



BNA, INC.

PRODUCT SAFETY & LIABILITY



REPORTER

Reproduced with permission from Product Safety & Liability Reporter, Vol. 33, No. 23, 06/13/2005, pp. 592-597. Copyright © 2005 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

PESTICIDES

Attorney Larry Ebner analyzes the U.S. Supreme Court ruling in *Bates v. Dow AgroSciences LLC*, which involved the preemptive scope of the Federal Insecticide, Fungicide, and Rodenticide Act. The author says that while the impact of *Bates* remains to be seen, it is clear that pesticide manufacturers promptly should begin to develop and utilize sophisticated new approaches when raising FIFRA preemption or otherwise defending against unwarranted product liability or toxic tort claims.

FIFRA PREEMPTION AFTER *BATES* v. *DOW AGROSCIENCES*

By LAWRENCE S. EBNER

U.S. Supreme Court decisions are supposed to be the final word on important and difficult legal issues. The Court's perplexing opinion in *Bates v. Dow AgroSciences LLC*, 125 S.Ct. 1788 (2005), however, raises as many questions as it answers about federal preemption of pesticide-related personal injury and crop damage claims. Advocacy groups like Beyond Pesticides and Earthjustice quickly proclaimed victory after the Court issued its decision on April 27. But in reality, neither the pesticide industry nor anti-pesticide militants and their trial lawyer allies obtained the clear-cut ruling that they sought regarding the Federal Insecticide, Fungicide, and Rodenticide Act's preemptive scope. Instead, the Court's 7-2 majority opinion, authored by Justice Stevens, is a jumble of inconsistencies which lower courts will have to untangle on a case-by-case basis, as pesticide manufacturers continue to assert preemption when confronted with claims based on

state-law standards that diverge from federal labeling requirements, or that otherwise conflict with the Act or its implementation.

Bates does not merit the landmark status some activists hastily assigned to the case. In fact, beginning with *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), involving federal preemption of cigarette-related claims, *Bates* is the latest in a 13-year string of Supreme Court tort preemption decisions which, when viewed as a whole, even legal scholars find difficult to reconcile. As one federal district judge explained only three weeks prior to *Bates*, "[m]any commentators believe these [post-*Cipollone*] cases did little to cure the confusion . . . Justices Blackmun and Scalia predicted" that the plurality opinion in *Cipollone* (also written by Justice Stevens) would engender. *In re Welding Fume Products Liability Litigation*, 364 F.Supp.2d 669, 681 (N.D. Ohio 2005); *id.* at 681 n.12 (collecting post-*Cipollone* Su-

preme Court cases) & n.14 (collecting law review articles).

In his separate opinion in *Cipollone*, Justice Blackmun stated that “I can only speculate as to the difficulty lower courts will encounter in attempting to implement today’s decision.” 505 U.S. 504 at 543-44 (Blackmun, J., concurring in part and dissenting in part). Along the same lines, Justice Scalia correctly observed that “questions raised by today’s decision will fill the lawbooks for years to come. A disposition that raises more questions than it answers does not serve the country well.” *Id.* at 556 (Scalia, J., concurring in part and dissenting in part). These same concerns apply to *Bates*. The decision is now part of the jurisprudential labyrinth which the Supreme Court has created in wrestling with the recurring conflict between our federalist system (*i.e.*, States’ rights) and federal statutes, like FIFRA, which mandate national uniformity of regulation with regard to health and safety-related subjects, such as pesticide labeling.

This article discusses why the impact of *Bates* remains to be seen. It already is clear, however, that pesticide manufacturers should promptly begin to develop and utilize sophisticated new approaches when raising FIFRA preemption or otherwise defending against unwarranted product liability or toxic tort claims.

