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PESTICIDES

The federal government regulates the marketing of many consumer goods, under various statutes. Some of these regulatory schemes do very little; others require an agency to examine a product's safety and effectiveness before it can be sold. These statutes provide no damages remedies for consumers who may be injured; state common law has been the traditional means of relief.

Congress has the power to expressly preempt state common-law actions, but the U.S. Supreme Court has repeatedly directed lower courts to interpret preemption provisions narrowly. The Court reiterated that principle in its most recent preemption decision, *Bates v. Dow Agrosciences LLC*. In this analysis, authors Daniel Mosteller and Brian Wolfman discuss the background of the *Bates* decision and predict its effects, in light of the lower courts' recent tendency to rule in favor of defendants in tort preemption cases.

Bates v. Dow Agrosciences: Will the Lower Courts Finally Start Listening?

BY DANIEL MOSTELLER AND BRIAN WOLFMAN

Background

Under a wide range of statutes, the federal government regulates the marketing of many consumer goods. Together, they affect every facet of our lives, from the cars we drive, the drugs we ingest, the hazardous substances we use to clean our homes, and the pesticides we apply to our lawns and use to grow the foods we eat. Some of these federal regulatory schemes do little more than ensure that manufacturers' unverified assertions about their products are set forth on labels that meet general federal disclosure requirements, while others demand that an expert agency take a serious look at the product's safety and efficacy before it is marketed. In any case, for consumers who have suffered injuries because the product is defective or has been marketed in an untruthful way, these federal statutes provide no damages remedies, leaving that function to the states, whose common law traditionally has

provided the means for compensating injuries caused by consumer products.

Although Congress has the power expressly to foreclose these state common-law actions by statute—in what are generally referred to as preemption provisions—the Supreme Court has time and again told the lower courts that such provisions must be interpreted narrowly and that they oust state remedies only when the text of the relevant federal law clearly and manifestly demands that result.[1] In its most recent foray into tort preemption, *Bates v. Dow Agrosciences LLC*,[2] a case involving injuries caused by federally regulated pesticides, the Supreme Court powerfully reiterated that principle.

In the pages that follow, we first provide the factual backdrop for the Court's decision, and then turn to the *Bates* decision itself, explaining on a claim-by-claim basis the Court's rejection of the pesticide manufacturer's broad preemption arguments. We then assess the immediate impact of the decision on pesticide-related litigation. Finally, we predict the effect *Bates* will have more generally on corporate claims of preemption in tort litigation. In this regard, we try to assess the likely reaction of the lower federal courts to *Bates* in light of the tendency of those courts in recent years to rule in favor of defendants in tort preemption cases.

In spring 2000, Dow Agrosciences LLC (Dow) began to market a new weed killer—Strongarm—to Texas peanut farmers. The product's label included the statement that the ''[u]se of Strongarm is recommended in all areas where peanuts are grown.''[3] A group of peanut farmers in West Texas, where the soil is less acidic than elsewhere in Texas, reported to Dow that the pesticide was damaging their peanut crop and was ineffective against weeds.[4] (In subsequent years, Dow added a label warning that the pesticide should not be used in less acidic soils.[5]) After negotiation with Dow failed, 29 of these farmers notified the company of their intention to file suit, as required by the Texas consumer protection statute.[6] After receiving this notice, Dow filed a declaratory judgment action in federal district court seeking to have the farmers' claims against Dow held preempted by federal law.[7] The farmers responded by filing counterclaims against Dow under the Texas consumer protection statute and under Texas common law. Specifically, the farmers claimed that the pesticide was defectively designed and manufactured, that Dow was negligent in its pre-market testing of Strongarm, that Dow breached express warranties that it made to the farmers, that Dow negligently failed to warn of Strongarm's shortcomings, and that Dow had committed fraud.[8]

