It’s Time To Fix FIFRA Preemption

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In 1991 the U.S. Supreme Court held in Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the nation’s primary pesticide law, does not preempt states’ political subdivisions (i.e., local governments) from banning or restricting the sale or use of pesticides that have been approved both by the U.S. Environmental Protection Agency and state regulatory agencies. Recognizing that two layers of pesticide regulation are enough, most states reacted to Mortier by enacting statutes or promulgating regulations that at least partially preempt local government regulation. But many of those state-imposed preemption measures are riddled with exceptions and loopholes, and all are subject to shifting political winds.

Strident anti-pesticide activists — who are seemingly oblivious to (or perhaps ignorant of) pesticides’ enormous public health and environmental benefits, as well as comprehensive federal and state review and regulation of pesticide safety — have continued to lobby misinformed or politically motivated county, city and town officials throughout the United States for unwarranted bans and restrictions. Their typical superficial, emotional and misleading pitch is that federal and state scientific expertise and regulatory determinations should be discounted, and that only local governments can protect their own citizens from the supposed health and environmental threats posed by pesticides.

One recent example is Montgomery County, Maryland (a politically liberal Washington, D.C., suburb), whose County Council, by a 6-3 vote, and without the approval of the county executive, adopted an ordinance which essentially banned the “cosmetic use” of most EPA- and Maryland-registered pesticides on residential lawns. Industry groups mounted a hard-fought and superbly prosecuted judicial challenge to the county ordinance. On Aug. 3, 2017, a Maryland state circuit court held that Maryland’s comprehensive regulation of pesticides on a state-wide basis occupies the field of pesticide use regulation and therefore impliedly preempts the ordinance. See Complete Lawn Care Inc. v. Montgomery County, Maryland, Civ. Action No. 424200-V (Cir. Ct., Mont. Cty.). In his detailed and thoughtful opinion, Judge Terrence J. McGann was highly critical of local efforts to second-guess federal and state pesticide regulatory determinations. He indicated that “[b]y generally banning the use of registered pesticides, the Ordinance prohibits and frustrates activity that is intended to be permitted by State law, which conflicts with, and thus is preempted by State Law.” Op. at 14. The County Council has authorized an appeal of the preemption ruling.

Despite this state trial court victory, local regulation of pesticide sale or use remains an actual or potential problem in any state that does not have a broad and air-tight statute or regulation that precludes local regulation of pesticides and that is not likely to be repealed or modified in the future. Pesticides, like drugs and other products whose safe use is heavily regulated by the federal government, simply should not be subject to the whims of local

government officials.

This article suggests that FIFRA is long overdue for an amendment that would expressly and unequivocally preempt all local regulation of pesticide sale and use. Along the same lines, Congress also should fix ambiguities in FIFRA that states such as California have exploited to usurp or defy the EPA's congressionally mandated, exclusive authority to regulate the warnings, precautionary measures, directions for use, and other contents of nationally uniform pesticide product labeling.

Statutory Background

FIFRA regulates "pesticides"— a term which the statute defines expansively to encompass a broad range of agricultural, professional, industrial and consumer pest control products, for example, agricultural insecticides and herbicides, pre- and post-construction termiticides, industrial wood preservatives, institutional, commercial, and household disinfectants, and mosquito repellents. See 7 U.S.C. § 136(u).

Enacted as part of a statutory overhaul in 1972, FIFRA § 24 ("Authority of States") allocates pesticide regulatory authority between the EPA and the 50 States. See 7 U.S.C. § 136v. Section 24 indicates in subsection (a) that "[a] *State* may regulate the *sale or use* of any federally registered pesticide" (emphasis added). But subsection (b), an express preemption provision, declares that "[s]uch State *shall not impose* or continue in effect *any requirements for labeling* or packaging *in addition to or different from* those required [under FIFRA]" (emphasis added). Although FIFRA §§ 24(a) and (b) seem straightforward, their scope and meaning have triggered decades of controversy and litigation.

FIFRA Should Be Amended To Preempt Local Regulation

According to the Supreme Court's Mortier decision, which focused on § 24(a), "[t]he exclusion of political subdivision cannot be inferred from the express authorization to the 'State[s]'" to regulate pesticide sale and use "because political subdivisions are components of the very entity the statute empowers." 501 U.S. at 608; see also id. at 612 ("The term 'State' is not self-limiting since political subdivisions are merely subordinate components of the whole.") The Supreme Court indicated that "the more plausible reading of FIFRA's authorization to the States leaves the allocation of regulatory authority to the 'absolute discretion' of the States themselves, including the option of leaving local regulation in the hands of local authorities." Id. at 608.

