

Bates v. Dow Agrosciences

U.S. Supreme Court restores sanity in products liability law

by H. Bishop Dansby, Esq.

In *Bates v. Dow Agrosciences LLC*, decided by the U.S. Supreme Court April 27, 2005, petitioners were 29 Texas peanut farmers who alleged that in the 2000 growing season their crops were severely damaged by the application of Dow's newly marketed pesticide named "Strongarm." The question presented was whether the *Federal Insecticide, Fungicide, and Rodenticide Act* (FIFRA), 7 U. S. C. §136 *et seq.* (2000 ed. and Supp. II), pre-empted their state-law claims for damages, denying those hurt by pesticides the right to compensation. The victims' rights court upheld the basic right to sue.

Victims' Rights

For a long time, the air has been filled with conservative chants for "tort reform." To accomplish tort reform, one must confront principles used and developed by thousands of actual cases where courts attempted to balance the rights of plaintiffs and defendants. One can nibble around the edges of tort law, such as eliminating joint and several liability (right to full compensation from liable parties). Another approach is to legislate caps on damages, such as has been done in medical malpractice cases.¹ A cruder approach is the appointment of conservative trial and appellate judges. Finally, one of the most promising approaches would have seemed to be federal preemption.

Federal Pre-emption

Federal pre-emption has the potential for effecting the aims of conservative tort reformers because it transfers responsibility for safety of products from the courts to administrative agencies. In a complex world, we do, in fact, need "pre-emptive" action to protect the American public. Potentially dangerous products such as drugs, medical devices, automobiles, and pesticides should meet threshold *a priori* standards before they are placed in commerce. The alternative would be experimentation with *ex post facto* remedies by the courts that could have the effect of counting the dead and wounded. However, the legal concept of federal pre-emption means that federal law and regulation takes the place of state law.

Pre-emption and "implied pre-emption" were being thrown up by defendants for many other products that were regulated by federal agencies, such as air bags, automobile tires, medical devices, and tobacco. The irony is that the most success with this approach had been achieved with *pesticides*, a product specifically designed to kill, and to target the hardiest, most resilient

creature on earth—insects. Their application runs the greatest risk of abuse and overuse by naïve consumers and under trained, lowly paid pesticide applicators. The mistakes we have made with pesticides in the past are mind-boggling. The pesticide DDT nearly wiped out the national symbol, the American bald eagle. Persistent organic pesticides (POPs) are found in the tissue of sea animals and human breast milk around the world. Tens of millions of American homes are contaminated with pesticides.² Pesticides have been strongly implicated in childhood cancer.³

The defense of pre-emption in the context of FIFRA began with a major tobacco case, *Cipollone v. Liggett Group, Inc.*⁴ Although *Cipollone* did not involve FIFRA, the *Public Health Cigarette Smoking Act of 1969* used similar terminology in the federal regulation of the label warnings. Both the Cigarette Smoking act and FIFRA forbade states from imposing "requirements" on the labels or warnings on the products. The Supreme Court distinguished between the two pre-emption clauses:

While the courts of appeal have rightly found guidance in Cipollone's interpretation of "requirements," some of those courts too quickly concluded that failure-to-warn claims were pre-empted under FIFRA, as they were in Cipollone, without paying attention to the rather obvious textual differences between the two pre-emption clauses. Unlike the pre-emption clause at issue in Cipollone, §136v(b) prohibits only state-law labeling and packaging requirements that are "in addition to or different from" the labeling and packaging requirements under FIFRA. Thus, 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.

The bottom line of this double talk is that state tort actions are once again allowed against pesticide manufacturers. FIFRA pre-emption is to be interpreted narrowly as affecting only the regulation by states of the wording of the label. Even failure to warn causes of action are allowed, on the theory that state actions can run in parallel with FIFRA regulation. Before *Cipollone*, this is the way claims against pesticide manufacturers did proceed, and this is how products liability, in general, functioned. The mere fact that a product was regulated and the mere fact that the product complied with that regulation did not protect the manufacturer from a common law tort action. Compliance with regulations was considered a minimum requirement of manufacturers.

On the authority of *Cipollone*, the lower courts had developed the principle that any cause of action that might induce a pesticide manufacturer to change its label was pre-empted. This had the effect of total pre-emption, as even a jury verdict could be said to have that effect. If a plaintiff alleged that a pesticide product was negligently designed because it harmed a person even when applied according to the label, the court would rule that such a cause of action was really a "failure to warn" disguised as "design defect." In other words, if EPA had decreed that the product was a good product when used according to the label, the judgment about whether it was properly designed had already been made. This created the anomalous situation that products could be legal and harmful even when used as directed. Indeed, this is exactly the situation with cigarettes. But, after *Bates*, this is not the law as to pesticides and is less likely to be the law for other dangerous products.