Dow sought refuge from these state-law claims in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[9] FIFRA, on the books since 1947, authorizes the federal government's regulation of pesticides.[10] Since its substantial overhaul in 1972, the act requires that the Environmental Protection Agency (EPA)—the agency charged by Congress to implement and enforce FIFRA—approve pesticides prior to their sale.[11] In theory, the EPA verifies pesticides' efficacy, lack of adverse environmental and health effects, and truthful labeling prior to marketing approval.[12] The EPA, however, has exercised its statutory authority[13] to generally waive the efficacy review and has publicly announced that its ''approval of a pesticide label does not reflect any determination on the part of EPA that the pesticide will be efficacious or will not damage crops or cause other property damage.''[14] Moreover, manufacturers face a continuing burden after a pesticide is brought to market; a pesticide bearing a label with information that currently cannot be justified as true is ''misbranded'' and, thus, violates FIFRA.[15]

When Congress amended FIFRA in 1972, it detailed a joint state and federal role for supervision of the pesticide market. The act authorizes state regulation of ''the sale or use of any federally registered pesticide'' as long as the states do not permit a sale or use prohibited by federal law.[16] Moreover, the act allows states to authorize sale of pesticides targeting ''special local needs.''[17] Based largely on these provisions, the Supreme Court in 1991 unanimously rejected the notion that FIFRA preempted states from entering the field of pesticide regulation.[18] FIFRA, however, does include a provision—codified at 7 U.S.C. § 136v(b)—that expressly preempts states from imposing or continuing ''any requirements for labeling or packaging in addition to or different from those required under'' the act.[19] Nothing in the preemption provision explicitly references state-law damages actions against pesticide manufacturers, and tort claims against them were a regular feature of the legal system both when FIFRA was originally enacted and at the time of its overhaul in 1972.[20] Moreover, in both its publications and prior litigating positions, the EPA had maintained long after the preemption provision was added that pesticide manufacturers remained ''potentially subject to damage suits by the user community if their products prove ineffective in actual use.''[21] Section 136v(b), nonetheless, served as the hook for Dow's requested injunction

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[1] *See, e.g., Medtronic Inc. v. Lohr*, 518 U.S. 470, 484-86 (1996).

[2] 125 S. Ct. 1788 (2005).

[3] *Id.* at 1793.

[4] *See id.*

[5] *See id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 1793, 1797 n.15.

[9] 7 U.S.C.A. §§ 136-136y (West 1999 & Supp. 2005).

[10] *See Bates*, 125 S. Ct. at 1794.

[11] *See id.* at 1794-95.

[12] *See id.* at 1795 (citing 7 U.S.C. § 136a(c)(5)(A)-(D) (2000)).

[13] 7 U.S.C. § 136a(c)(5); 40 C.F.R. § 158.640(b) (2004).

[14] *Bates*, 125 S. Ct. at 1796 (quoting ENVTL. PROT. AGENCY, PESTICIDE REGISTRATION NOTICE 96-4, at 3 (1996)) (internal quotation mark omitted).

[15] *See id.* at 1795 (citing 7 U.S.C. § 136j(a)(1)(E)).

[16] 7 U.S.C. § 136v(a).

[17] *Id.* § 136v(c)(1).

[18] *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607 (1991).

[19] 7 U.S.C. § 136v(b).

[20] *See Bates*, 125 S. Ct. at 1796.

[21] *Id.* (quoting ENVTL. PROT. AGENCY, PESTICIDE REGISTRATION NOTICE 96-4, at 5 (1996) (quoting Regulations for the Enforcement of the Federal Insecticide, Fungicide and Rodenticide Act; Proposed Registration, Reregistration and Classifications Procedures, 47 Fed. Reg. 40,659, 40,661 (Sept. 15, 1982))) (internal quotation marks omitted); *see also id.* at 1794 & n.7.

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against the farmers' action to obtain compensation for damage to their crops.

