

The Role of Pesticide Enforcement in Toxic Tort Litigation

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Pesticide enforcement activities can have important consequences for private litigants in toxic tort suits. This is particularly true in situations involving structural pest control (e.g., control of pests such as termites, rodents and roaches) where homeowners or other members of the public may claim that they have been exposed to hazardous chemicals. An increase in government regulatory activities involving pesticides and the attendant press coverage have helped to trigger an explosion of toxic tort litigation. The plaintiffs' bar has been only too happy to accommodate heightened public anxiety.

Most toxic tort complaints em-

ploy the "kitchen sink" method of pleading. A typical pesticide misapplication case may include counts for continuing chemical trespass, infliction of emotional distress, and cancerphobia as well for more traditional causes of action such as negligence and breach of warranty. Despite the proliferation of toxic tort theories, the key issue confronting judges and juries in these cases remains the same: *Was the pesticide applied properly?* Environmental enforcement officials often play a critical role in answering this mixed question of law and fact. This article examines a few of the principles and cases that establish a correlation between pesticide enforcement or regulatory activity and potential toxic tort liability.

"The Label Is the Law"

When it comes to pesticide enforcement, the maxim is "the label is the law." A pesticide's labeling is the standard by which enforce-

ment officials determine whether or not the pesticide has been misused or misapplied. Proof of compliance with the label is a pest control operator's best defense in an enforcement proceeding or in a toxic tort suit.

The contents of the label are prescribed by the U.S. Environmental Protection Agency under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)¹. FIFRA was enacted more than forty years ago as a misbranding statute. It was comprehensively revamped in 1972 to address growing environmental and safety concerns about the widespread use of pesticides.

Under section 3(a) of FIFRA, no person in any state may sell, distribute, or receive a pesticide that is not registered with EPA². A pesticide will be registered only if "it will perform its intended function without unreasonable adverse effects on the environment." FIFRA section 3(c)(5)(C). "Unreasonable adverse effects" means

"any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." FIFRA section 2(bb).

To register a pesticide, the manufacturer must submit to EPA not only extensive safety data but also a copy of the proposed labeling³. The labeling must comply with the requirements of the Act. FIFRA section 3(c)(5)(B). Thus, the labeling must contain application directions and procedures, safety precautions and warning statements that will ensure that the pesticide, when used in accordance with the labeling, will not cause "unreasonable adverse effects on the environment."

The heart of the pesticide enforcement program is section 12(a)(2)(G) of FIFRA, which makes it unlawful to use a pesticide "in a manner inconsistent with its labeling." See also FIFRA section 2(ee)⁴. A proposed EPA regulation makes it clear that a violation of section 12(a)(2)(G) of FIFRA represents misuse of the pesticide⁵.

Pursuant to section 26 of FIFRA, virtually every state exercises primary responsibility for enforcing pesticide use violations (i.e., use of a pesticide in a manner inconsistent with its labeling)⁶. Under section 27 of FIFRA, EPA retains enforcement oversight authority. Section 14 of FIFRA authorizes civil and criminal penalties for violations of the Act. States, under their primary enforcement authority, or EPA (normally through its regional offices), may initiate civil enforcement proceedings for pesticide misuse. Alternatively, a warning may be issued if the violation occurred "despite the exercise of due care or did not cause significant harm to health or the environment." FIFRA section 14(a)(4). It is well established that no private right of action exists for violations of FIFRA⁷.

Every state also operates its own pesticide regulatory program,

including some type of pesticide registration scheme as an adjunct to FIFRA registration. See FIFRA section 24(a)⁸. No state, however, may "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." FIFRA section 24(b). Thus, *only* EPA may establish requirements for the contents of a pesticide's label or labeling⁹.

Misuse Determinations

The central role that the EPA-approved label plays in pesticide enforcement suggests its significance in toxic tort suits. Consider the example of a homeowner who, suspecting a termite problem, hires a licensed pest control operator to perform a termiticide treatment. The following day, the homeowner happens to read a newspaper article about the potential risks of the termiticide that was applied. Suddenly, he notices that there is still a slight chemical odor in his basement. He arranges for a state inspector to visit. The enforcement official conducts a site inspection and also reviews the detailed record of the application made by the PCO. The inspector finds no evidence that the termiticide was applied in a manner inconsistent with its labeling, i.e., misused.

Should the homeowner subsequently sue the pest control operator for alleged misapplication of the termiticide, the findings of the state enforcement official may constitute crucial evidence. In all probability, the defendant would call the inspector as a witness to present his findings as set forth in his written inspection report. In addition, the records kept by the PCO will provide important evidence of the specific application made and its consistency with label requirements.