The *Bates* court was clear that it intended to allow state common law torts to be a parallel remedy to FIFRA regulation:

Private remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA. Unlike the cigarette labeling law at issue in Cipollone, which prescribed certain immutable warning statements, FIFRA contemplates that pesticide labels will evolve over time, as manufacturers gain more information about their products' performance in diverse settings. As one court explained, tort suits can serve as a catalyst in this process:

"By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides such as [the pesticide there at issue], a state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed

labeling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits. In addition, the specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement." Ferebee, 736

So, were nine circuit courts of appeal and innumerable state courts wrong in their interpretation of *Cipollone*?⁵ I do not remember any other example of so much clear precedent being overturned. The *Bates* court, apparently recognizing how thin the difference between its interpretation of the FIFRA pre-emption provision and that of the circuit courts of appeal, proposed an alternative rationale:

Even if Dow had offered us a plausible alternative reading of §136v(b)—indeed, even if its alternative were just

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— From *Bates vs. Dow*

as plausible as our reading of that text—we would nevertheless have a duty to accept the reading that disfavors pre-emption. "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." Medtronic, 518 U. S., at 485. In areas of traditional state

regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention "clear and manifest."

While resort to the states' rights mantra is a bit weak, the Court's argument that follows is more convincing:

The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly. See Silkwood v. Kerr-McGee Corp., 464 U. S. 238, 251 (1984). Moreover, this history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items. See Mortier, 501 U. S., at 613 (stating that the 1972 amendments' goal was to "strengthen existing labeling requirements and ensure that these requirements were followed in practice").

Supreme Court affirms right to sue

Because of the distortion caused by *Cipollone*, we have had fifteen years of FIFRA pre-emption. Among farmers' claims alone, it is documented that 100 claims against pesticide manufacturers filed in the last 15 years were dismissed, while

only three have prevailed. We had reached the point where pesticide claims against the manufacturer were no longer a viable cause of action. The Supreme Court chose to hear this case and has not only clarified federal pre-emption in the area of products liability, I believe it has also signaled a return to sanity in tort reform. Although necessarily speculative to say so, the court may well have been influenced by recent highly publicized product liability cases. The Firestone and Ford Explorer tire cases made its way into Congressional hearings, as did Vioxx and other drug cases. If industry had wanted to avoid common law product liability, it should have made better tires, better drugs.

If doctors and huge drug companies occupy a place of privilege, pesticides surely do not. *Bates* was a golden opportunity to return the civil litigation system to its traditional role of responding to societal needs in a complex, rapacious, and competitive world. This case not only clears the way for protection against dangerous pesticides, but also deals a lethal blow to tort reform through the back door of federal pre-emption. The real importance of *Bates* is that it may mark the end of the use of pre-emption for tort reform.

Beyond Pesticides, Defenders of Wildlife, Farmworker Justice Fund, Natural Resources Defense Council, Physicians for Social Responsibility, Public Citizen and Sierra Club

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joined in *Bates v. Dow* with an amicus brief. Earthjustice and Trial Lawyers for Public Justice served as legal counsel. The Bush Administration filed a brief in support of Dow Chemical Company.

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Endnotes

¹ While such legislation has been found to be constitutional, it is ostensibly an encroachment on the right to jury trial. Further, it is ostensibly unnecessary, given the common law procedures of remittitur and right of appeal.

² Americans put an estimated 62.7 million pounds (28.5 million kilograms) of pesticides and 278.5 million pounds (126.6 million kilograms) of antimicrobials (disinfectants) into their homes each year. Somia Gurunathan and others, "Accumulation of Chlorpyrifos on Residential Surfaces and Toys Accessible to Children," *Environmental Health Perspectives* Vol. 106, No. 1 (January 1998), pgs. 9-16.

Recent studies estimate that between 78% and 97% of families in the midwestern U.S. use pesticides in and around the home. Julie L. Daniels and others, "Pesticides and Childhood Cancers," *Environmental Health Perspectives* Vol. 105, No. 10 (October 1997), pgs. 1068-1077.

A study of indoor air in homes in Jacksonville, Florida detected pesticides in the air in 100% of the homes. Janice M. Pogoda and Susan Pres-

ton-Martin, "Household Pesticides and Risk of Pediatric Brain Tumors," *Environmental Health Perspectives* Vol. 105, No. 11 (November 1997), pgs. 1214-1220.

³ Zahm, Shelia Hoar and Mary H. Ward, "Pesticides and Childhood Cancer," *Environmental Health Perspectives* 106, Supp.3, Jun98.

⁴ *Cipollone v. Liggett Group, Inc.*, 505 U. S. 504 (1992).

⁵ Finally, it bears emphasis that all nine federal courts of appeals that have addressed FIFRA pre-emption since *Cipollone* and *Medtronic* have concluded that § 136v(b) preempts common-law labeling claims. The highest courts of at least 18 states have agreed... In another nine States, intermediate courts of appeal have also adopted this construction. Only one state supreme court and one state intermediate appellate court have disagreed... "The very strength of this consensus is enough to rule out any serious claim of ambiguity." *General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236, 1244-1245 (2004). Brief for Respondent, *Bates v. Dow Agrosciences LLC*, page 27-28.

⁶ David Frederick, who represented the farmers in oral arguments before the Supreme Court, in a statement to BNA.