The Supreme Court's Decision

The Supreme Court, in a 7-2 decision authored by Justice Stevens, found that none of the farmers' claims against Dow was definitively preempted by FIFRA.[22] The ruling reversed the decision of the Fifth Circuit that FIFRA expressly preempted all of the farmers' claims.[23] The Court acknowledged that, under its 1992 decision in *Cipollone v. Liggett Group Inc.*,[24] the ''requirements'' language of Section 136v(b) preempts both state statutes *and* common-law rules that impose duties in areas of regulation that Congress has assigned exclusively to the federal government.[25] *Cipollone* had found that the preemption provision accompanying the federal cigarette-labeling law forecloses certain state common-law claims against tobacco companies for a negligent failure to warn,[26] rejecting the contention that the term ''requirement'' refers only to the positive enactments of state legislatures.[27]

However, a holding that FIFRA *could* preempt common-law actions, *Bates* explained, did nothing to define the preemptive *scope* of Section 136v(b). In addressing that question, the Court noted the two specific ways that Congress had limited the breadth of the preemption provision: first, the state law must apply to ''labeling or packaging''; second, the state law must be ''in addition to or different from'' requirements imposed by FIFRA.[28] From these key observations, the Court proceeded to examine each of the farmers' counterclaims—similar to the claim-by-claim analysis it had conducted in *Cipollone* and *Medtronic Inc. v. Lohr*[29] —to determine whether they were within FIFRA's preemptive reach.

The Fraud and Failure-to-Warn Claims

The Court agreed with Dow that two of the farmers' claims—fraud and negligent failure to warn—did premise liability solely on the false or inadequate content of the pesticide's label. Since those two claims were based on Dow's affirmative legal duty to incorporate certain elements into the pesticide's label, they were ''requirements'' applying to ''labeling or packaging.''[30] But the Court's agreement with Dow went no further. The Court then proceeded to consider whether those two claims would, under Section 136v(b), impermissibly create requirements that were ''in addition to or different from'' FIFRA's requirements.

The Court found that this ''in addition to or different from'' qualifying language distinguished FIFRA from the absolute language of the preemption statute in *Cipollone*, which allowed ''[n]o [state-law] requirement or prohibition'' related to product labeling.[31] In noting this distinction, the Court took lower courts to task for ''too quickly conclud[ing] 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.''[32]

Instead, the Court recognized, the proper interpretation of FIFRA's provision was controlled by the analysis it had undertaken of a similarly worded preemption provision in *Medtronic*.[33] Thus, the Court held, a state common-law action could be maintained against a medical device manufacturer as long as it premised liability on a violation of the Medical Device Amendments of 1976,[34] because those amendments preempt only state-law requirements that are ''different from, or in addition to'' the federal law.[35] *Medtronic* explained that ''[t]he presence of a damages remedy does not amount to the additional or different 'requirement' that is necessary under the statute; rather, it merely provides another reason for manufacturers to comply with identical existing 'requirements' under federal law.''[36]

Bates rejected the efforts of Dow and the United States, appearing as Dow's amicus, to avoid *Medtronic* and eviscerate FIFRA's ''in addition to or different from'' language. In doing so, the Court invoked the presumption against preemption, a canon of construction that disfavors the displacement of state law.[37] The Court also noted that in light of the long history of tort litigation against pesticide manufacturers and Congress's overarching goal in regulating pesticides to make manufacturers use the utmost care, if Congress had intended to immunize manufacturers from tort liability, it ''surely'' would have articulated that intent more clearly.[38] Congress's decision to allow the EPA to waive efficacy review—meaning that ''the EPA never passed on the accuracy of the statement in Strongarm's original label recommending the product's use 'in all areas where peanuts are grown' ''[39]—also undermined the contention that Congress understood Section 136v(b) to broadly preempt state tort law. In the Court's view, Congress would be unlikely to foreclose such a powerful means of ensuring pesticide safety without ensuring that alternative remedies were in place.[40] The EPA's similar past interpretations of the provision, which had understood FIFRA to co-exist with state-law liability, further bolstered this view.[41]

For these reasons, *Bates* concluded that ''although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in § 136v(b) precludes States from providing such a

