April 2005
Vol. V, No. 4

Community Rights Report

CRC's Monthly Newsletter

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FEATURE CASE

Landmark Ruling Rejects Preemption Challenge to State Common Law and Statutory Remedies for Pesticide Injuries

On April 27, the U.S. Supreme Court handed state and local officials a big preemption victory by holding that consumers may seek state law remedies against a pesticide manufacturer for harm to human health or property. One prominent court watcher hailed the decision as "one of the court's most significant rulings on the pre-emptive effect of federal statutes."

In *Bates v. Dow Agrosciences LLC*, No. 03-388, the Supreme Court reversed a lower court ruling that prohibited 29 Texas peanut farms from pursuing state common law and statutory claims based on allegations that a pesticide called "Strongarm" damaged their crops. The farmers assert that the manufacturer recommended the pesticide for use on all peanut crops even though it knew or should have known that it would stunt peanut growth in certain soils.

The federal pesticide statute, which governs registration and labeling, expressly preempts any state or local "requirement for labeling or packaging in addition to or different from" federal requirements. This provision prevents states from creating a crazy-quilt of labeling requirements that mandate different colors, font size, or wording. Several lower courts have gone much further and applied the provision to prevent those harmed by pesticides from bringing common law actions that might induce the manufacturer to alter the label. Because the federal statute does not permit individuals harmed by violations to sue in federal court, the lower court rulings finding preemption often slammed the courthouse door on the victims. The U.S. Environmental Protection Agency and Department of Justice originally took the position that the federal pesticide statute does not preempt state common law actions. But the Solicitor General subsequently adopted a contrary position and filed an amicus brief supporting Dow.

The *Bates* Court began its analysis by concluding that the term "requirements" as used in the preemption provision is broad enough to encompass common law actions. It concluded, however, that several common-law rules invoked by the farmers are not label or packaging rules, including those relating to product design, testing, and warranty obligations. The high court rejected the argument, embraced by several lower courts, that these rules should be treated as labeling requirements merely because jury verdicts in favor of plaintiffs based on these rules might induce a pesticide manufacturer to alter its label.

The Court further held that even where common-law rules relate to labeling, states may provide additional remedies for violations of the federal standards so long as they do not impose additional requirements. The Court remanded the case to the lower courts for a determination of whether the common-law rules underlying the farmers' fraud and failure-to-warn claims are equivalent to federal requirements.

The *Bates* Court reaffirmed the presumption against preemption that recognizes the role of the states as "independent sovereigns in our federal system," a presumption that requires Congress to articulate any intention to preempt in "clear and manifest" terms. Moreover, the Court stressed that the notion that federal law clearly preempts state remedies is "particularly dubious" in view of EPA's contrary position just five years ago. The Court also observed that states had long afforded tort remedies to those injured by poisonous substances, and that if Congress had intended to supplant these remedies, it would have expressed that intent more clearly, particularly since the federal statute authorized EPA to waive any review of the efficacy of pesticides in the federal registration process.

In a separate opinion concurring in the judgment in part and dissenting in part, Justices Thomas and Scalia launched a broadside attack on the whole notion of implied preemption, asserting that the majority's failure to address Dow's arguments in this regard "comports with this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied preemption." It remains doubtful, however, that a majority of the Court is willing to abandon these doctrines entirely.

The decision is not only a victory for public health and the environment, but also for the vital role of states in our federal system. CRC filed an amicus brief in *Eyl v. Ciba-Geigy*, No. 02-1500, a previous preemption case that raised similar issues.

QUOTE OF THE MONTH

"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.'"

Bates v. Dow Agrosciences, slip op. at 16 (U.S. April 27, 2005)

OUTRAGE OF THE MONTH

California Coastal Commission Fights for its Life

The California Coastal Commission, which is in the business of defending the state's 1,100 miles of coastline from environmental threats, had to defend *itself* from a legal threat in the California Supreme Court earlier this month. Happily for the environment, lovers of California beaches, and the agency, the court gave the Commission's challengers a chilly reception.

The case started in 1999 when the misleadingly-named Marine Forests Society sued the Commission for its refusal to grant a permit to allow the Society to dump garbage—old tires, plastic jugs, PVC pipe—on ropes off the California coast in hopes of creating an artificial reef that would soon teem with marine life. The Commission was skeptical of the Society's claims, saying science didn't support the belief that plants and fish would make the proposed junk heap home. The Society then sued the Commission, saying its structure violated the separation of powers, because the state legislature appointed eight members of the 12-member executive agency.

Tellingly, the Society's legal counsel is the Pacific Legal Foundation, which has long complained that the Commission blocks the unfettered exercise of private property rights. Richard Zumbrun, a PLF co-founder, told a local newspaper that his real complaint with the Commission are rules that give the public access to the state's beaches.

The California Supreme Court seemed unmoved by Zumbrun's arguments about alleged separation of powers violations. Chief Justice Ronald George reminded Zumbrun that the California and U.S. Constitutions have different notions of executive power, calling it "a mistake…to try to import principles of federal jurisprudence that are not applicable to the states." Another justice noted that for over a century, the court had consistently upheld the validity of the state legislature's appointment power.

The Court must rule in the case by the beginning of July. Let's hope that California's highest court recognizes that the Marine Forest Society's legal arguments aren't any better than the scientific basis for its schemes.

EYE ON WASHINGTON

Toxic Contamination as a Taking: Judge Block's Short-Lived Ruling

On April 11, Judge Lawrence Block of the U.S. Court of Federal Claims handed down a surprising ruling that threatened to transform nearly all government contamination of private land into a compensable taking. But just four days later, the appellate court for that circuit tacked in a much different direction.

The issue of whether contamination should be treated as a taking or a tort is of special significance to claims against the United States because the Court of Federal Claims (the court with jurisdiction over takings claims against the U.S.) has no jurisdiction over claims sounding in tort. In *Hansen v. United States*, No. 02-21L, Judge Block held that a takings claimant may state a cause of action based on government contamination of private land without asserting that the contamination was foreseeable. Judge Block read existing precedent as requiring only causation, not predictability.

On April 15, however, the U.S. Court of Appeals for the Federal Circuit reviewed the same line of precedent and reached the opposite conclusion. In *Moden v. United States*, No. 04-5092, the court held that where a claimant alleges a taking based on the government's contamination of private land, the claimant first must establish that the contamination was the foreseeable or predictable result of authorized government action.

CRC opposed Judge Block's nomination to the Court of Federal Claims due to serious concerns over whether he could set aside his personal views on property rights and dispassionately apply the law. His *Hansen* ruling, which failed to outlast even Washington's ephemeral cherry blossoms, heightens those concerns considerably.

ON THE HORIZON

State Sovereign Immunity from Takings Claims

On April 4, the U.S. Supreme Court denied certiorari in *DLX, Inc. v. Commonwealth of Kentucky* (6th Cir. 2004), which raised the interesting issue of whether states enjoy sovereign immunity, in federal district court, from a takings claim brought under the Fifth and Fourteenth Amendments. Notwithstanding this denial of review, expect the issue to continue to percolate in the lower federal courts, and prepare for the possibility of a cert. grant down the road.