Case Background

Pesticide Labeling Under FIFRA. *Bates*, a crop damage case, is the Supreme Court’s first opinion on tort preemption under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136-136y. FIFRA is the nation’s principal pesticide regulatory statute. It was enacted in 1947, but “[i]n 1972, growing environmental and safety concerns led Congress to undertake a comprehensive revision” of the Act. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 601 (1991) (holding that FIFRA does not categorically preempt local governments from regulating pesticide use). The 1972 amendments “significantly strengthened FIFRA’s registration and labeling standards” and transformed the Act into a “comprehensive regulatory statute.” *Ibid.*; see also *Bates*, 125 S.Ct. at 1794-95. In so doing, Congress carefully considered the allocation of pesticide regulatory authority between the newly created U.S. Environmental Protection Agency and the states. Under the federal-state “regulatory partnership” that Congress established, the states share responsibility with EPA for regulating the “sale or use” of pesticides (*see* 7 U.S.C. § 136v(a)), but as the Supreme Court indicated in *Mortier*, pesticide “labeling . . . fall[s] within an area that FIFRA’s ‘program’ pre-empts.” *Id.* at 615; *see* 7 U.S.C. § 136v(b).

More specifically, FIFRA’s express preemption provision, § 136v(b) (“Uniformity”), provides that a “State shall not impose any requirements for labeling or packaging in addition to or different from those required under [FIFRA].” *Bates* not only mischaracterizes this long-standing cornerstone of the federal-state pesticide regulatory scheme as a “relatively obscure provision” (125 S.Ct. at 1802), but also conveniently ignores Congress’ intent “[i]n dividing the responsibility between the States and the Federal Government for the management of an *effective* pesticide program . . . to *completely* preempt State authority in regard to labeling.” H.R. Rep. No. 92-511, at 16 (1971) (emphasis added).

Pesticide labeling is the principal means by which EPA—a federal agency with the necessary scientific resources and expertise, experience, and national perspective to regulate labeling—ensures that all necessary warnings, directions for use, and other essential information are communicated from a pesticide’s manufacturer through the chain of distribution to the pesticide applicator or user. As EPA confirmed in a recent *Federal Register* notice,

[a] pesticide label is the user’s direction for using pesticides safely and effectively. It contains important information about where to use, or not use, the product, health and safety information that should be read and understood before using a pesticide product, and how to dispose of that product.

70 Fed. Reg. 12,276, 12,281 (Mar. 11, 2005). To underscore the importance of a pesticide’s nationally uniform, EPA-regulated labeling, FIFRA makes it unlawful for any person to use a pesticide “in a manner inconsistent with its labeling.” 7 U.S.C. § 136j(a)(2)(G).

Pre-*Bates* Case Law. In 1992 the Supreme Court held in *Cipollone* that a “federal statute barring additional ‘requirement[s]’ . . . imposed under State law pre-empts common-law claims.” *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Cipollone*, 505 U.S. at 522) (internal quotation marks omitted) (emphasis added). In the wake of *Cipollone*, “a groundswell of federal and state decisions emerged” holding that § 136v(b) of FIFRA expressly preempts failure-to-warn claims and other causes of action which impose additional or different, state-law requirements for labeling. *Bates*, 125 S.Ct. at 1797. The Supreme Court *precipitated* the “groundswell” of FIFRA preemption precedent by remanding for further consideration in light of *Cipollone*, two federal court of appeals cases involving failure-to-warn claims against pesticide manufacturers. After those federal courts of appeals held on remand that § 136v(b) expressly preempts failure-to-warn claims, the Supreme Court declined further review. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993). In fact, for well over a decade, the Court repeatedly let stand similar rulings concerning the preemptive scope of § 136v(b). By the time *Bates* was decided, all nine federal courts of appeals that had considered the subject in light of *Cipollone*, along with state appellate courts in more than half the States, and a multitude of federal and state trial courts, had adopted or applied the principle that § 136v(b) expressly preempts failure-to-warn and other labeling-related damages claims. The small number of cases holding to the contrary included a much-criticized, pre-*Cipollone* court of appeals decision (*Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984)), and a Texas Supreme Court case holding that labeling-related crop damage claims are excluded from § 136v(b) (*American Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002)). *See Bates*, 125 S.Ct. at 1794.

‘Bates’ certainly does not merit the landmark status which some activists hastily assigned to the case.