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[22] *Id.* at 1804.
[23] *See id.* at 1793-94, 1804.
[24] 505 U.S. 504 (1992).
[25] *See Bates*, 125 S. Ct. at 1798.
[26] *Cipollone*, 505 U.S. at 524-25 (plurality opinion); *id.* at 552-54 (Scalia, J., concurring in the judgment in part).
[27] *Id.* at 521 (plurality opinion).
[28] *See Bates*, 125 S. Ct. at 1798.
[29] 518 U.S. 470 (1996).
[30] *See Bates*, 125 S. Ct. at 1799-1800.
[31] *See id.* at 1800 & n.22 (quoting 15 U.S.C. § 1334(b) (2000)) (internal quotation mark omitted).
[32] *Id.* at 1800 (citing *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995); *Shaw v. Dow Brands Inc.*, 994 F.2d 364, 371 (7th Cir. 1993)).
[33] *See id.* 1800-01.
[34] 21 U.S.C. §§ 360c-360k (2000 & Supp. II 2002).
[35] *See Medtronic*, 518 U.S. at 494-96 (quoting 21 U.S.C. § 360k(a)(1) (2000)) (internal quotation marks omitted).
[36] *Id.* at 495.
[37] *See Bates*, 125 S. Ct. at 1801.
[38] *Id.* at 1801.
[39] *Id.* at 1796.
[40] *See id.* at 1802.
[41] *See id.* at 1801; *see also id.* at 1804-05 (Breyer, J., concurring).

remedy.''[42] Further, the Court held, ''state law need not explicitly incorporate FIFRA's standards as an element of a cause of action in order to survive pre-emption.'' [43] Rather, assuming such a state-law cause of action exists, only when a case comes to trial would the preemption question be joined, and jury instructions would need to reflect that the ''nominally equivalent'' state-law legal requirements were ''*genuinely* equivalent'' to FIFRA's requirements.[44] Because the parties had not provided sufficient briefing, the Court declined to decide whether Texas's fraud and failure-to-warn doctrine would incorporate FIFRA's labeling standards and thus would escape preemption.[45]

The Defective Design, Defective Manufacture, Negligent Testing, and Warranty Claims

With respect to all of the farmers' other claims—defective design, defective manufacture, negligent testing, and breach of express warranty—the Court reversed outright because those claims did not ''require[] that manufacturers label or package their products in any particular way.''[46] This reasoning included the express warranty claim because, even if that claim was based on statements made on the product's label, it was premised on Dow's voluntary contractual commitment to the product's users to live up to promises made by the company (and not on statements purportedly ''required'' by state law).[47] Dow had convinced the Fifth Circuit—as manufacturers had convinced many other federal and state appellate courts[48]—that these four claims nevertheless were ''requirements for labeling or packaging'' under section 136v(b) ''because success on such claims would necessarily induce Dow to alter its product label.''[49] Moreover, claims based on the oral statements of Dow's agents were viewed by the Fifth Circuit as preempted, so long as the representations were identical to the information contained on the label, because ''[s]uccess on such an 'off label' claim would provide a manufacturer with a strong incentive to alter its label to avoid future liability.''[50] Using this inducement theory, the farmers' claims had been dismissed as ''disguised'' *Cipollone*-like claims for failure to warn.[51]

Bates rejected that theory in a powerful repudiation of the lower courts' reasoning, holding that courts should not treat the manufacturer's predictions of voluntary behavior changes as ''requirements'':

> 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. The proper inquiry calls for an examination of the elements of the common-law duty at issue; it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action (a question, in any event, that will depend on a variety of cost/benefit calculations best left to the manufacturer's accountants).[52]

Thus, put most simply, the Fifth Circuit's ''effects-based test'' violates the statutory text.

Moreover, in an important corollary to this holding, the Court explained that state-law claims based on oral representations are not preempted for another reason: Such representations do not fall under FIFRA's definition of labeling, which consists solely of ''written, printed, or graphic matter.''[53]

For all of these reasons, the Court reversed the grant of summary judgment for Dow on all four of these non-label-based claims.[54]

The Immediate Impact of the Decision on Pesticide Cases

The Court's holding in *Bates* revives the right of consumers to recover when they are harmed by a pesticide's design or misled by the manufacturer's marketing. The Fifth Circuit's interpretation of FIFRA to immunize manufacturers from liability followed the interpretation of almost all of the post-*Cipollone* federal and state appellate courts. As the industry never hesitated to proclaim, prior to *Bates*, nine federal circuits and appellate courts in 27 states had held that FIFRA broadly preempts state-law claims based on defective pesticide design and improper marketing.[55] That unfortunate history is now just that—history.

