

Legal Times

LAW AND LOBBYING IN THE NATION'S CAPITAL

JUNE 23, 2003

Does U.S. Trump States in Pesticide Cases?

Supreme Court will decide whether to take cases testing federal pre-emption of tort lawsuits filed in state courts.

By TONY MAURO

The Supreme Court will soon consider a pair of cases that could place the justices in the middle of a high-stakes battle over whether herbicide and pesticide manufacturers can be held liable in state courts for injuries to people and damage to crops.

In one of the cases, the Bush administration has sided with the pesticide industry, reversing a position taken by the government under President Bill Clinton.

The cases, *American Cyanamid Co. v. Geye*, No. 02-367, and *Eyl v. Ciba-Geigy Corp.*, No. 02-1500, are on the agenda for the Court's final private conference of the term on June 26. At the conference, the justices will weigh whether to grant review in these and dozens of other cases. Cases granted would be argued in the fall.

At issue in both cases is whether the labeling provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) pre-empt state law tort actions for damage to crops and injuries to people caused by pesticides. The dispute echoes pre-emption issues the Supreme Court has faced in the context of federal laws on tobacco product labeling and medical devices.

As in those other areas, FIFRA prohibits states from imposing additional "requirements" that go beyond those imposed in FIFRA itself. The industry, which wants to be insulated from lawsuits at the state level, claims that permitting tort actions in state courts amounts to an additional "requirement" and therefore violates FIFRA.

"It's a huge issue," says Douglas Kendall, executive director of Community Rights Counsel, which filed a brief in *Eyl* with the Natural Resources Defense Council and the group Beyond Pesticides. "A lot of common law state actions hang in the balance." Environmental groups want those injured by pesticides to be able to sue manufacturers in state court.

In *American Cyanamid*, Texas peanut farmer Terry Geye and his son Brandon used a mixture of two of the company's herbicides, Pursuit and Prowl, on part of their acreage in 1993. Product brochures explicitly stated that the two could be mixed to attack weeds that interfere with peanut crops. Instead, Geye and his son claim the combination damaged their crops and substantially reduced their yield. When they sued the company, it invoked FIFRA pre-emption and won summary judgment in the trial court. But a Texas Court of Appeals and the state Supreme Court ruled that the suit was not pre-empted.

The company appealed to the Supreme Court, and the justices last November asked Solicitor General Theodore Olson for his views. In May, Olson told the Court in a brief that in spite of two prior briefs filed in 1999 against federal pre-emption, "that position no longer represents the view of the United States."

Olson wrote that the government now believes that state-law damage claims create the sort of additional "requirement" on labeling that is barred by FIFRA. In spite of this new view, however, Olson told the Court that it should not take up *American Cyanamid* because the Texas Supreme Court ruling was interlocutory and not final in nature.

American Cyanamid's lawyer, Lawrence Ebner of the D.C. office of McKenna Long & Aldridge, said in an interview the industry is "certainly pleased that the solicitor general has repudiated the past advocacy position and now agrees with the vast majority of courts." But he disagrees with the government on the finality issue and thinks the Texas ruling is ripe for review. Ebner also says the Texas ruling conflicts with other decisions of the California Supreme Court and the U.S. Court of Appeals for the 5th Circuit, leaving major agricultural areas with differing rules on liability.

Pesticide industry representatives met with lawyers in the SG's office before the new brief was filed, Ebner and others knowledgeable about the case say. "We explained why the case is important," says Ebner.

It is common for the SG to consult with various parties in a case before responding to an invitation from the Court to file a brief. In this case, the government did not meet with the Geyes' lawyer, Kerwin Stephens of Stephens & Myers in Graham, Texas. Stephens declines to comment except to say that the government's prior position on the pre-emption issue was "well-reasoned and is the law."

In the other case before the high court, Public Citizen is representing Harold Eyl, a maintenance worker in Wisner, Neb., who was exposed to Ciba-Geigy's herbicide Pramitol in 1993. He was working in a playground, unaware that the herbicide had been applied in the same area the same morning by another city worker. Eyl soon developed dermatitis and vasculitis, skin and blood ailments that left him permanently disabled and unable to work.

He sued the company, claiming that its brochures failed to warn about the dangers of Pramitol to bystanders. The company unsuccessfully invoked FIFRA pre-emption and a jury awarded Eyl \$2.1 million in damages. The company appealed, and Eyl argued that pre-emption should not apply because he was a bystander. But the Nebraska Supreme Court reversed, finding that the state tort action was pre-empted.

In a petition filed for Eyl with the Supreme Court in April, Public Citizen cited the government's anti-pre-emption position—since reversed—as evidence that the high court should review the case. The Nebraska Supreme Court ruling and the similar rulings of other courts have "eliminated injured persons' rights to compensation under state law contrary to congressional intent," the brief states.

The group urges the Court to take *Eyl* rather than *American Cyanamid* because no one disputes the finality of the Nebraska judgment.

Public Citizen, in a later brief filed after the SG's reversal in *Cyanamid*, calls the new government position on FIFRA pre-emption "puzzling." But Alan Morrison, head of Public Citizen Litigation Group, says the new stand is easily explained: "We had an election two years ago."