Bates Suit. The petitioners in *Bates*, Texas peanut farmers, claimed that their crops, planted in soils with pH levels of 7.2 or higher, were damaged by Strongarm®, an herbicide whose EPA-approved label originally recommended its use “in all areas where peanuts are grown.” *Bates*, 125 S.Ct. at 1793. According to the growers, the manufacturer’s agents made equivalent representations in their sales presentations. *Ibid.* After growers reported crop damage, the manufacturer, Dow AgroSciences LLC, distributed the herbicide in Texas with an EPA-approved supplemental label which prohibited application “to soils with a pH of 7.2 or greater.” *Ibid.* Federal district court litigation ensued between Dow AgroSciences and growers who had not agreed to participate in the company’s claims settlement program. The growers brought claims for breach of express warranty, fraud, violation of the Texas Deceptive Trade Practices - Consumer Protection Act, strict liability (including defective design and defective manufacture), and negligent testing, as well as allegations construed as negligent failure to warn. *Id.* at 1793, 1797 n.15.

The federal district court in Texas held that § 136v(b) expressly preempted the growers’ claims (one claim was dismissed on state-law grounds), and the U.S. Court of Appeals for the Fifth Circuit affirmed. *Id.* at 1793. The growers filed a petition for a writ of certiorari, arguing that § 136v(b) does not preempt tort claims at all, and alternatively, that labeling-related crop damage claims are not covered by § 136v(b) due to EPA’s waiver of the submission of product efficacy (*i.e.*, effectiveness) data at the time that most (but not all) agricultural pesticides are first registered (*see* 7 U.S.C. § 136a(c)(5)). At the Supreme Court’s invitation, the United States, through the Solicitor General, filed an *amicus curiae* brief supporting the view that § 136v(b) preempts failure-to-warn and other labeling-related claims, including those involving crop damage.

Government’s Position. The government’s position, which EPA actively supported, was in line with the vast majority of pre-*Bates* FIFRA preemption case law. During the Clinton administration, the government had filed an *amicus curiae* brief in California’s state supreme court, *unsuccessfully* advocating the categorical view that § 136v(b) does not preempt tort claims. *See Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366 (Cal. 2000); *see also Bates*, 125 S.Ct. at 1794 n.7; Lawrence S. Ebner, “The California Supreme Court Weighs In On FIFRA Preemption,” *BNA Toxics Law Reporter* (Vol. 15, No. 24) at 627 (June 22, 2000). In 2003, when the Supreme Court invited the United States to express its views on FIFRA preemption in connection with a certiorari petition that subsequently was denied, the government reexamined the position that it advocated in *Etcheverry* and concluded that it was incorrect. *See*

Express Preemption Test Under § 136v(b)

Bates is limited to the express preemptive scope of § 136v(b) of FIFRA. The Court had no difficulty *rejecting* the fundamental contention of the petitioners and their public interest group *amici* that § 136v(b)’s prohibition against states imposing additional or different requirements for labeling is inapplicable to damages actions: “[T]he term ‘requirements’ in § 136v(b) *reaches beyond* positive enactments, such as statutes and regulations, to *embrace common-law duties*. . . . While the use of ‘requirements’ in a pre-emption clause may not invariably carry this meaning, we think this is the best reading of § 136v(b).” *Bates*, 125 S.Ct. at 1798 (*citing Cipollone*) (emphasis added).

Based on the language of § 136v(b), the Court found that

[f]or a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement “*for labeling or packaging*”; rules governing the design of a product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is “*in addition to or different from those required under this subchapter*.”

Ibid. In essence, this is no different than the analysis which the majority of courts have utilized since *Cipollone* to determine whether a claim is preempted by § 136v(b). *Bates*, however, expounds upon § 136v(b)’s express preemption criteria in a way that creates substantial uncertainty for litigants. The opinion also underscores the need, in connection with § 136v(b) preemption analysis, for close, case-by-case judicial scrutiny of the specific state-law requirements for labeling that would be imposed by particular claims.