Several specific points bear mention. First, *Bates* will apply just as forcefully to claims of personal injury by consumers who have suffered physical harm from unsafe pesticides as it will to crop damage claims brought by farmers. The Court's reasoning was based on a blend of general preemption jurisprudence and a detailed understanding of FIFRA, but none of it turned on a distinction between crop damage (efficacy) and health-based claims. Indeed, the Court viewed the split in appellate authority that it was resolving as including personal-injury cases,[56] and it criticized the reasoning of courts that had held personal-injury claims preempted,[57] while relying at length on a pre-*Cipollone* personal-injury decision from the D.C. Circuit that had emphatically rejected preemption.[58]

Second, plaintiffs will now face no barriers whatsoever from FIFRA in bringing state-law claims that are not premised on the legally required content of a pesticide's label or on omissions from that label. Thus, claims of express warranty and negligent testing, or claims based on defects in the manufacture or design of a pesticide—which are important components of most pesticide-related suits—will advance without fear of preemption. Here, it is important to reiterate the Court's

[42] *Id.*
[43] *Id.* at 1800.
[44] *Id.* at 1804.
[45] *Id.* at 1803.
[46] *Id.* at 1798.
[47] *See id.* at 1798-99.
[48] *Id.* at 1799 n.19
[49] *Dow Agrosciences LLC v. Bates*, 332 F.3d 323, 333 (5th Cir. 2003).
[50] *Id.* at 331.
[51] *See Bates*, 125 S. Ct. at 1794 (citing *Dow*, 332 F.3d at 332-33).
[52] *Id.* at 1799.
[53] *See id.* at 1798 n.17 (quoting 7 U.S.C. § 136(p)(2) (2000)) (internal quotation mark omitted).
[54] *Id.* at 1798.
[55] *See* Brief in Opp. to Pet. for Cert., at 1, in *Bates v. Dow Agrosciences LLC*, No. 03-388 (U.S. S. Ct. filed Nov. 13 2003).
[56] *Bates*, 125 S. Ct. at 1794 nn.4 & 6 (citing several personal-injury cases).
[57] *Id.* at 1799 & n.19 (quoting *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir. 2002)).
[58] *Id.* at 1802 (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541-42 (D.C. Cir. 1984)).

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holding with regard to express warranty and its statement that off-label claims (such as those based on oral representations) are not preempted. That these claims survive preemption is highly significant, because, historically, many misrepresentations alleged in suits over the safety and efficacy of pesticides have been conveyed through voluntary warranties and through the sales pitches of industry representatives.

Third, even where a state-law claim is based on omissions from, or misstatements on, a product label, preemption will not occur if the claim parallels FIFRA's labeling requirements. Such claims will no longer be preempted based only on manufacturers' cries that juries inevitably impose non-uniform standards.[59] To the contrary, even though ''juries might on occasion reach contrary conclusions on a similar issue of misbranding,''[60] as long as the jury is properly instructed (i.e., the jury instructions accurately set forth federal requirements and permit imposition of liability based only on violations of those requirements), *Bates* makes clear that state common-law claims may go forward. Put another way, under *Bates,* state-law claims of negligence per se based on violations of federal pesticide law are not preempted.

In short, it is a new day for plaintiffs in pesticide litigation.

The Long-Term Implications: How Will the Lower Courts React?

