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## Case Analysis: Bates v. Dow AgroSciences LLC

Are pesticide makers liable for failure to provide warnings adequate to make the product reasonably safe?

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*Abstract: In 1995, the Washington Supreme Court held that failure-to-warn claims brought against the makers of federally-registered pesticides are preempted by federal law. In 2005, the U.S. Supreme Court announced that such claims are preempted only if they impose duties on pesticide makers that are in addition to or different from the duties imposed under federal law. This Case Analysis argues that the latter decision should lead to a reevaluation of the state supreme court's position that failure-to-warn claims are preempted. Such reevaluation should lead to the conclusion that some failure-to-warn claims are allowed, depending on the factual bases for the claims.*

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In three cases decided together in 1995, the Washington Supreme Court unanimously struck down failure-to-warn damage claims brought against manufacturers of federally-registered pesticides. The state supreme court held that such claims are preempted<sup>1</sup> by the Federal Insecticide, Fungicide, and Rodenticide Act<sup>2</sup> (FIFRA), a federal law that regulates the use and labeling of pesticides, herbicides and other similar chemicals used to control or eradicate unwanted target organisms. Although FIFRA allows individual states to regulate the sale or use of a federally-registered pesticide,<sup>3</sup> it bars “any requirements for labeling or packaging in addition to or different from those required under this subchapter.”<sup>4</sup> These decisions were consistent with the overwhelming majority of state and federal court decisions addressing the question in the 1990s.

Ten years later, in *Bates v. Dow AgroSciences LLC*,<sup>5</sup> the United States Supreme Court examined FIFRA's preemption clause. The decision rejected much of the analytical underpinnings of the preemption caselaw in Washington State and elsewhere. As a result, failure-to-warn claims against pesticide manufacturers may have renewed vitality under Washington law.

### **1995: Washington Supreme Court Closes the Door on Failure-to-Warn Claims**

*All-Pure Chemical Co. v. White*<sup>6</sup> The first case in the Washington Supreme Court's 1995 trilogy arose from injuries sustained by a swimming pool owner when she

incorrectly mixed pool cleaning chemicals and an explosion resulted. The pool owner brought a lawsuit against the chemicals' distributor, alleging that the warnings and instructions were inadequate to make the product reasonably safe for its intended use. The jury found the distributor to be liable. The distributor paid a judgment of \$43,438.01, and then brought a contribution action against the owner of the pool supply store which had sold the chemicals to the pool owner. In the contribution action, the trial court granted summary judgment dismissing the distributor's claim. The court of appeals affirmed, holding that FIFRA preempted the pool owner's underlying failure-to-warn claim against the distributor.<sup>7</sup> The distributor appealed to the Washington Supreme Court.

The state supreme court affirmed the court of appeals, holding that FIFRA preempted the failure-to-warn claim.<sup>8</sup> The court begins its preemption analysis with the comment that FIFRA's preemption clause is "designed to ensure uniformity of labeling[.]"<sup>9</sup> Whether the duty imposed under state law arises from a statutory enactment or common law makes no difference. "[A]ny state tort claim that requires a showing that a party should have included additional or different labeling or packaging than is required by FIFRA is preempted by the Act's express preemption clause."<sup>10</sup> The court characterizes the pool owner's failure-to-warn claim as requiring additional warnings, which, as a practical matter, the distributor could provide only by adding to the label.<sup>11</sup> Even if off-label warnings were feasible, the court concludes that such warnings would necessarily be premised upon a determination that the label was inadequate and required supplementation.<sup>12</sup>

*Goodwin v. Bacon*<sup>13</sup> Next, the court took up the case of a Grant County potato farmer whose crops were damaged by an herbicide inadvertently applied to his land. In order to control a dust problem, the farmer spread manure and grass clippings on his crop land. Unbeknownst to him, the manure and grass clippings contained residues of an herbicide used to control broadleaf weeds in grasslands and other non-crop areas. A month or so later, the farmer planted his potato crop. The crop showed defects that are consistent with damages caused by the herbicide. The farmer brought a lawsuit against the manufacturer, alleging that the manufacturer negligently failed to adequately label the herbicide and negligently failed to warn of the effects of the herbicide on food crops such as potatoes. At trial, the jury found for the farmer, awarding him \$200,000 (later reduced to \$120,457.52). The manufacturer appealed the trial verdict, and the Washington Supreme Court accepted direct review.

