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IS IT FINALLY TIME TO FIX FIFRA PREEMPTION?

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The Federal Insecticide, Fungicide, and Rodenticide Act, better known as FIFRA, is the comprehensive federal statute that for the past 70 years has regulated "pesticides"—a term which encompasses 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. As an attorney who advises and represents the pesticide, structural pest control, and wood preserving industries, I have been fighting FIFRA-related legal battles for almost 45 years. One of the most persistent as well as hotly contested areas of pesticide regulation involves the subject of "preemption"—the supremacy of federal law over state law, and state law over local law.

Section 24 of FIFRA ("Authority of States"), enacted in 1972, allocates pesticide regulatory authority between the U.S. Environmental Protection Agency (EPA) and the fifty States. It 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 §§ 24(a) & (b) seem straightforward, their scope and meaning have triggered decades of controversy and litigation. Congress could, and in my view should, *improve* the way that pesticides are regulated at both the federal and state levels by amending FIFRA § 24 in order to clarify or modify federal preemption of state, and local, pesticide regulation. I believe that the time finally has come for Congress to revisit § 24 and fix it in at least three ways:

1. Clarify the relationship between federal regulation of pesticide labeling vs. state regulation of pesticide use.

The problem: As currently written, there is a fundamental ambiguity in the structure of §§ 24(a) & (b). Because nationally uniform product labeling is the primary means by which 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 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 U.S. Court of Appeals for 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." Nonetheless, 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) long has been the most flagrant violator of § 24(b). DPR often exploits the ambiguity between FIFRA §§ 24(a) & (b) by holding a pesticide product's California registration hostage unless and until the producer obtains 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. California DPR's practice of imposing its own labeling requirements not only usurps EPA's pesticide labeling authority and thereby nullifies FIFRA preemption, 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.

The solution: FIFRA § 24(a) should be amended to prevent a State from regulating the content of EPA-approved pesticide labeling under the guise of regulating pesticide use. More specifically, a State should be allowed to regulate the use of pesticides only to the extent of approving or denying state registration for one or more uses of a federally registered pesticide. For example, even though a pesticide has a FIFRA registration for use on crops A, B, & C, a State should be allowed to grant state registration for use of the pesticide on crops A & B but not C, or allowed to prohibit the use of the pesticide altogether in the State. But a State should have no authority to impose its own pesticide application standards, requirements, or restrictions as a condition for obtaining or maintaining state registration.

2. Preempt local governments from regulating pesticides.

***The problem*:** Since the 1970s, anti-pesticide activists have sought to undermine FIFRA and state pesticide regulation by lobbying politically motivated and/or ill-informed local government officials (e.g., county, city, or town councils) to ban or restrict local use of various types of pesticides (e.g., lawn-care products).

About 25 years ago, the pesticide industry lost a Supreme Court case, *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), which held that FIFRA does not preempt political subdivisions of States from regulating local use of pesticides. In response, and recognizing that two levels of pesticide regulation are enough, many (but not all) States have enacted statutes or adopted regulations that at least to some extent, preclude local governments from regulating the use of pesticides. The nature and scope of state preemption of local pesticide regulation, however, vary from State to State, and some state preemption provisions are weakened by exceptions and loopholes.

Allowing local governments to prohibit, restrict, or otherwise regulate the sale and use of federally and state-registered pesticides—products whose safety already has been comprehensively assessed and regulated by EPA—is wholly unnecessary. Local regulation can create confusion or uncertainty, as well as impose unwarranted administrative burdens and commercial costs. Even worse, a patchwork of conflicting or inconsistent local pesticide regulations regarding which pesticides can be sold and used, and under what circumstances, also can be deleterious to public health and the environment. Such local regulation can unjustifiably deprive farmers, homeowners, and

consumers of beneficial products that have been approved for use by EPA and a State's pesticide regulatory agency.

The solution: Because local government regulation of pesticides undermines EPA as well as state regulation, preemption of local regulation should not be left up to the vagaries of each State. Instead, FIFRA § 24(a) should be amended to expressly preempt all political subdivisions of States from regulating the sale and use of pesticides.

3. Preempt state-law damages suits that directly or indirectly impose requirements for pesticide labeling.

The problem: In *Bates v. Dow AgroSciences, LLC*, 544 U.S. 431 (2005), the Supreme Court addressed the question of whether FIFRA § 24(b) preempts state-law personal injury or property damage suits against pesticide manufacturers. The Court held that § 24(b) preempts such suits only to the extent that they are based on failure-to-warn (or fraud) claims that "set a standard for a product's labeling," *id.* at 446, *and only* if such claims would impose state "requirements for labeling" that are "in addition to or different from"—*but not "parallel" or "equivalent" to*—FIFRA's general misbranding standard (a standard requiring labeling to include warnings and precautionary statements that are "adequate to protect health and the environment"). *Id.* at 447.

As a practical matter, the *Bates* decision—especially the vague "parallel" or "equivalent" state-requirements exclusion from federal labeling preemption that the Court read into FIFRA § 24(b)—significantly narrowed the robust

body of pre-*Bates* FIFRA tort preemption case law that had developed in the lower courts. *Bates* continues to enable plaintiffs' attorneys to circumvent FIFRA preemption by carefully wording their claims to avoid a direct challenge to a pesticide's labeling. The result is that even when a plaintiff is alleging "failure to warn," courts and juries throughout the United States can award damages in a pesticide-related personal injury or property damage suit, on the theory that state standards for adequate warnings are parallel or equivalent to FIFRA's broad and vague misbranding standard.

The Solution: FIFRA § 24(b) should be amended to eliminate the "parallel" or "equivalent" requirements loophole and to make it clear that any state-law damages claim which directly *or* indirectly challenges, or otherwise is based on, the content or format of EPA-approved product labeling is expressly preempted.

Proposed FIFRA Amendment

To amend FIFRA preemption as described above, FIFRA §§ 24(a) & (b) could be revised to read something like this:

FIFRA § 24 (Authority of States)

(a) IN GENERAL

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, or permit any sale or use of a pesticide or device prohibited under this Act. 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.

(b) UNIFORMITY

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 condition for obtaining or maintaining state registration, any requirement relating to the content or format of a federally registered pesticide's labeling.

Conclusion

In view of the continuing problems with the structure and language of FIFRA §§ 24(a) & (b)—defects which judicial decisions have illuminated and exacerbated—industry groups should consider pressing for congressional amendments that would remedy (i) States' encroachment upon EPA's exclusive authority to regulate pesticide labeling, (ii) state-law damages suits that challenge the content or adequacy of pesticide labeling, and (iii) local government prohibitions or restrictions on the sale or use of federally and state-registered pesticides. Perhaps the time finally has come for Congress to revisit and revamp FIFRA § 24 to resolve these problems in order to achieve a better coordinated system of federal and state regulation of pesticides.

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The views expressed in this article are solely those of Mr. Ebner and do not necessarily represent or reflect the views of his clients.

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