The importance of the state inspector's findings was recently underscored in a termiticide suit in South Carolina. The court ruled that a state official's testimony re-

garding the applicator's compliance with label procedures was sufficient for the jury to conclude that the pest control operator was not negligent. *Rabb v. Orkin Exterminating Co.*¹⁰ The official's testimony was bolstered by the pest control operator's own testimony about his adherence to label procedures.

Negligence Per Se

Some plaintiffs' attorneys blithely assume that evidence of misuse of a pesticide is negligence *per se*. In a recent termiticide misapplication suit, however, a federal district court held that alleged flaws in an EPA-approved termiticide label (i.e., alleged inadequate label warnings and directions) would not constitute negligence *per se* on the part of the manufacturer. *Dine v. Western Exterminating Co.*¹¹

The *Dine* court held that the principle of negligence *per se* would apply only if FIFRA (or its District of Columbia counterpart) was intended specifically to protect homeowners or to prevent infiltration of houses by pesticides. But the court found that FIFRA and the regulations promulgated thereunder "have a far broader scope."¹² The court explained that the legislative goal of FIFRA "was to establish a broad scheme for regulating the manufacture and use of pesticides."¹³ "No provision of FIFRA suggests that the class of persons to be protected is any less broad than the entire population of the United States."¹⁴

As a result, the court held that the plaintiffs could not invoke the principle of negligence *per se* to avoid the burden of demonstrating that a duty owed to them by the defendants had been breached. The court's rationale should apply with equal force to allegations of pesticide misuse.

Duty to Warn

A continuing controversy exists as to whether professional applicators have a duty to provide

pre-treatment warnings to homeowners or building occupants.¹⁵ While there is no such requirement imposed by FIFRA, the law is still unsettled on whether an applicator can be held liable under state tort law for failing to provide warning statements.¹⁶ Pesticide enforcement officials should be aware that any determinations they make regarding warnings which may or may not have been given by a PCO could have ramifications in toxic tort suits.

The cases discussing whether PCOs have a duty to warn customers, and if so, what constitutes an adequate warning, do not establish a clear or consistent pattern. A state court of appeals in Texas held that the manufacturer of a termiticide, not the professional applicator who applied the product, had the duty to provide warnings about the hazards of the chemical when used in certain situations, *Kahn v. Velsicol Chemical Corp.*¹⁷ The manufacturer had attempted to shift liability to the PCO by invoking the "learned intermediary" doctrine, which has been used with some success by pharmaceutical manufacturers in product liability cases. The court found that most, if not all, of the expertise possessed by professional exterminators came from the manufacturers and suppliers of the chemicals through bulletins, seminars, and labeling. Thus, the manufacturer cannot escape liability for failing to place adequate warnings and instructions on the label.

This ruling is consistent with the fact that what PCOs know about the hazards of a pesticide normally is based on information provided by the manufacturer or distributor and by EPA. In *Dine v. Western Exterminating Co., supra*, however, the court held that the applicator in that case "unquestionably had a duty to warn plaintiffs" about the hazards of the termiticide being used. The manufacturer of the termiticide, which had been responsible for the con-

tent of the labeling, had acted reasonably in relying on the applicator to "convey any necessary warnings," according to the *Dine* court.¹⁸

Issues have arisen in toxic tort suits regarding the adequacy of FIFRA label warnings and precautionary statements. A federal district court in Michigan recently ruled that FIFRA precludes tort suits under state law alleging that the warnings on pesticide labels are inadequate. *Fitzgerald v. Mallinckrodt, Inc.*¹⁹ The court held that "any state law tort recovery based on a failure to warn theory would abrogate Congress' intent to provide uniform regulations governing the labeling of pesticides."²⁰

The plaintiff in *Fitzgerald* had been a greenskeeper on a golf course for eighteen years. His supervisor instructed him on how to mix and apply an inorganic, mercury-based fungicide. The greenskeeper wore a snowmobile suit, respirator, goggles and rubber gloves during mixing, but spilled some of the fungicide on his clothes and created a large cloud of dust. He brushed off his clothes and washed his hands and face. That night, he began to feel sick. The greenskeeper was diagnosed as suffering from mercury poisoning.

