

## **Article on Herbicides and FIFRA Pre-emption; 98281-06**

### **History**

Congress has delegated powers to the Environmental Protection Agency (EPA) to regulate the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §136 et seq. The Act is a federal regulatory program whose purpose is to assess the risks of pesticides and to control their usage so that any exposure that may result poses an acceptable level of risk. Before any pesticide can be distributed or sold in the U.S., it must be registered with the EPA. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476 (1991).

Federal Insecticide and Fungicide Act used to be mainly a pesticide licensing and labeling law, until 1972, when it was transformed by Congress into a comprehensive regulatory statute. *Id.* The 1972 amendments have also significantly strengthened the pre-existing registration and labeling standards, specified that FIFRA regulates pesticide use as well as sales and labeling, and granted increased enforcement authority to the Environmental Protection Agency (EPA). *Id.* at 597.

The pesticide regulations apply to those individuals involved in the production, formulation, and distribution of pesticides. The rules also apply to those individuals using pesticides such as: commercial applicators, individual farms and farmworkers, households, and individuals involved in food supply. *Louisiana Department of Environmental Quality*, <http://www.deq.state.la.us/index.htm>. The regulations, administered by the Environmental Protection Agency and the States, include registering pesticides, setting tolerances for pesticide residue on food, setting standards to protect workers who are exposed to pesticides, certifying and training pesticide applicators and

educating consumers about pesticides. The rule prohibits any person in any state from distributing or selling any pesticide that is not registered or whose registration has been canceled or suspended. *Louisiana Department of Environmental Quality*, <http://www.deq.state.la.us/index.htm>.

### **FIFRA's Pre-emption**

The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. The preemption doctrine is grounded upon the Supremacy Clause of Article Six of the United States Constitution, which invalidates those state laws that interfere with, or are contrary to federal law. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712, 105 S.Ct. 2371, 2374, 85 L.Ed.2d 714 (1985) (*citing* U.S. Const. Art. VI, Cl.2.)

There are several forms in which pre-emption may occur: Congress may, in enacting a federal statute, express a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Louisiana Public Service Commission v. Federal Comm. Commission*, 476 U.S. 355, 368-69, 106 (S.Ct. 1890.)

Majority of courts have held that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. pre-empts state regulation of sale, use and labeling of pesticides. FIFRA states:

(a) In general: A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter. (b) Uniformity: Such law will impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

*Diehl v. Polo Cooperative Association*, 766 N.E.2d 317, 319, 262 Ill.Dec. 697 (2002)

(citing 7 U.S.C.A. sec 136v(a)(b) (West 1999))

### **Labeling and Packaging**

Much of the litigation has involved labeling and packaging. In *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995), the court indicated that, while FIFRA preempts a state's imposition of additional labeling requirements, it does not preempt a state's authority to monitor compliance with labeling requirements imposed by FIFRA.

Clear Congressional purpose in enacting FIFRA was to preempt only conflicting state law requirements concerning labeling and packaging of pesticides; concern was with uniformity among the states. *Dow Chemical Co. v. Ebling*, App. 2000, 723 N.E.2d 881, transfer granted, opinion vacated, in rap 11(b)(3) 741 N.E.2d 1249. Indirect challenges to pesticide labeling approved by Environmental Protection Agency (EPA) by way of state law tort claims, are preempted by FIFRA. *Id.*

The Court of Appeals of Indiana held in 1996 that “[t]he broad prohibition imposed by FIFRA against state regulation of warning labels on hazardous substances bars common-law liability attempts to impose liability on top of that provided by federal laws.” *Hottinger v. Trugreen Corp*, 665 N.E.2d 593 (1996). Accordingly, FIFRA preempts state common law strict liability and negligence claims for defective warning or the failure to warn of the hazards associated with the products subject to regulation under the Act. *Hottinger*, 665 N.E.2d 598 (1996.)

In *Stephen v. American Cyanamid Co.*, 1994 WL 1251230, 1 (Ind.Cir.) (1994), the court held that FIFRA expressly preempted state-imposed requirements relating to the adequacy of information set forth in the labeling and packaging of pesticides registered with the EPA. The plaintiff claimed that Cyanamid failed to warn of herbicide's alleged propensity to carry over and damage corn follow crops, and that it should have provided additional or different information in the labeling. The court held that each of plaintiff's claims (negligence, strict liability in tort, breach of warranty, and breach of implied covenants of good faith and fair dealing) was preempted by FIFRA, since the labeling and packaging of the herbicide have been approved by the EPA and have complied with the FIFRA's requirements. *American Cyanamid* at 2.

### **Conclusion**

The only Supreme Court's case regarding the FIFRA's preemption, *Wisconsin Public Intervenor v. Mortier*, did not clear up the confusion concerning the scope of FIFRA's preemptive effect; in fact, a flood of cases involving state and local regulation followed. The Supreme Court may find that all failure to warn claims are preempted or may conclude, as has the EPA, that only positive statutory enactments are requirements which result in FIFRA preemption.

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