The state supreme court reversed the jury's award of damages. The court states: "Unquestionably, FIFRA section 136v(b) expressly preempts state labeling requirements."<sup>14</sup> The preemptive effect of FIFRA extends both to positive enactments of state law as well as common law requirements.<sup>15</sup> Having said this, however, the court observes that "a determination that Congress did not intend to limit the scope of a preemption clause to positive law does not mandate preclusion of all common law claims. The Court must consider each specific claim to determine whether the predicate legal duty constitutes, in this case, a requirement in addition to or different from that imposed by FIFRA or the EPA."<sup>16</sup> "Thus," states the court, "we examine each of Plaintiff's claims and ask: does the underlying duty rely on a showing of inadequate labeling?"<sup>17</sup> On this basis, the court held that a claim for inadequate labeling is preempted.<sup>18</sup>

Moreover, it ruled that a non-label failure-to-warn claim ultimately relies on a showing that the label is inadequate; therefore, it refused to distinguish such a claim from an inadequate labeling claim.<sup>19</sup>

*Hue v. Farmboy Spray Co.*<sup>20</sup> The third and final case in which the Washington Supreme Court addressed FIFRA preemption dealt with a claim of damages from the aerial drift of herbicides. Dryland wheat farmers in the Horse Heaven Hills arranged for the aerial application of herbicides on their wheat farms. Downwind farmers and homeowners in Benton County claimed that the herbicides drifted onto their properties, damaging crops and gardens. They brought suit against the manufacturer of the herbicides, alleging that the manufacturer failed to provide adequate warnings or instructions on the label. The trial court dismissed this claim as preempted by FIFRA. The downwind farmers and homeowners appealed, and the Washington Supreme Court accepted direct review.

The supreme court affirmed the trial court decision. Reflecting its comment in *All-Pure*, the court states: “In the federal labeling law involved here, ... Congress has decided that the federal government will determine the appropriate warnings for a product, and that the warnings shall be uniform for the whole nation.”<sup>21</sup> Again, the court holds that FIFRA’s preemptive scope includes both “positive enactments of state law-making bodies and common law duties enforced in actions for damages.”<sup>22</sup> With this backdrop, the court turns to the question of whether FIFRA preempts the specific claims before it: “[T]he central inquiry in each case is whether the legal duty that is the predicate of the common law damages action constitutes a State ‘requirement[ ] for labeling or packaging in addition to or different from’ the FIFRA requirements, giving that clause a fair but narrow reading.”<sup>23</sup> The court concludes that:

Plaintiffs’ claim based on inadequate warnings or instructions is predicated upon a state duty to provide warnings and instructions that are necessary to make a product reasonably safe. RCW 7.72.030(1). Clearly, this duty constitutes a requirement for labeling or packaging in addition to or different from the information required under FIFRA. The gist of plaintiffs’ case is that pesticides like those at issue here should not be used in an area like the Horse Heaven Hills/Badger Canyon ecosystem, where there is a risk of long distance drift or mass air contamination. Clearly, this sort of caution should go on the label.<sup>24</sup>

### **2005: U.S. Supreme Court Clears the Way for New Look at Failure-to-Warn Claims**

In *Bates v. Dow AgroSciences LLC*, the United States Supreme Court, for the first time, addressed FIFRA’s preemptive effect on tort and other common law claims arising under state law.<sup>25</sup> It confirmed the majority view – and that of the Washington Supreme Court – that such tort and state-law claims are subject to FIFRA preemption to the same extent as positive enactments of state law.<sup>26</sup> However, it takes a new approach to the determination of which common law claims are preempted. The Court’s analysis should lead to a reconsideration of whether failure-to-warn claims under Washington law are indeed preempted.

