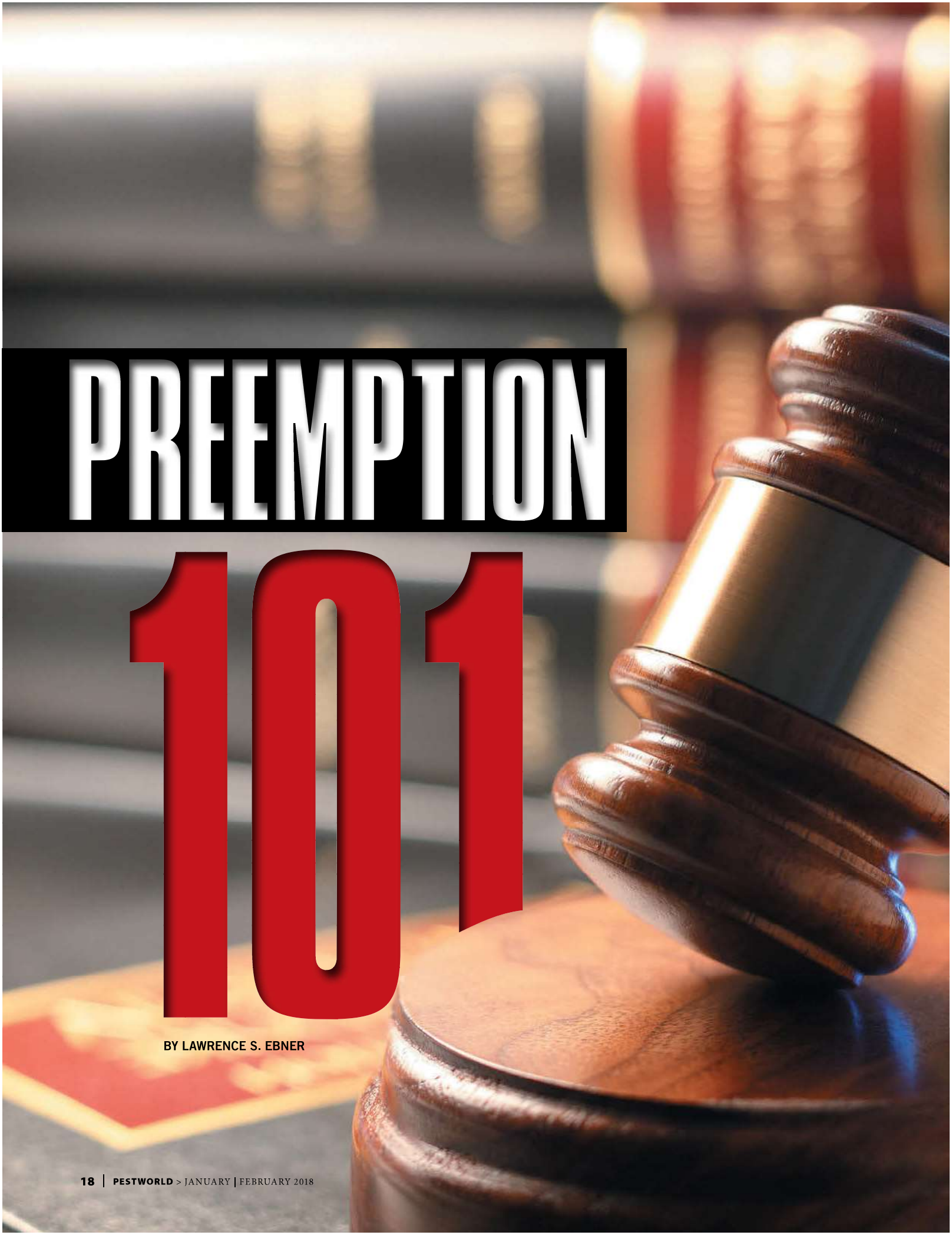

PREEMPTION 101

BY LAWRENCE S. EBNER

PREEMPTION IS A LEGAL CONCEPT THAT IS important to every member of the pest control industry. In broad terms, preemption refers to one type of law supplanting or barring another type of law. There are two general categories of preemption: (1) federal preemption of state and local law, and (2) state preemption of local law. This article summarizes preemption basics that everyone involved in the pest management business should know.

FEDERAL PREEMPTION

The U.S. Constitution allocates powers between the federal government and the 50 states. The Supremacy Clause, which is part of Article VI of the Constitution, declares that the "Constitution, and the Laws of the United States... shall be the supreme Law of the Land... any Thing in the Constitution of Laws of any State to the Contrary notwithstanding." This means that when a state law conflicts with a federal law, the federal law reigns supreme and preempts the state law.

Over the course of many years, the U.S. Supreme Court has established and applied several key principles that implement the Supremacy Clause and federal preemption of state law in a wide variety of circumstances. Most importantly, the Court repeatedly has explained that state law (including local law) can be "expressly" or "impliedly" preempted by federal law:

Express preemption occurs where a federal statute explicitly preempts state law. The most relevant example of express preemption for the pest control industry is section 24(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"): "[A] State shall not impose or continue in effect any requirements for [pesticide] labeling or packaging in addition to or different from those required under [the Act]." This express preemption provision, which is entitled "Uniformity," reflects Congress' intent to establish a system of nationally uniform labeling for each pesticide product granted a FIFRA registration by the U.S. Environmental Protection Agency (EPA). In *Bates v. Dow AgroSciences, LLC*, 544 U.S. 431, 452 (2005), the Supreme Court explained that section 24(b), which was added to FIFRA in 1972, "pre-empts competing state labeling standards—imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings." Nevertheless, a few state agencies, such as the California Department of Pesticide Regulation, are notorious for attempting to skirt FIFRA preemption and impose their own pesticide labeling requirements as a condition for state registration of FIFRA-registered products.

