FIFRA. The Eleventh Circuit in *Papas II* explained that "*Cipollone* convinces us that the term 'requirements' in section 136v(b) 'sweeps broadly and suggests no distinction between positive enactments and the common law.' . . . Common law damages awards are one form of state regulation and, as such, are 'requirements' within the meaning of section 136v[b]."[18] Or as the Ninth Circuit put it in *Taylor AG Indus. v. Pure-Gro*, "[l]ike the preemption provision of the 1969 Cigarette Act [in *Cipollone*], §136v(b) uses the broad term 'requirements' to preempt state actions for damages. . . . '[n]ot even the most dedicated hair-splitter could distinguish these statements.' "[19] Along the same lines, the Fifth Circuit held in *Andrus v. AgrEvo USA Co.*, that "the 'undeniable practical effect' of . . . recovering a large damage award on . . . claims that the manufacturer failed to meet state labeling requirements and failed to warn . . . of potential adverse effects would be the imposition of additional labeling standards not mandated by FIFRA."[20]

Numerous state appellate courts have reached the same conclusion, often affording deference to the unanimous, post-*Cipollone* view of the federal courts of appeals on this question of federal statutory interpretation. For example, in *Etcheverry v. Tri-Ag Service, Inc.*, the California Supreme Court explained that "[t]he federal court decisions holding that FIFRA preempts state law failure-to-warn claims are numerous, consistent, pragmatic and powerfully reasoned."[21] Consistent with the overwhelming body of case law on FIFRA preemption, the court held that "[w]hen a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA."[22]

Thus, for more than a decade, the FIFRA preemption defense, which is limited to claims which directly or indirectly challenge the adequacy of the warnings or other information on EPA-approved product labeling, has been successfully invoked by pesticide manufacturers and distributors in personal injury, environmental contamination, and crop damage suits.

The Trial Bar Persuades The Clinton EPA To Intervene

As the FIFRA tort preemption doctrine was adopted by more and more federal and state courts throughout the 1990s, trial lawyers started to realize that they would be deprived of the ability to pursue failure-to-warn claims against pesticide manufacturers. To try to pin liability for their clients' problems on pesticide manufacturers, trial lawyers, instead of directly or indirectly attacking the EPA-approved labeling or warnings accompanying a pesticide product, now would have to satisfy the burden of proving at trial that a pesticide product, approved for use both by EPA and state regulatory agencies, contained a design defect or manufacturing flaw.

In 1996, certain members of the trial bar, supported by anti-pesticide groups, prevailed upon EPA's Office of General Counsel to issue, through the Office of Pesticide Programs, a "guidance" document purporting to "correct a misunderstanding" on the part of several federal courts of appeals which had held that § 136v(b) of FIFRA preempts labeling-related agricultural crop damage claims.[23] CropLife America (formerly known as the American Crop Protection Association), the national trade group for agricultural pesticide manufacturers and distributors, objected to the propriety and content of the guidance document. In response to CropLife America, which has played a leading role in establishing and maintaining the FIFRA preemption defense, EPA's General Counsel disclaimed any intent to take a position on FIFRA preemption.

Two years later, however, with the nationwide body of FIFRA preemption cases continuing to expand, the EPA, supported by the trial bar and anti-pesticide groups, tried again to stem the judicial tide. More specifically, in *Etcheverry v. Tri-Ag Service*, a case before the supreme court of California, the nation's most important agricultural state, on the issue of whether FIFRA preempts failure-to-warn claims involving agricultural crop damage, the federal government filed an *amicus curiae* brief for the first time in any FIFRA tort preemption case. The brief was filed despite industry's efforts to persuade the government to stay out of private tort litigation, or at least recognize that FIFRA preemption of labeling-related claims is expressly mandated by § 136v(b) and consistent with EPA's statutory responsibility to maintain national labeling uniformity.

The position taken in the March 1999 *Etcheverry amicus* brief ignored the vast body of FIFRA preemption case law that had developed in light of *Cipollone.* Instead, attempting to resurrect *Ferebee*'s holding (without ever cit-

ing that case), the government's *amicus* brief argued that § 136v(b) is limited to positive enactments (such as state statutes and state agency regulations), and does not encompass tort claims at all. In support of this categorical anti-preemption position, the government's brief adopted many of the arguments that the trial bar and anti-pesticide groups had unsuccessfully advocated in other FIFRA preemption cases. The California Supreme Court, in a 5-2 decision, squarely rejected all of the government's anti-preemption arguments.[24] In so doing, the court noted that "[e]ven though the question presented in this case has been addressed by nine of the federal circuit courts of appeals, the United States failed to file amicus curiae briefs in any of the cases and permitted those courts to proceed upon a fundamental assumption that it now characterizes as mistaken."[25]