The events leading up to the *Bates* decision involve Texas peanut farmers whose crops were damaged by an herbicide allegedly used in accordance with the directions for use found on the label. In federal district court, the farmers asserted a claim against the manufacturer for negligent failure to warn. The district court granted the manufacturer's motion for summary judgment dismissing this claim as preempted by FIFRA. The court of appeals affirmed, and the U.S. Supreme Court granted certiorari.

The Supreme Court held that two conditions must be met before FIFRA will preempt a state law imposing liability on a pesticide manufacturer: "First, it must be a requirement '*for labeling or packaging*' .... Second, it must impose a labeling or packaging requirement that is '*in addition to or different from*' those required under this subchapter."<sup>27</sup> As for the first condition, the Court held that a failure-to-warn claim is "premised on common-law rules that qualify as '*requirements for labeling or packaging.*' These rules set a standard for a product's labeling that the [pesticide] label is alleged to have violated by containing ... inadequate warnings."<sup>28</sup>

However, the Court cautions against a hasty conclusion that this means FIFRA preempts such claims. Turning to the second condition of its preemption test, the Court says: "§ 136v(b) prohibits only state-law labeling and packaging requirements that are '*in addition to or different from*' the labeling and packaging requirements under FIFRA. Thus, a state-law labeling requirement is not pre-empted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions."<sup>29</sup> Relevant to a failure-to-warn claim is FIFRA's misbranding requirement "that a pesticide label not contain ... inadequate instructions or warnings."<sup>30</sup> According to the Court, this is the only plausible reading of FIFRA that would not render meaningless the words "in addition to or different from."<sup>31</sup>

The Court describes its approach as "the '*parallel requirements*' reading of § 136v(b) ...."<sup>32</sup> A state has "the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements."<sup>33</sup> In fact, the Court opined that "[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA."<sup>34</sup> To survive preemption, "state law need not explicitly incorporate FIFRA's standards as an element of a cause of action ...."<sup>35</sup> Moreover, it "need not be phrased in the *identical* language as its corresponding FIFRA requirement ...."<sup>36</sup> What is required is that the state rules be "fully consistent with federal requirements."<sup>37</sup> "We emphasize that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption."<sup>38</sup> This includes equivalency with relevant EPA regulations.<sup>39</sup>

### **Failure-to-Warn Revisited**

The Washington Supreme Court's 1995 decisions striking down failure-to-warn claims against manufacturers of federally-registered pesticides should be reevaluated in light of *Bates*. A failure-to-warn claim clearly meets *Bates*' first condition for FIFRA preemption: it sets a standard for the product's labeling that may be violated by inadequate warnings; thus, it is a requirement for labeling or packaging. But is the duty imposed by a failure-to-warn claim under Washington law in addition to or different from FIFRA's requirement that a pesticide label not contain inadequate instructions or

warnings? Or, does it merely parallel these requirements and provide a private remedy for their enforcement?

In 1995, the state supreme court did not really get into the second preemption condition in the way contemplated by the *Bates* decision. The state court identified the central inquiry as “whether the legal duty that is the predicate of the common law damages action constitutes a State ‘requirement[ ] for labeling or packaging in addition to or different from’ the FIFRA requirements ....”<sup>40</sup> Although this formulation recites the phrase “in addition to or different from,” the 1995 decisions do not give that phrase the primacy that it has in *Bates*’ second condition.<sup>41</sup> Indeed, the state court appears to have read “uniformity” into the labeling requirement,<sup>42</sup> whereas the U.S. Supreme Court now clarifies that what is required is not that the label requirements be uniform, but that any state requirements parallel (i.e., be fully consistent with and equivalent to) FIFRA requirements.

