

# Speaking Truth to Power

Speaking truth to power, for justice! The Supreme Court really got it right in its decision April 27, 2005 upholding the right of 29 Texas peanut farmers to sue for crop damage they claimed was caused by Dow Chemical Company's herbicide Strongarm (diclosulam). In a 7-2 decision – Justices Thomas and Scalia dissented – Dow argued that because it registers its products with EPA it is shielded from common tort law.

We urged our colleagues to join together and file a friend of the court brief in the face of nine circuit courts of appeal and numerous state court decisions against the right to seek redress for pesticide-caused damage. It looked bleak. Earthjustice attorney Patti Goldman wrote a spectacular brief. Meanwhile, the Bush administration reversed the government's longstanding position and supported Dow with a brief that challenges the basic right to sue in a democracy. Then the Supreme Court's decision. Attorney Bishop Dansby writes in this issue of PAY, "I do not remember any other example of so much clear precedent being overturned." Then, he writes about the broad legal implications of the case in stopping backdoor attempts to effect tort reform by limiting the public's access to the courts through federal preemption.

The case warrants our attention because it reaffirms a basic democratic right to defend ourselves against toxic chemical abuse. The court found:

*The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against preemption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly. Moreover, this history emphasizes the importance of providing incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items. Particularly given that Congress amended FIFRA to allow EPA to waive efficacy review of newly registered pesticides (and in the course of those amendments made technical changes to §136v(b)), it seems unlikely that Congress considered a relatively obscure provision like §136v(b) to give pesticide manufacturers virtual immunity from certain forms of tort liability. Over-enforcement of FIFRA's misbranding prohibition creates a risk of imposing unnecessary financial burdens on manufacturers; under-enforcement creates not only financial risks for consumers, but risks that affect their safety and the environment as well.*

*Dow and the United States exaggerate the disruptive effects of using common-law suits to enforce the prohibition on misbranding. FIFRA has prohibited inaccurate representations and inadequate warnings since its enactment in 1947, while tort suits alleging failure-to-warn claims were common well before that date and continued beyond the 1972 amendments. We have been pointed to no evidence that such tort suits led to a "crazy-quilt" of FIFRA standards or otherwise created any real hardship for manufacturers or for EPA. Indeed, for much of this period EPA appears to have welcomed these tort suits.*

Now the question is whether there will be an effort in Congress to explicitly preempt the right to sue that has been affirmed by the Supreme Court. It is critical to uphold this right because: (i) Pesticides are registered by EPA under a risk assessment review process that implicitly does not consider all aspects of potential harm; (ii) The potential for court review of cases in which people are harmed creates a strong incentive for the development of safer products; and, (iii) The same companies or their trade associations, including Dow Chemical Company, that have successfully lobbied for weak national laws and standards do not want people who are harmed as a result to seek redress.

## The Truth Comes Out

Meanwhile, pesticides continue to leave their mark, literally, on people's bodies. In the *Third National Report on Human Exposure to Environmental Chemicals*, released by the Centers for Disease Control (CDC) on July 21, striking new data shows widespread synthetic pyrethroid pesticide exposure. The report finds that more than 50 percent of the population carries residues of the metabolite (3-Phenoxybenzoic acid) for the pyrethroid insecticides permethrin, cypermethrin and deltamethrin. While permethrin is a possible carcinogen, all the pyrethroids are closely associated with respiratory illness and asthma, an illness of increasing concern affecting growing numbers of people, which we write about in this issue. Sixteen million people suffer from asthma in the U.S. alone, including 1 in 8 school-aged children. Asthma is the leading cause of school absenteeism and the third most common cause for hospitalization in children under 15. Low-income populations, minorities, and children living in inner cities experience disproportionately higher morbidity and mortality due to asthma.

While CDC officials do not link residues in the body to adverse impacts on health, this is yet more evidence that we must, at the community level, adopt practices that eliminate the use of toxic pesticides.

This issue of PAY identifies other battles that must be waged to keep protections from backsliding: Congress is considering legislation to amend the *Clean Water Act* to eliminate the national pollutant discharge elimination system (NPDES) permit

requirement, making it easier to contaminate waterways; and, the Bush administration is proposing to weaken EPA cancer guidelines.

The more the laws are weakened, the greater is the responsibility for local decision makers who can no longer rely on a regulatory system to protect their community's health, water safety, and environment.

—Jay Feldman is executive director of Beyond Pesticides.