The long-term implications of *Bates* are not easy to gauge. To be sure, in ruling in favor of the plaintiffs, the Court made clear that the lower courts' broad preemption holdings in pesticide cases could not be reconciled with the long tradition of state-law liability pre-dating FIFRA's enactment and with FIFRA's unmistakable pro-consumer, pro-safety purposes. However, the Supreme Court has said the same thing before in tort preemption cases with little impact on subsequent lower court rulings. Indeed, a perplexing, but predictable pattern began to emerge shortly before the Supreme Court's 1992 ruling in *Cipollone.* The federal appellate courts have generally held that various federal health and safety statutes preempt a wide range of state-law damages actions, only to be told by the Supreme Court years later that the statute's preemptive reach was far narrower than they had believed.[61] The state appellate courts, on the other hand, have often been more sensitive to the prerogatives of state law, creating splits in appellate authority that formed the basis for Supreme Court review.[62]

The FIFRA preemption cases did not quite follow that pattern. To be sure, the three post-*Cipollone* cases rejecting preemption came from state appellate courts.[63] But otherwise the variance in FIFRA cases between the preemption views of the lower appellate courts and that of the Supreme Court was even more pronounced than it had been with respect to cases involving other regulatory statutes. As noted earlier, based on a rote application of the Court's earlier holding in *Cipollone*, the pro-preemption slant in the lower courts was overwhelming. Not only did nearly every federal circuit hold that plaintiffs' tort claims were broadly preempted by FIFRA, but so did almost every state appellate court presented with the issue. And, as *Bates* explained, many of the lower courts went well beyond the subject matters targeted for preemption by Section 136v(b)—labeling and packaging of pesticides—and held that damages claims premised on breach of warranty or the design and testing of pesticides were preempted as well.[64]

How did the lower courts get it so wrong? *Bates* suggests several answers. As explained above, the lower courts' rulings were premised on one of the High Court's prior rulings—*Cipollone*—involving the Public Health Cigarette Smoking Act of 1969.[65] As noted earlier, the Court in *Bates* reacted bluntly to the lower courts' interpretation of *Cipollone*: Those courts simply did not ''pay[] attention to the rather obvious textual differences'' between the Smoking Act, which mandates specific label warnings and preempts all conflicting state warnings, and FIFRA, which preempts state labeling and packaging requirements only when they are ''in addition to or different from'' federal requirements.[66] Moreover, *Bates* demonstrated that the lower courts had failed to apply the presumption against preemption, which requires courts to assume that state law is not preempted unless a contrary intent arises unmistakably from the federal statutory scheme.

Perhaps most importantly, *Bates* rejected the lower courts' fundamental assumption that the mere existence of a federal preemption provision evinces a congressional desire for uniformity that necessarily conflicts with state tort law outcomes, which may differ state-to-state and case-to-case. *Bates* refused to operate at that level of generality, and instead asked: Precisely what kind of uniformity did Congress desire? To be sure, Congress expressed an intent to preempt ''competing state labeling standards . . . that would create significant inefficiencies for manufacturers.''[67] But no other broad preemptive intent is discernable from FIFRA. Indeed, FIFRA establishes a dual scheme of regulation between the federal government and state and local authorities, under which states and localities are authorized, among other things, to ban federally approved pesticides.[68] Moreover, at the time of its overhaul in 1972, FIFRA sat side-by-side with a long tradition of

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[59] *See id.* at 1802-03 (rejecting such arguments as overstated).

[60] *Id.* at 1803.

[61] *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (damages action premised on failure to install boat propeller guard not preempted by Federal Boat Safety Act, overruling unanimous federal authority favoring preemption); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (no preemption of state tort claims based on defective medical devices, disagreeing in whole or in part with views of eight federal circuit courts); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 n.2 (1992) (state tort claims generally not preempted despite unanimity of contrary federal circuit court authority).

[62] *See, e.g., Cipollone*, 505 U.S. at 508 n.3; *Moore v. Brunswick Bowling & Billiard Corp*. 889 S.W.2d 246 (Tex. 1994) (rejecting preemption in boat safety case prior to decision in *Sprietsma, supra*).

[63] *Sleath v. W. Mont. Home Health Servs.*, 16 P.3d 1042 (Mont. 2000); *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000); *American Cyanamid Co. v. Geye*, 79 S.W.3d 21 (Tex. 2002).