Among those FIFRA requirements is that pesticides may not be misbranded.<sup>43</sup> Misbranding includes providing a label that “does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with ... are adequate to protect health and the environment ....”<sup>44</sup> Misbranding also includes providing a label that “does not contain a warning or caution statement which may be necessary and if complied with ... is adequate to protect health and the environment ....”<sup>45</sup> A failure-to-warn claim will survive preemption if the duty it imposes goes no further than these misbranding requirements.

In Washington, failure-to-warn claims are governed by the Washington Product Liability Act<sup>46</sup> (WPLA). “A product manufacturer is subject to liability to a claimant if the claimant’s harm was proximately caused by the negligence of the manufacturer in that the product was ... not reasonably safe because adequate warnings or instructions were not provided.”<sup>47</sup> Under Washington law, there are two ways to establish inadequate warnings. First, applying a “risk-utility” balancing test, the warnings are inadequate –

– if, at the time of manufacture, the likelihood that the product would cause the claimant’s harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.<sup>48</sup>

This subsection requires a balancing of, on one side, “the likelihood that the product would cause the claimant’s harm or similar harms and the seriousness of those harms” against, on the other side, “the adequacy of the warnings that were provided and the ability of the manufacturer to have provided an alternative warning that would have prevented the injury.”<sup>49</sup> This is a strict liability standard, so that “once the balancing test of subsection (b) has been applied and the product is found to be not reasonably safe because adequate warnings were not provided, the manufacturer is liable for harm proximately caused by the inadequate warnings.”<sup>50</sup>

Alternatively, under the consumer-expectations test, the question is “whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.”<sup>51</sup>

Similar to the risk-utility test, the consumer expectation test is a balancing test, but its focus is on whether an ordinary consumer would be aware of the dangers of the product, not on the product itself. Factors to be considered in determining an ordinary consumer's reasonable expectations include the relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk, as well as the nature of the product or the nature of the claimed defect.<sup>52</sup>

In determining whether FIFRA preempts such claims brought against the manufacturer of a federally-registered pesticide, the issue may be framed in the context of the misbranding requirements as follows: Under Washington law, could a manufacturer of a pesticide product be liable for failure to warn if the pesticide label contains warnings and directions for use that, if followed, are adequate to protect health and the environment? If not, then the duty imposed under state law is fully consistent with and equivalent to the FIFRA misbranding requirements, and there is no preemption.

Looking first at the balancing test, the duty imposed on the manufacturer is to warn users of potential harm, and to provide instructions to protect against that harm, if the likelihood that the product would cause such harm and the seriousness of the harm outweighs the burden on the manufacturer of providing an adequate warning.<sup>53</sup> This duty is no broader than the duty that FIFRA imposes on the manufacturer. For example, FIFRA regulations provide that “[w]hen data or other information show that an acute hazard may exist to humans or domestic animals, the label *must* bear precautionary statements describing the particular hazard, the route(s) of exposure and the precautions to be taken to avoid accident, injury or toxic effect or to mitigate the effect.”<sup>54</sup> Similar labeling requirements apply to physical or chemical hazards posed by pesticides,<sup>55</sup> as well as hazards to the environment.<sup>56</sup> The registration and labeling requirements under FIFRA involve a balancing of risk and utility, just as occurs under a failure-to-warn claim. “FIFRA registration is a cost-benefit analysis that no unreasonable risk exists to man or the environment taking into account the economic, social and environmental costs and benefits of the use of any pesticide.”<sup>57</sup>

On the other hand, a failure-to-warn claim based on the consumer-expectations test arguably imposes a duty on the manufacturer that is broader than its duties under FIFRA. Under the consumer-expectation test, the duty imposed on the manufacturer is to provide warnings and instructions sufficient to satisfy the expectations of the ordinary consumer of the product. Unlike the risk-utility test, which merely provides a remedy to someone who is injured as a result of label misbranding, the consumer-expectations test appears to add a new requirement: namely, that the adequacy of the label be judged from the perspective of the product's ordinary consumer. To the extent that ordinary consumers would expect warnings or instructions that add to or differ from FIFRA's requirements, a claim based on the consumer-expectation test is preempted.