“Requirements for Labeling”

Bates explains that the “petitioners’ fraud and negligent-failure-to-warn claims are premised on common-law rules that qualify as ‘requirements for labeling’ ” because they “*set a standard* for a product’s labeling.” *Id.* at 1799 (emphasis added). In contrast, the opinion indicates that “[r]ules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for ‘labeling or packaging.’ ” *Id.* at 1798. According to the Court, because “[n]one of these common-law rules requires that manufacturers label or package their products in any particular way . . . petitioners’ claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted.” *Ibid.*

**The ruling expounds upon § 136v(b)'s express
preemption criteria in a way that creates
substantial uncertainty for litigants.**

But does the Court's holding enable a plaintiff to avoid § 136v(b) simply by attaching a "defective design" or "breach of express warranty" tag to a cause of action? That clearly would be contrary to Supreme Court preemption precedent. The Court has explained that "distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would elevate form over substance and allow parties to evade the pre-emptive scope of [the statute] simply by relabeling their . . . claims." *Aetna Health Inc. v. Davila*, 124 S.Ct. 2488, 2498 (2004) (internal quotation marks omitted); see also *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) (preemption cannot be "avoided by mere artful pleading"). Prior to *Bates*, it was well-established that "merely to call something a design or manufacturing defect claim does not automatically avoid FIFRA's explicit preemption clause." *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 564 (1st Cir. 1996) (holding that a personal injury plaintiff's pesticide-related design defect claim was a "disguised labeling claim"); see also *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir. 2002) ("if the state law claim is premised on inadequate labeling or a failure to warn [it] is nonetheless pre-empted regardless of the guise under which the claim is presented") (internal quotation marks omitted); *Traube v. Freund*, 775 N.E.2d 212, 217 (Ill. App. Ct. 2002) ("FIFRA preemption clearly does not turn upon the name a plaintiff gives to his or her cause of action.").

The lower courts will have to decide whether *Bates* authorizes plaintiffs to circumvent § 136v(b) simply by pleading around it, or instead, whether even in light of *Bates*, § 136v(b) continues to apply to claims which a plaintiff has denominated and pleaded as "defective design" or "breach of express warranty," but nevertheless are based on state-law duties that, upon close examination, "set a standard for a product's labeling." *Bates*, 125 S.Ct. at 1799. Indeed, the Court emphasized that in determining whether a state-law claim imposes a requirement for labeling, "[t]he proper inquiry calls for an examination of the elements of the common-law duty at issue." *Ibid.*

Under *Bates*, if the state-law duty underlying a cause of action "requires that manufacturers label . . . their products in any particular way," then that duty would "set a standard for . . . labeling." *Id.* at 1798, 1799. The Court found, however, that the Fifth Circuit was "quite wrong when it assumed that any event, such as a jury verdict, that might 'induce' a pesticide manufacturer to change its label should be viewed as a requirement." *Id.* at 1798. According to the Court, "[a] requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an *optional decision* is not a requirement." *Id.* at 1799 (emphasis added).

'Optional' in the Real World? But in the real world, how "optional" is a pesticide manufacturer's decision to revise a label if leaving it unchanged would expose the

company to recurring state tort liability? Justice Stevens' baffling suggestion in *Bates* that a jury verdict awarding damages for a manufacturer's violation of a common-law duty does not impose a "requirement" for purposes of federal preemption under § 136v(b) conflicts with his opinion in *Cipollone*, which explains that "[s]tate regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." 505 U.S. at 521 (internal quotation marks omitted) (discussing a federal preemption provision which prohibited the States from imposing certain requirements); see also *Medtronic v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring in part and concurring in the judgment) ("[t]he effects of . . . the state tort suit are identical" to those of a "state agency regulation"). The pre-*Bates* FIFRA preemption cases were equally emphatic. See, e.g., *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994) (rejecting as "sophistry" the plaintiffs' contention that "state common law tort judgments are not 'requirements' . . . it cannot be presumed that businesses wish to bring about their own economic suicide"); see generally Viet D. Dinh, "Reassessing the Law of Preemption," 88 Geo. L.J. 2085, 2114 (2000) ("the effect of tort liability on primary conduct is the same as a statutory prescription or regulatory standard").