Following the severe lashing that its arguments received in *Etcheverry*, the federal government never again filed a brief advocating an anti-FIFRA tort preemption position. Nevertheless, this *Etcheverry amicus* brief has continued to be routinely submitted, quoted, and/or cited by trial lawyers as representing EPA's position on FIFRA preemption of state tort claims. Most courts have not been persuaded. For example, the plaintiffs in *Eyl v. Ciba-Geigy Corp.* asked the Nebraska Supreme Court "to adopt the position of the EPA that was set forth in an amicus brief filed in *Etcheverry*."[26] The Nebraska Supreme Court pointedly declined to do so:

> [W]e give no deference to the EPA's position in the amicus brief filed in *Etcheverry*. The *Etcheverry* brief was written for that specific case. The EPA did not file an amicus brief with this court in this case. Nor have we found – outside of *Etcheverry* – a similar brief filed by the EPA in any of the numerous other cases which have discussed FIFRA preemption. In addition, the record is silent whether the view expressed in the *Etcheverry* brief was an EPA official policy statement for all cases and if the EPA still adheres to that view. Further, we note that in *Etcheverry,* the California Supreme Court did not adopt the EPA's arguments.[27]

As a result of developments during the Supreme Court's 2002 term, the *Etcheverry amicus* brief is now indisputably a dead letter, and cannot ethically be cited by trial attorneys or anti-pesticide groups as representing the government's position.

The Bush Administration's Position

The U.S. Supreme Court has repeatedly denied review of cases involving FIFRA tort preemption. Most recently, on June 27, 2003, the Court denied the April 2003 certiorari petition filed in *Eyl v. Ciba-Geigy Corp.* by Public Citizen Litigation Group (a petition which relied upon the *Etcheverry amicus* as supposedly representing the government's position).[28] On the same day, the Court also denied the *certiorari* petition that was filed in September 2002 by the pesticide manufacturer defendant in *American Cyanamid Co. v. Geye.*[29] In *Geye* the Texas Supreme Court held in a result-driven opinion (contrary to the holdings of the Fifth Circuit, California Supreme Court, and numerous other courts), that labeling-related claims involving crop damage are excluded from FIFRA preemption.

Significantly, in November 2002, two months after the *Geye certiorari* petition was filed, the Supreme Court, for the first time in any FIFRA tort preemption case, invited the Solicitor General to submit a brief expressing the views of the United States. The Court's invitation (in reality, an order to file an *amicus* brief), afforded the government a clear opportunity to reconsider the *Etcheverry amicus* brief.

Industry attorneys, including from CropLife America and the Chamber of Commerce of the United States, met with the Solicitor General's office, and with attorneys from EPA and other interested federal agencies, to explain why as a matter of both legal analysis and public policy, the reasons for FIFRA preemption of failure-to-warn and other labeling-related damages claims are compelling. (One author of this article represented American Cyanamid, the petitioner in *Geye*, and the other author is the General Counsel of CropLife America, which filed an *amicus* brief in support of the petitioner.)

The Solicitor General's May 2003 *amicus* brief to the Supreme Court unequivocally declared that the categorical position against FIFRA preemption that had been advocated in the *Etcheverry amicus* brief to the California Supreme Court is "incorrect" and "no longer represents the view of the United States"[30] The Solicitor General's *Geye amicus* further explains:

> The United States has *reexamined* the position that it urged in *Etcheverry* in light of the ruling by the California Supreme Court in that case, as well as the subsequent rulings of other courts, and it has concluded that its position in *Etcheverry* that FIFRA categorically does not preempt common law tort suits or other damages actions is *incorrect*. In the United States' view, just as Section 136v(b) applies to requirements imposed in a law enacted by a state legislature or a regulation promulgated by a state agency, *it applies to requirements imposed in the form of a duty or standard of care in a tort action*. . . The United States . . . submits that the legal standard applied in a state-law damages action may "impose" a "requirement[]" for labeling or packaging within the meaning of 7 U.S. C. 136v(b).[31]

The foregoing position of the United States on FIFRA tort preemption, presented to the U.S. Supreme Court in the *Geye amicus* brief, is consistent with *Cipollone* and other Supreme Court tort preemption jurisprudence, as well as with the nearly unanimous views of the hundreds of fed-

eral and state trial and appellate courts that have considered the subject. This Administration's carefully considered reexamination of FIFRA tort preemption remedies the prior Administration's politicization of that subject.[32]

Conclusion

The Supremacy Clause,[33] which is the constitutional basis for federal preemption of state law, is one of the principal constitutional underpinnings of our federalism. Respect for states' rights does not require, and the Supremacy Clause does not allow, state law tort claims which, as in the case of pesticide-related failure-to-warn claims, conflict with federal law. Congress determined that to promote safe and effective use of pesticides, nationally uniform product labeling is necessary and desirable, and that only the federal EPA should have the authority to regulate it. This intent is clearly expressed in § 136v(b) of FIFRA. The courts, and now the Executive Branch, have recognized that state tort claims for failure-to-warn and inadequate labeling are encompassed by the broad, plain language of that preemption provision.