The risk-utility test and the consumer-expectations test are independent bases for establishing liability for failure-to-warn.<sup>58</sup> FIFRA should not be read to preempt a failure-to-warn claim that is based on the risk-utility test. That test imposes no duty on the manufacturer that the manufacturer is not already subject to under FIFRA's

misbranding requirements; it merely provides a private remedy for a misbranding violation. On the other hand, a failure-to-warn claim based on the consumer-expectations test is problematic. FIFRA does not include a requirement that the ordinary consumer be satisfied with the adequacy of the label's warnings and instructions. Therefore, a cause of action for failure to warn that is premised on the consumer-expectations test likely is preempted by FIFRA.

This is no slam dunk. Across the country, pesticide makers argue that failure-to-warn claims are preempted because they do not meet *Bates*' requirement that state-law claims be fully consistent with and equivalent to FIFRA requirements.<sup>59</sup> What can be said is that *Bates* changes the analysis, and requires courts to more rigorously examine the duties that would be imposed by the state-law claim. When presented with the opportunity to revisit its 1995 decisions in light of *Bates*, the Washington Supreme Court should open the courthouse doors to those claimants who have failure-to-warn claims based on genuine violations of FIFRA's misbranding requirements.

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<sup>1</sup> Preemption refers to the doctrine that a "state law that conflicts with federal law is without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (internal quotation marks omitted).

<sup>2</sup> 7 U.S.C. § 136 et seq.

<sup>3</sup> 7 U.S.C. § 136v(a).

<sup>4</sup> 7 U.S.C. § 136v(b).

<sup>5</sup> 544 U.S. \_\_\_\_\_, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005).

<sup>6</sup> 127 Wn.2d 1, 896 P.2d 697 (1995).

<sup>7</sup> A contribution action requires that the plaintiff and defendant be jointly and severally liable. In the underlying case, the manufacturer failed to raise the preemption defense – which, had it been raised, apparently would have defeated the pool owner's claim. Therefore, the manufacturer was not liable, and no joint and several liability applies. *Id.* at 4-5.

<sup>8</sup> *Id.* at 12.

<sup>9</sup> *Id.* at 9.

<sup>10</sup> *Id.* at 10.

<sup>11</sup> *Id.* at 11-12.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> 127 Wn.2d 50, 896 P.2d 673 (1995).

<sup>14</sup> *Id.* at 58.

<sup>15</sup> *Id.* at 64.

<sup>16</sup> *Id.* (citations omitted).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 64-65.

<sup>19</sup> *Id.* at 65.

<sup>20</sup> 127 Wn.2d 67, 896 P.2d 682 (1995).

<sup>21</sup> *Id.* at 85.

<sup>22</sup> *Id.* at 83.

<sup>23</sup> *Id.* at 85-86.

<sup>24</sup> *Id.* at 86.

<sup>25</sup> *Bates v. Dow AgroSciences LLC*, 125 S.Ct. at 1796.

<sup>26</sup> *Id.* at 1798.

<sup>27</sup> *Id.* (emphasis by the Court).

<sup>28</sup> *Id.* at 1799-1800.

<sup>29</sup> *Id.* at 1800 (emphasis by the Court).

<sup>30</sup> *Id.* (citing 7 U.S.C. § 136(q)(1) (F) and (G)).

<sup>31</sup> *Id.* at 1801.

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<sup>32</sup> *Id.* at 1800.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1802.

<sup>35</sup> *Id.* at 1800.

<sup>36</sup> *Id.* at 1804 (emphasis by the Court).

<sup>37</sup> *Id.* at 1803.