Bates nevertheless holds that "[t]he inducement test is unquestionably overbroad" and "finds no support in the text of § 136v(b)." 125 S.Ct. at 1799. But how can that be since, according to the Court (*ibid.*), a state-law duty sets a standard for labeling (*i.e.*, imposes a requirement for labeling within the meaning of § 136v(b)) if it requires a manufacturer to label a product in a particular way? The opinion cautions that § 136v(b) "does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action." *Ibid.* The Court previously has explained, however, that "this Court's pre-emption cases ordinarily assume compliance with the state-law duty in question." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 882 (2000). Further, the opinion notes that "[g]iven the inherently dangerous nature of pesticides, most safety gains are achieved not through modifying a pesticide's design, but by improving the warnings and instructions contained on its label." 125 S.Ct. at 1802 n.25. In view of the Court's seemingly circular reasoning, trial courts will have to decide whether *Bates* still allows them to consider, as one factor in determining whether a claim is based on a duty that would require a product to be labeled in a particular way (*i.e.*, a duty that would impose requirements for labeling), evidence that the manufacturer would change the labeling to avoid liability for breach of that duty.

Meaning of 'In Addition To or Different From'

Section 136v(b) preempts any requirements for labeling which are "*in addition to or different from*" those required under FIFRA. 7 U.S.C. § 136v(b) (emphasis added). *Bates* reads into this seemingly all-encompassing prohibition, a "parallel requirements" exception (125 S.Ct. at 1800) which, unless judiciously applied by the lower courts, threatens to engulf § 136v(b) itself.

The opinion holds that § 136v(b) "pre-empts any statutory or common-law rule that would impose a la-

being requirement that *diverges from* those set out in FIFRA and its implementing regulations. It does not, however, pre-empt any state rules that are *fully consistent with* federal requirements.” *Id.* at 1803 (emphasis added). More specifically, *Bates* holds that “a state-law labeling requirement is not pre-empted by § 136v(b) if it is *equivalent to*, and fully consistent with, FIFRA’s *misbranding provisions*.” *Id.* at 1800 (emphasis added).

FIFRA makes it unlawful to distribute or sell a pesticide that is “misbranded.” 7 U.S.C. § 136j(a)(1)(E). A pesticide is misbranded if, among other things, its label does not contain adequate warnings (*id.* § 136(q)(1)(G)), its labeling does not contain necessary directions for use (*id.* § 136(q)(1)(F)), or its labeling contains a false or misleading statement (*id.* § 136(q)(1)(A)). Citing FIFRA’s prohibition against distribution of a misbranded pesticide, the Court indicates that “manufacturers have a continuing obligation to adhere to FIFRA’s labeling requirements.” *Bates*, 125 S.Ct. at 1795.

The Court remanded the petitioners’ fraud and failure-to-warn claims for the Fifth Circuit’s determination as to whether they are based on state-law duties that “diverge” from, or instead, whether they are based on duties that are “equivalent” to, FIFRA’s misbranding standards, as applied by EPA. *See id.* at 1803 & 1803 n.27. (It can be inferred from the Court’s remand that *Bates* does not read into § 136v(b) the categorical exclusion of efficacy-related crop damage claims that the petitioners and their amici had advocated.) The Court explained its “equivalency” concept as follows:

We emphasize that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption. For example, were the Court of Appeals to determine that the element of falsity in Texas’ common-law definition of fraud imposed a broader obligation than FIFRA’s requirement that labels not contain “false or misleading statements,” that state-law cause of action would be pre-empted by § 136v(b) to the extent of that difference. State-law requirements must also be measured against any relevant EPA regulations that give content to FIFRA’s misbranding standards. For example, a failure-to-warn claim alleging that a given pesticide’s label should have stated “DANGER” instead of the more subdued “CAUTION” would be pre-empted because it is inconsistent with 40 CFR § 156.64 (2004), which specifically assigns these warnings to particular classes of pesticides based on their toxicity.

Id. at 1803-04 (emphasis added). The Court noted that

[a]t present, there appear to be relatively few regulations that refine or elaborate upon FIFRA’s broadly phrased misbranding standards. To the extent that EPA promulgates such regulations in the future, they will necessarily affect the scope of pre-emption under § 136v(b).

Id. at 1804 n.28; *see also id.* at 1804 (Breyer, J., concurring) (explaining that “EPA enjoys . . . authority” to “determine the pre-emptive effect” of its own rules and that “the federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements”).

Referring to its “ ‘parallel requirements’ reading of § 136v(b),” the Court asserts that there is no other “plausible alternative interpretation of ‘in addition to or different from’ that would give that phrase meaning.”