Congress, however, has the power to preempt local as well as state law, especially since, as the court explained in Mortier, political subdivisions are merely "subordinate components" of states. FIFRA § 24(a) could be amended, therefore, to qualify a state's authority to regulate pesticide sale and use by expressly preempting local governments from doing the same. Adding the following sentence to § 24(a) would accomplish that objective: "A political subdivision of a State shall not impose or continue in effect any prohibition, restriction, or other requirement relating to sale or use of a pesticide."

Such a nationwide prohibition against local regulation of pesticides would override the Mortier decision's erroneous notion that local regulation promotes, rather than undermines,

federal and state regulation. See Mortier, 501 U.S. at 614-15. In my view, FIFRA preemption of local regulation would strengthen the well-coordinated federal/state pesticide regulatory program that FIFRA contemplates, and in turn, promote the safe and beneficial use of pesticides throughout the nation. Insofar as local conditions truly warrant special use restrictions, they can be added, at the EPA's discretion, to pesticide product labeling, or they can be a basis for limiting state registration of a product.

FIFRA Preemption of State-Imposed Labeling Requirements Should Be Strengthened

As currently written, there is a fundamental ambiguity in the structure of FIFRA §§ 24(a) and (b). Because nationally uniform product labeling is the primary means by which the EPA regulates pesticide use — for example, by specifying what warnings and precautionary measures, and restrictions or other conditions, govern application of a particular pesticide to various types of agricultural crops — there is an inherent conflict between prohibiting states from imposing their own "requirements for labeling" under § 24(b) while allowing them to "regulate the ... use" of pesticides under § 24(a). A recent decision of the Tenth Circuit, Schoenhofer v. McClaskey, No. 16-3226 (July 3, 2017), illustrates the problem. The court rejected a challenge to a Kansas regulation that by its own terms, imposed termiticide application requirements "[i]n addition to the requirements of the label." According to the court, § 24(b) does not apply because "the Kansas regulation does not govern labeling. It governs use."

The California Department of Pesticide Regulation (DPR) often exploits the ambiguity between FIFRA §§ 24(a) and (b) by holding a pesticide product's California registration (required in addition to an EPA registration) hostage unless and until the producer obtains the EPA's permission to include whatever label warnings, application requirements, etc. that DPR demands. This can be a time-consuming process, impeding the availability of pesticide products for particular uses in the nation's largest and most important agricultural state.

California DPR's practice of imposing its own labeling requirements not only usurps the EPA's exclusive pesticide labeling authority, but also, as a practical matter, enables DPR to dictate the content of labeling that may be distributed nationally. This is an egregious example of a state accomplishing indirectly what FIFRA § 24(b) expressly prohibits a state from doing directly. This problem could be fixed by amending § 24(a) to limit a state's pesticide regulatory authority to either approving or denying state registration for one or more uses of an EPA-registered pesticide. Such an amendment could read in part as follows: "A State may grant, or decline to grant, registration for one or more uses of a federally registered pesticide, but shall not otherwise regulate the sale or use of a federally registered pesticide in the State ..."

Section 24(b) itself suffers from another ambiguity. In Bates v. Dow AgroSciences LLC, 544 U.S. 431 (2005), the Supreme Court held that § 24(b) expressly preempts state-law, pesticide-related product liability suits only to the extent that they are based on failure-to-warn (or fraud) claims that would impose state "requirements for labeling" that are "in addition to or different from" — but not "parallel" or "equivalent" to — FIFRA's general prohibition against distributing a "misbranded" pesticide (defined to include a pesticide whose labeling does not contain adequate warnings and precautions). See id. at 447. Under

Bates, even when a plaintiff is alleging “failure to warn,” courts can award damages in a pesticide-related personal injury or property damage suit on the theory that state common law standards for adequate warnings are parallel or equivalent to FIFRA’s broad and vague misbranding standard.

This giant “parallel” or “equivalent” state-requirements loophole, which essentially negates FIFRA preemption of state-imposed labeling requirements, can be closed by amending § 24(b) to eliminate the “in addition to or different from” language that the court in Bates somehow found to be less than all-encompassing. To accomplish this objective, and to further restrict a state from indirectly regulating pesticide labeling, § 24(b) could be amended to read as follows: “A State (including a political subdivision of a State) shall not directly or indirectly impose or continue in effect by statute, regulation, common law, or any other means, including as a condition for obtaining or maintaining state registration, any requirement relating to the content or format of a federally registered pesticide’s labeling.”

Conclusion

Problematic judicial developments such as the Mortier and Bates cases, state encroachment upon the EPA’s exclusive authority to regulate pesticide labeling, and local government second-guessing of EPA and state pesticide use approvals, are compelling reasons why Congress, for the first time in 45 years, should revisit and clarify FIFRA’s preemption of state and local pesticide regulatory authority.

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DISCLOSURE: Ebner filed Supreme Court amicus briefs on behalf of pesticide industry trade associations in the Wisconsin Public Intervenor v. Mortier and Bates v. Dow AgroSciences LLC cases discussed in this article.