* Douglas T. Nelson is Senior Vice President and General Counsel of CropLife America, a trade association of the developers, manufacturers, formulators and distributors of plant science solutions for agriculture and pest management in the United States. CropLife America (predecessor names, National Agricultural Chemicals Association (1933-1995) and American Crop Protection Association (1995-2000)) has played a leading role in establishing and maintaining the FIFRA tort preemption doctrine, including by filing *amicus* briefs in numerous federal and state appellate cases on that subject.

Lawrence S. Ebner is leader of the Appellate Group at McKenna Long & Aldridge LLP in Washington, D.C. He has advocated the FIFRA preemption defense on behalf of individual pesticide manufacturers and CropLife America in appeals before the U.S. Supreme Court, federal courts of appeals, and state appellate courts. These include the *Geye*, *Etcheverry*, *Taylor*, *Arkansas-Platte*, and *Papas* cases discussed in this article.

Footnotes

[1] *Ruckelshaus v. Monsanto Co*, 467 U.S. 986, 991 (1984) (citing H.R. Rep. No. 92-511, at 1 (1971)).
[2] S. Rep. No. 92-838, pt. II, at 1 (1972).
[3] S. Rep. No. 92-511, at 1 (1971).
[4] 7 U.S.C. §§ 136a(a), 136a(c)(5).
[5] *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 612 (1991) (holding that FIFRA does not preempt local governments from adopting ordinances that restrict pesticide use).
[6] *Id.* at 601.
[7] 7 U.S.C. § 136v(a).
[8] 7 U.S.C. § 136v(b).
[9] H.R. Rep. No. 92-511, at 16 (1971) (emphasis added); *see id.* at 1-2 ("State authority to change Federal labeling and packaging is completely preempted . . . .").
[10] 7 U.S.C. § 136v(b).
[11] *Mortier*, 501 U.S. at 615.
[12] *Ferebee v. Chevron Chemical Co.,* 736 F.2d 1529 (D.C. Cir. 1984)
[13] *Papas v. Upjohn Co.*, 926 F.2d 1019, 1025-26 (11th Cir. 1991) (emphasis added).
[14] 959 F.2d 158, 162 (10th Cir. 1992).
[15] 505 U.S. 504, 521 (1992) (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *see also CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Cipollone*, 505 U.S. at 522) (noting *Cipollone* held that a "federal statute barring additional 'requirement[s] . . . "imposed under state law" ' pre-empts common-law claims").
[16] *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.* ("*Arkansas-Platte II*"), 981 F.2d 1177 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993); *Papas v. Upjohn Co.* ("*Papas II*"), 985 F.2d 516 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993).
[17] *See, e.g., Dow AgroSciences v. Bates,* 332 F.3d 323 (5th Cir. 2003); *Netland v. Hess & Clark Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied* 123 S.Ct. 415 (2002); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Papas v. Upjohn Co. ("Papas II")*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc. ("Arkansas-Platte II")*, 981 F.2d 1177 (10th Cir. 1993).
[18] 985 F.2d at 518 (quoting *Cipollone*, 505 U.S. at 521).
[19] 54 F.3d 555, 559-60 (9th Cir. 1995) (quoting *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993)).
[20] 178 F.3d 395, 398-99 (5th Cir. 1999) (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994)).
[21] 993 P.2d 366, 368 (Cal. 2000).
[22] *Id.* at 377.
[23] Pesticide Regulation ("PR") Notice 96-4.
[24] *See* 993 P.2d at 371-74; *see also* Lawrence S. Ebner, *The California Supreme Court Weighs In On FIFRA Preemption*, 15 BNA Toxics Law Reporter 627 (June 22, 2000); Lawrence S. Ebner, *California Supreme Court Repudiates Federal Government Position on FIFRA Tort Preemption*, Product Liability Law & Strategy (April 2000).
[25] *Id.* at 374 .
[26] 650 N.W.2d 744, 753 (Neb. 2002), *cert. denied* 71 U.S.L.W. 3799 (June 27, 2003) (No. 02-1500).
[27] *Id. at* 753-754.
[28] *See* n.26.
[29] 79 S.W.3d 21 (Tex. 2002), *cert. denied* 71 U.S.L.W. 3799 (June 27, 2003) (No. 02-367).
[30] Brief for the United States As Amicus Curiae, *American Cyanamid Co. v. Geye* (No. 02-367), *available at http://www.justice.gov/osg/briefs/2002/2pet/6invit/2002-0367.pet.ami.inv.html*
[31] *Id.* at 17, 18-19 (emphasis added).
[32] The government's brief opposed certiorari in *Geye* on the ground that because the Texas Supreme Court's order was interlocutory (it affirmed the state court of appeals' reversal of the state trial court's grant of summary judgment in favor of the manufacturer), the U.S. Supreme Court lacked jurisdiction under 28 U.S.C. § 1257. For this reason, the government's brief took no position on the merits of whether the *Geye* plaintiffs' particular claims are labeling-related, and thus, preempted. *See* U.S. Br. at 19.
[33] U.S. Const., Art. VI, cl. 2.