[64] *Bates*, 125 S. Ct. at 1798-99.

[65] 15 U.S.C. §§ 1331-1340 (2000).

[66] *Id.* at 1800.

[67] *Id.* at 1803.

[68] *Id.* at 1797, 1802.

state common-law recovery for injuries caused by pesticides. Because those remedies tend to push manufacturers to enhance safety, *Bates* noted, ''[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA.''[69]

As we have said, however, the Court has sent these signals in prior preemption cases, with little effect in the lower courts. Moreover, we acknowledge that each allegedly preemptive federal statutory regime is different and must be analyzed on its own terms. *Bates* itself makes that clear, both in its criticism of the lower courts' rote (and incorrect) reading of *Cipollone* and in its thorough explication and application of FIFRA's complex regulatory scheme. But there is reason to think that *Bates*, taken together with *Medtronic*, will make a significant difference in the preemption wars.

First of all, *Bates* was not a close call, but a 7-2 decision, sweeping away dozens of lower court precedents and refusing to hold any of the plaintiffs' claims preempted. The lower courts, bound as they are to follow the rulings of the Supreme Court, cannot help but take notice.

Second, *Bates* did more than give lip service to the oft-repeated presumption against preemption. Rather, it explained what that presumption means: Unless the court finds that Congress *clearly* wanted to preempt a *particular* claim or remedy—i.e., unless the statutory justification for the defendant's claim of preemption is unambiguous—preemption of state law should be rejected. As the Court put it, even if Dow had ''offered us a plausible alternative reading of § 136v(b)— indeed, even if its alternative were just as plausible as our reading of that text—we would nevertheless have a duty to accept the reading that disfavors preemption.''[70] That's pretty powerful anti-preemption medicine.

Third, relying on *Medtronic*, *Bates* reiterated that when Congress only preempts state law that is ''different from, or in addition to'' federal law, the states are free to impose liability based on duties that parallel federal requirements.[71] This reminder is important because the lower courts, like the Solicitor General,[72] had ignored *Medtronic*, maintaining that civil juries simply could not be trusted to apply federal standards consistently. The Court emphatically rejected that position, noting that juries can, in fact, be trusted to apply jury instructions that set forth FIFRA's standards as a basis for awarding state-law damages.

Finally, the Court looked to the purposes of FIFRA and recognized that it was implausible to ascribe to the Congress that enacted the 1972 amendments an intent to provide virtual immunity to pesticide manufacturers.[73]

It is the last point that provides the most hope for plaintiffs harmed by federally regulated products. The Medical Device Amendments, Federal Boat Safety Act of 1971,[74] the Federal Hazardous Substances Act,[75] and FIFRA are but a few of the many statutes passed by Congress in the late 1960s and 1970s. Those statutes were meant to expand consumer protection by requiring manufacturers to establish the safety and efficacy of their products—products with the potential both to improve lives and to do great harm—before they entered the market.[76] None of these statutes provides consumers with a federal remedy for injuries suffered because the product was defectively designed or manufactured, mislabeled, or deceptively marketed. No remedy was necessary because state common law already provided remedies that Congress realized would co-exist with the newly enacted regulatory scheme.[77] *Bates* understood that the contrary notion urged by industry and often tacitly accepted by the lower courts—that these same landmark health and safety laws had actually drastically curtailed consumer rights by silently enacting massive ''tort reform'' —is as implausible as it is dangerous. Time will tell whether the lower courts will come to the same understanding.

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[69] *Id.* at 1802.
[70] *Id.* at 1801.
[71] *Id.* at 1800-01.
[72] *Id.* at 1801.
[73] *Id.* at 1802 (''[I]t seems unlikely that Congress considered a relatively obscure provision like § 136v(b) to give pesticide manufacturers virtual immunity from certain forms of tort liability'').
[74] Pub. L. No. 98-89, 97 Stat. 605 (codified as amended in various sections of 46 U.S.C.).
[75] 15 U.S.C. §§ 1261-1278 (2000).
[76] *See id.* at 1802.
[77] *See id.* at 1801-02.

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