Id. at 1801. According to the Court, that phrase is “evidence of [Congress]’ intent to draw a distinction between state labeling requirements that are pre-empted and those that are not.” *Ibid.* But there is an alternative plausible interpretation: Rather than merely prohibiting state labeling requirements that *differ* from federal requirements, Congress also expressly barred *additional* state labeling requirements in order to *entirely preclude* state regulation of labeling. This reading of § 136v(b) is supported by its legislative history, which indicates that the House Committee on Agriculture “has adopted language which is intended to *completely preempt State authority in regard to labeling*.” H.R. Rep. No. 92-511, at 16 (1971) (emphasis added). It also is consistent with the Supreme Court’s acknowledgement in *Wisconsin Public Intervenor v. Mortier* that pesticide “labeling . . . fall[s] within an area that FIFRA’s ‘program’ pre-empts.” 501 U.S. at 615.

Bates acknowledges that “FIFRA does not provide a federal remedy” to individuals who seek to enforce the statute’s labeling requirements (including its misbranding requirements). 125 S.Ct. at 1801. The absence of such a private enforcement provision in FIFRA represents a carefully considered congressional determination, not a statutory deficiency. *See Rodriguez v. American Cyanamid Co.*, 858 F. Supp. 127, 131 (D. Ariz. 1994) (“Congress considered and explicitly rejected amendments that would have authorized citizen suits to enforce the 1972 Act’s prohibitions”) (quoting *In re Agent Orange Product Liability Litigation*, 635 F.2d 987, 992 n.9 (2d Cir. 1980) and collecting cases); *see also Almond Hill School v. U.S. Dept. of Agriculture*, 768 F.2d 1030, 1037-38 (9th Cir. 1985) (discussing the reasons why Congress decided not to include a private enforcement provision in FIFRA).

Yet, according to the Court, “[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA.” *Bates*, 125 S.Ct. at 1802. To the contrary, a spate of damages suits allowing juries in every state to determine for themselves whether a product is misbranded under FIFRA, especially if EPA has made no finding that the product is misbranded, inevitably would disrupt if not destroy the national labeling uniformity which Congress mandated in the statute. The United States, in the *amicus curiae* brief which the Solicitor General and EPA General Counsel submitted to the Supreme Court, expressed great concern about the impact of such suits:

The FIFRA [misbranding and enforcement] provisions, taken in combination, provide a comprehensive scheme for imposing and enforcing a nationally uniform system of labeling requirements and *confer upon EPA the full range of authority to interpret and apply the uniform federal standards.*

...

It is no answer to say that the FIFRA misbranding standard and the state standard of due care are “consistent,” because the State is under no obligation under state law to ensure that its common-law standard produces labeling requirements that are the same as those mandated under FIFRA — *and absent an EPA finding of misbranding is in no position to do so.* EPA administers FIFRA through centralized expert judgment, while the 50 States apply common-law standards through an adversarial process . . . it is *virtually certain that even identically*

phrased federal and state standards would produce divergent labeling requirements.

...

Congress, which expressed its objective in Section 136v(b) to subject pesticide manufacturers to a single body of federal law governing pesticide labeling obligations, could not have intended to undermine that uniformity by allowing each State to determine for itself whether the federally approved label is “false or misleading,” and, if so, what remedies and sanctions to impose on the registrant.

Brief for United States as *Amicus Curiae* at 25-26 (emphasis added).

According to the Court, “the United States exaggerate[s] the disruptive effects of using common-law suits to enforce the prohibition on misbranding.” 125 S.Ct. at 1802. But the majority opinion’s reliance on “[t]he long history of tort litigation against manufacturers of poisonous substances (*id.* at 1801),” especially prior to enactment of § 136v(b) more than three decades ago, is as Justice Thomas indicated, “irrelevant” (*id.* at 1806) (Thomas, J., concurring in the judgment in part and dissenting in part). Needless to say, the frequency, burdens, and costs of litigation in today’s world, especially in the area of product liability and toxic torts, have greatly increased since the mid-Twentieth Century. Nor are tort suits needed as some sort of “catalyst” to spur product improvements. *Id.* at 1802. Pesticide manufacturers are responsible corporate citizens which already have every ethical and commercial incentive for ensuring that their products are safe and effective, and that their labeling is up-to-date.