It is important to note that under section 24(a) of FIFRA, "[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 [under FIFRA]." This means that each state retains authority to decide for itself whether to allow a FIFRA-registered pesticide to be used in the state, and if so, whether any state-specific use restrictions should be

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imposed. Since the way that a pesticide product is used and applied is regulated primarily by its nationally uniform, EPA-approved labeling, there always has been a strain between a state's authority under section 24(a) of FIFRA to regulate pesticide *use* and EPA's exclusive authority under section 24(b) to regulate the content of pesticide *labeling*.

A recent decision by the U.S. Court of Appeals for the Tenth Circuit illustrates the inherent conflict between sections 24(a) & (b). In *Schoenhofer v. McClaskey*, a pest management professional filed a suit claiming that FIFRA preempts a Kansas Department of Agriculture regulation which states in part as follows: "*In addition to the requirements of the label*, each preconstruction application of pesticide for the control of termites shall consist of establishing both horizontal and vertical chemical barriers, as specified in this regulation." Kan. Admin. Regs. § 4-13-26 (emphasis added). Recall that section 24(b) of FIFRA expressly preempts state-imposed requirements for labeling that are "in addition to or different from" EPA's. Nonetheless, the court of appeals rejected preemption on the ground that "the Kansas regulation does not govern labeling. It governs use."

FIFRA preemption of state common-law claims: State law encompasses state "common law" (i.e., court-made law), as well as state statutes and state agency regulations. Between 1989 and 2005, many federal and state courts held that section 24(b) of FIFRA expressly preempts state common law damages suits alleging that a pesticide manufacturer's labeling failed to provide adequate warnings about a pesticide's risks to applicator, bystanders or the environment. In the *Bates* case, the Supreme Court upheld FIFRA preemption of state common law product liability suits where the plaintiff is attacking the adequacy of the warnings or other information on a pesticide product's EPA-approved labeling.

Implied preemption occurs where, even in the absence of an express preemption provision in a federal statute, state law and federal law conflict. Such a conflict can arise where federal law on a particular subject is so comprehensive, it leaves no room for state regulation (referred to as "field preemption"); where it is physically impossible to comply with both state and federal law ("impossibility preemption"); or where state law obstructs or frustrates the purposes and objectives of federal law ("obstacle preemption").

Wisconsin Public Intervenor v. Mortier. More than 25 years ago, the Supreme Court held in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), that FIFRA does not either expressly or impliedly preempt political subdivisions of states (i.e., local governments) from imposing restrictions (e.g., prohibitions; permitting requirements) on pesticide use. According to the Court, "FIFRA implies a regulatory partnership between federal, state, *and* local governments." 501 U.S. at 615.

The *Mortier* decision was a major disappointment for NPMA and other pesticide industry groups, which filed *amicus curiae* ("friend of the court") briefs with the Court. Those briefs argued that two layers of pesticide use regulation—federal and state—are enough, and that an additional layer of regulation by tens of thousands of counties and municipalities around the United States would not only pose a logistical nightmare for pesticide applicators, but also undermine public safety.

STATE PREEMPTION

In the wake of the *Mortier* decision, the concept of *state* (rather than federal) preemption of local regulation became important to the pest control industry. For various reasons, pest control industry leaders did not (and still do not) believe that a FIFRA amendment expressly preempting local governments from regulating pesticide use would be politically feasible. (It is widely accepted, however, that the preemptive scope of section 24(b) of FIFRA encompasses, and thus prohibits, local governments, as well as states, from imposing their own pesticide labeling requirements.)

The Supreme Court explained in *Mortier* that "[t]he term 'State' is not self-limiting since political subdivisions are merely subordinate components of the whole."(501 U.S. at 612). In other words, political subdivisions are subject to whatever limitations of authority a state constitution, a state legislature or a state regulatory agency imposes on counties, cities, towns and other types of local governments.

Although state constitutions vary widely, virtually every state government has the authority to prohibit or restrict, in other words preempt, the authority of local governments to regulate pesticide use—either through legislation or regulation. NPMA indicates that all but a handful of states have preempted local government regulation of pesticide use in one way or another.

CONCLUSION

Preemption is a legal concept that has many practical implications. Under our federalist system, federal preemption of state regulation—and by extension, state preemption of local regulation—are needed to ensure that all levels of government operate in a smooth and coordinated manner for the protection and benefit of the public. This is especially true in connection with subjects such as pesticide labeling, where national uniformity is necessary, or pesticide use regulation, where at least statewide uniformity is desirable. Members of the pest control industry, with the leadership that NPMA provides, should remain vigilant to ensure that state and local governments do not encroach upon preempted regulatory areas in connection with the sale, distribution and use of pesticides. ●

Larry Ebner has been advising NPMA on legal and regulatory matters for more than 30 years. Last year, he founded Capital Appellate Advocacy PLLC (www.capitalappellate.com), a Washington, D.C.-based boutique law firm that focuses on federal issues important to regulated businesses and industries.