The greenskeeper admitted that he knew about, but failed to read, the pesticide label on the twenty-five pound drum from which he removed the fungicide. He sued the manufacturer alleging that if the label warnings had been different, he would not have been injured in the same manner. The federal district court dismissed the suit. The court agreed that because FIFRA section 24(b) preempts states from adopting requirements regarding pesticide labeling, state tort remedies for alleged inadequate label warnings or directions are also preempted. In reaching its decision, the *Fitzgerald* court repudiated an earlier decision by the U.S. Court of Appeals for the Dis-

trict of Columbia, which had reached a different conclusion in a similar case.²¹ The Michigan court found that FIFRA's preemption of state pesticide labeling requirements encompasses not only statutes enacted by state legislatures, but also court-made law in individual suits. The *Fitzgerald* court agreed with dicta by the U.S. Court of Appeals for the First Circuit that FIFRA's preemption clause "expressly prohibits 'state law' not merely 'statutory law' from imposing any 'requirement or prohibition' different from the Act's warning label."²² The Michigan court stated: "Where the federal government has preempted any state regulation, there can be no recovery in tort. Allowing recovery under state tort law where Congress has preempted state law would effectively authorize the state to do through the back door exactly what it cannot through the front. FIFRA expressly provides that no state may impose 'any requirement for labeling or packaging in addition to or different from those required under this Act.'"²³

Conclusion

This article highlights only a few of the principles and cases which establish a correlation between pesticide enforcement or regulatory activity and potential toxic tort liability. Federal and state pesticide officials should recognize that they are not operating in a vacuum. While they must strive to fulfill their duties in an impartial manner, their determinations may affect both the outcome of individual liability suits and the future direction of pesticide toxic tort law.

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References

- 1) U.S.C. § 136-136y (1982 & Supp. III 1985).
- 2) "Pesticide" is defined as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." FIFRA § 2(u).
- 3) The "label" is the written, printed, or graphic material affixed to the pesticide container. "Labeling" encompasses the label, but also includes any other written, printed, or graphic material that accompanies the pesticide. See FIFRA § 2(p). EPA has recently indicated that some parts of the termiticide labels or labeling should be considered merely advisory.
- 4) Section 2(ee) of FIFRA defines use of a pesticide in a manner inconsistent with its labeling as use "in a manner not permitted by the labeling." Several exceptions are provided, including applying a pesticide at a rate less than that specified on the labeling; applying a pesticide against a target pest not specified on the labeling unless prohibited by the labeling itself; and employing any method of application not prohibited by the labeling. These exceptions were added by Congress in 1978 to afford applicators more flexibility in determining the manner in which to apply their pesticides. H.R. Rep. No. 663, 95th Cong., 1st Sess. 15,20,70, reprinted in 1978 U.S. Code Cong. & Ad. News 1988, 1993, 2039.
- 5) See 49 Fed. Reg. 37,972 (1984) (proposed 40 C.F.R. 156.1(e)(2)).
- 6) State pesticide officials have their own organizations -- the American Association of Pesticide Control Officials (AAPCO) and the Association of Structural Pest Control Regulatory Officials (ASPCRO). The latter group is made up specifically of state personnel involved in structural pest control.
- 7) See e.g., Fiedler v. Clark, 714 F.2d 79 (9th Cir. 1983) (citing *In re Agent Orange Product Liability Litigation*, 635 F.2d 987,991-92 n.9 (2d Cir. 1980)).
- 8) The legislative history of FIFRA makes it clear that towns, counties, and other political subdivisions of a state are preempted from regulating pesticides. See *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109, 111, *aff'd*, 822 F.2d 55 (4th Cir. 1987) ("[T]he legislative history could not be more clear."). *But see* *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476,683 P.2d 1150 (1984).
- 9) The regulatory scheme of FIFRA is discussed in detail in the *Pesticide Regulation Handbook* (Revised Edition) (Executive Enterprises Publications Co. 1987).
- 10) No. 6:87-0714-3 (D.S.C. Oct.30, 1987), 25 *Toxics L. Rep.* (BNA) 682 (Nov. 18,1987).
- 11) 86-1857-OG (D.D.C. Mar. 9,1988).
- 12) Slip. op. at 10.
- 13) *Id.* at 10-11.
- 14) *Id.* at 11 (citing *In re Agent Orange Product Liability Litigation*, *supra*).
- 15) See Ebner, "PCOs and the Duty to Warn," *Pest Management* (March 1988); Ebner and Rahinsky, "The Duty to Warn Controversy," *Pest Management* (May 1986).
- 16) The following states have adopted regulations requiring professional applicators to provide customers with a copy of the EPA-approved label or other specific precautionary information: California, Connecticut, Maryland, Massachusetts, New Jersey, New York, and Texas.
- 17) 711 S.W.2d 310 (Tex. Civ. App. 1986, writ *ref'd n.r.e.*).
- 18) *Dine, supra*, slip op at 13, 15-16.
- 19) 86-2598 (E.D. Mich. Dec. 22, 1987).
- 20) Slip op at 8.
- 21) See *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1985).
- 22) See *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627-28 (1st Cir. 1987).
- 23) *Fitzgerald, supra*, slip op at 8.

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