Bates ultimately acknowledges the significant role of § 136v(b) in maintaining nationally uniform labeling:

[U]nder our interpretation, § 136v(b) retains a narrow, but still important, role. In the main, it preempts competing state labeling standards—imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings—that would create significant inefficiencies for manufacturers.

125 S.Ct. at 1803 (emphasis added). The Court failed to appreciate, however, that the compelling need for national labeling uniformity transcends economic inefficiencies. Indeed, although “the statute authorizes a relatively decentralized scheme that preserves a broad role for state regulation” (*id.* at 1802), the crucial role played by EPA-regulated, nationally uniform product labeling in promoting the safe and effective use of pesticides cannot be overstated.

The Post-Bates Challenge

Trial courts called upon to conduct post-*Bates* preemption analyses under § 136v(b) face a formidable task. *Bates* indicates that “[i]n undertaking a preemption analysis at the pleadings stage of a case, a court should bear in mind the concept of equivalence.” 125 S.Ct. 1804. Further,

[i]f a case proceeds to trial, the court’s jury instructions must ensure that nominally equivalent labeling requirements are genuinely equivalent. If a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards. For a manufacturer should not be held liable under a state labeling requirement subject to

§ 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA.

Ibid. (emphasis on “genuinely” in original); *see also id.* at 1805 (Thomas, J., concurring in the judgment in part and dissenting in part) (“A state-law cause of action, even if not specific to labeling, nevertheless imposes a labeling requirement ‘in addition to or different from’ FIFRA’s when it attaches liability to statements on the label that do not produce liability under FIFRA.”) (emphasis added).

In other words, for purposes of § 136v(b) preemption analysis, the question which *Bates* instructs courts to answer on a case-by case, claim-by-claim basis is whether the omission (or inclusion) of a particular warning or other statement on a product’s labeling renders the product misbranded under FIFRA. Under *Bates*, if a product is not misbranded under FIFRA, a state-law damages claim imposing requirements for labeling of the product (e.g., a failure-to-warn claim), would impose requirements that are “in addition to or different from,” and not equivalent to, FIFRA’s misbranding standards. Therefore, § 136v(b) would expressly preempt the claim.

It may not be readily apparent to a trial court whether a particular failure-to-warn claim (or similar claim) would impose a requirement for labeling that is “genuinely equivalent” to FIFRA’s misbranding standards, as interpreted and applied by EPA. Such a determination may involve considerably more judicial analysis than a superficial comparison between the general elements of the state-law cause of action and the text of FIFRA’s misbranding definition. For example, suppose a plaintiff alleges that a manufacturer failed to warn him that using its pesticide product would cause his hair to fall out. In order to determine whether omission of that warning from the product’s EPA-approved label rendered the product misbranded for purposes of § 136v(b) preemption analysis, the trial court would have to determine whether such a warning was “necessary” and “if complied with . . . adequate to protect health” (7 U.S.C. § 136(q)(1)(G)). To make that determination, the court, either prior to or during trial, might want to consider facts such as whether the plaintiff has credible scientific evidence to support his claim that the pesticide caused his hair to fall out; whether the manufacturer was aware of any such scientific evidence; and whether EPA, if aware of such evidence, would have required a warning on the product’s labeling regarding the risk to a user’s hair. If EPA would not have required such a warning, then the manufacturer would not be “liable for misbranding as defined by FIFRA.” *Bates*, 125 S.Ct. at 1804. As a result, the failure-to-warn claim would impose a labeling requirement which diverges from EPA’s labeling requirements, and therefore, as confirmed by *Bates*, would be preempted by § 136v(b).

Conclusion

Bates creates new challenges for pesticide manufacturers, which not only need to continue doing everything possible to prevent product liability, but also to defend themselves vigorously when unwarranted damages suits are filed. *Bates* is a major disappointment for industry, and has the potential to seriously undermine EPA’s authority to regulate nationally uniform pesticide labeling and carry out the statute’s misbranding prohibition in a fair and uniform manner. Nevertheless, FI-

FRA preemption remains an important and viable defense against certain types of state-law damages claims. Pesticide manufacturers and others in the chain of dis-

tribution will immediately need to adopt new strategies and tactics for pursuing preemption, and when necessary, for mounting an aggressive defense at trial.