<sup>38</sup> *Id.* at 1803. At least to the extent that the state-law claim requires proof of a violation of FIFRA, even the dissenting justices agree that FIFRA does not preempt the claim merely because it provides a private damages remedy. *Id.* at 1805 (Thomas, J., dissenting). Therefore, on this point, the members of the Court were in full agreement with one another.

<sup>39</sup> *Id.* at 1803-04 (“For example, a failure-to-warn claim alleging that a given pesticide’s label should have stated “DANGER” instead of the more subdued “CAUTION” would be pre-empted because it is inconsistent with [an EPA regulation] which specifically assigns these warnings to particular classes of pesticides based on their toxicity.”).

<sup>40</sup> *Hue v. Farmboy Spray Co.*, 127 Wn.2d at 85-86.

<sup>41</sup> Division 3 of the Washington Court of Appeals characterized a failure-to-warn claim concerning pesticides as follows: “Their claim is necessarily predicated upon a state duty to provide warnings and instructions that are necessary to make a product reasonably safe. Such a duty constitutes a requirement for labeling or packaging in addition to or different from the information required under FIFRA. It is therefore preempted.” *Didier v. Drexel Chemical Co.*, 86 Wn.App. 795, 801, 938 P.2d 364 (1997) (citations and internal quotation marks omitted) (citing *Hue v. Farmboy Spray Co.*, 127 Wn.2d at 86).

<sup>42</sup> *Hue v. Farmboy Spray Co.*, 127 Wn.2d at 85; *see also*, *All-Pure Chemical Co. v. White*, 127 Wn.2d at 9.

<sup>43</sup> 7 U.S.C. § 136j(1)(e).

<sup>44</sup> 7 U.S.C. § 136(q)(1)(F).

<sup>45</sup> 7 U.S.C. § 136(q)(1)(G).

<sup>46</sup> RCW 7.72.010 et seq.

<sup>47</sup> RCW 7.72.030(1).

<sup>48</sup> RCW 7.72.030(1)(b).

<sup>49</sup> *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 763, 818 P.2d 1337 (1992).

<sup>50</sup> *Id.* In the context of a design-defect case, the state supreme court has said that in some cases pesticides may be an unavoidably unsafe product to which a negligence standard applies rather than strict liability, but this must be determined on a product-by-product basis. “[T]he defendant manufacturer of a challenged product would have to demonstrate that an inherently dangerous product is also necessary regardless of the risks involved to the user. This would involve ... focusing on the product and its *relative value to society*. Thus, despite the fact that its product cannot be made safer for its intended use, a pesticide manufacturer could demonstrate the product serves an important enough function (e.g., in the realm of food production) so as to justify its unavoidable risks.” *Ruiz-Guzman v. Amvac Chemical Corp.*, 141 Wn.2d 493, 510, 7 P.3d 795 (2000) (emphasis by the court) (citations and internal quotation marks omitted).

<sup>51</sup> RCW 7.72.030(3).

<sup>52</sup> *Neher v. II Morrow Inc.*, No. 97-35068, 1998 WL 340087, at \*2 (9th Cir. June 11, 1998) (citations and internal quotation marks omitted) (applying Washington law and quoting *Seattle First Nat'l Bank v. Tabert*, 86 Wn.2d 145, 154, 542 P.2d 774 (1975) (en banc)).

<sup>53</sup> *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d at 765.

<sup>54</sup> 40 CFR § 156.70(b) (emphasis added).

<sup>55</sup> 40 CFR § 156.78.

<sup>56</sup> 40 CFR § 156.80.

<sup>57</sup> *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9<sup>th</sup> Cir. 1984) (internal quotation marks omitted).

<sup>58</sup> *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d at 765.

<sup>59</sup> *See, e.g., Fox v. Cheminova, Inc.*, 387 F.Supp.2d 160 (E.D.N.Y. 2005) (denying summary judgment dismissal of failure-to-warn claim because there was a factual question as to whether the state-law claims are genuinely equivalent to FIFRA requirements).