A second area in which preemption is an issue involves pesticides and herbicides, which are regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).\footnote{7 U.S.C. §§ 136–136y.} The statute requires manufacturers to submit information to the Environmental Protection Agency (EPA), which reviews the claims made for the product and approves the label under which the product is to be marketed.

FIFRA provides that states “shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under” FIFRA.\footnote{7 U.S.C. § 136v(b).} Prior to 2005, a number of courts seized on this language as a basis for precluding state warranty, negligence, and strict liability claims.\footnote{See, e.g., Hardin v. BASF Corp., 397 F.3d 1082 (8th Cir. 2005) (FIFRA preempts any claim which has effect of directly or indirectly challenging EPA-approved label, including negligence, strict liability, and UDAP claims by farmers whose crops were damaged by herbicide blowing off other fields), reh'g granted and opinion vacated (June 29, 2005).} These courts adopted the theory that any state law claim that could make the manufacturer want to change the label was preempted, failing to note that manufacturers have other choices besides changing the label, such as improving the product or paying claims to compensate those injured.\footnote{7 U.S.C. § 136v(b).} In 2005, in \textit{Bates v. Dow Agrosciences L.L.C.}, the United States Supreme Court repudiated the theory that any claim that might make a manufacturer want to change its label was preempted. The Court held that the prohibition against any “requirements for labeling or packaging” beyond those imposed by FIFRA did not encompass rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of the products, to market products free of manufacturing defects, and to honor their express warranties.\footnote{7 U.S.C. § 136v(b).} Accordingly, claims for defective design, defective manufacture, negligent testing, breach of warranty, and UDAP violations based on breach of warranty were not preempted.\footnote{7 U.S.C. § 136v(b).} However, as fraud and failure to warn claims might set a substantive standard for the content of the label, the Court held that they might be preempted.\footnote{7 U.S.C. § 136v(b).} The general test consists of two parts: a state claim is preempted only if (1) the statute or common law rule creates a requirement for labeling or packaging, and (2) that requirement is in addition to or different from those adopted under FIFRA.\footnote{7 U.S.C. § 136v(b).}

Even before the Supreme Court’s ruling, a number of courts had held that particular types of claims were not preempted.\footnote{7 U.S.C. § 136v(b).} For example, some courts ruled that claims based on false advertising were not preempted,\footnote{7 U.S.C. § 136v(b).} although this view was not unanimous and some courts held that claims based on statements made by the manufacturer’s representatives or in advertisements were preempted.\footnote{7 U.S.C. § 136v(b).} Since \textit{Bates}, a number of courts have held that claims based on failure to warn or on the inadequacy of the label are preempted.\footnote{7 U.S.C. § 136v(b).} However, the Third Circuit has held that a marketing brochure that was not distributed with the product and did not contain instructions for its use was not a “label,” so FIFRA did not preempt claims that it misrepresented the product’s qualities.\footnote{7 U.S.C. § 136v(b).} It also held that a claim that the manufacturer’s label failed to warn users of the dangers an insecticide posed to other plants was not preempted because the statute imposed only a generalized duty to warn of this danger and the EPA had not adopted specific requirements.\footnote{7 U.S.C. § 136v(b).} States are also allowed to regulate the sale or use of federally registered pesticides or devices.\footnote{7 U.S.C. § 136v(b).}

Similar issues arise with respect to veterinary medicines, which are regulated by the federal Viruses, Serums, Toxins, and Analogous Products Act.\footnote{7 U.S.C. § 136v(b).} This statute does not itself preempt state laws, but statements issued by the Animal and Plant Health Inspection Service often state an intent to occupy the field regarding safety, efficacy, purity, potency, and labeling of these products.\footnote{7 U.S.C. § 136v(b).} Courts have given effect to this agency statement and held that common law claims relying on bases of liability different from or in addition to federal requirements are preempted, but claims are not preempted to the extent they seek relief for violation of the federal substantive standards.\footnote{7 U.S.C. § 136v(b).}

\textbf{Footnotes}


285 [266] See, e.g., Hardin v. BASF Corp., 397 F.3d 1082 (8th Cir. 2005) (FIFRA preempts any claim which has effect of directly or indirectly challenging EPA-approved label, including negligence, strict liability, and UDAP claims by farmers whose crops were damaged by herbicide blowing off other fields), reh’g granted and opinion vacated (June 29,
2005); Dow Agrosciences L.L.C. v. Bates, 332 F.3d 323 (5th Cir. 2003) (fraud, warranty, UDAP, defective design, and negligent manufacture claims preempted), rev’d, 544 U.S. 431 (2005); Andrus v. Agrevo USA Co., 178 F.3d 395 (5th Cir. 1999) (warranty claims preempted when herbicide did not perform as advertised on the label); Kuiper v. Am. Cyanamid Co., 131 F.3d 656 (7th Cir. 1997) (FIFRA preempts state law claims of negligent manufacture and failure to warn); Grenier v. Vermont Log Buildings, Inc., 96 F.3d 559 (1st Cir. 1996) (FIFRA preempts failure to warn claim, some design defect or manufacturing defect claims, and claim that language in EPA-approved label created express warranty).


288 [269] Id., 544 U.S. at 444.

289 [270] See also Mortellite v. Novartis Crop Prot., Inc., 460 F.3d 483 (3d Cir. 2006) (following Bates; FIFRA does not preempt strict liability, negligent testing, or express warranty claims); Wuebker v. Wilbur-Ellis Co., 418 F.3d 883 (8th Cir. 2005) (following Bates; claims for defective design, breach of implied warranties, and recklessness are not preempted); Bourbia v. S.C. Johnson & Son, Inc., 375 F. Supp. 3d 454 (S.D.N.Y. 2019) (FIFRA does not preempt claim that insect repellant manufacturer breached express warranty that was created by statements on label); Carias v. Monsanto Co., 2016 WL 6803780 (E.D.N.Y. Sept. 30, 2016) (UDAP and strict liability claims based on herbicide’s danger to human health not preempted except that plaintiffs cannot seek injunction requiring label change); Johansson v. Cent. Garden & Pet Co., 804 F. Supp. 2d 257 (D.N.J. 2011) (claim that product was defective is not preempted, nor are UDAP claims unless they are based on the label); Golden Wolf Partners v. BASF Corp., 2010 WL 5173197 (E.D. Cal. Dec. 13, 2010) (claims of strict liability, negligent manufacturing, negligence in labeling, and misrepresentation not preempted); Braun v. E.I. du Pont de Nemours & Co., 58 U.C.C. Rep. Serv. 2d 868 (D.S.D. 2006) (claim that herbicide failed to perform is not preempted).


291 [272] Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 444, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005). See also Schoenhofer v. McClaskey, 861 F.3d 1170 (10th Cir. 2017) (state regulation concerning how pest control applicators should apply pesticides to certain construction sites governs use, not labeling, and thus is not expressly preempted; also rejecting argument based on implied preemption); Blitz v. Monsanto Co., 317 F. Supp. 3d 1042 (W.D. Wis. 2018) (warranty and other state law claims based on deceptive statement on herbicide label not preempted; these claims are consistent with FIFRA, which forbids false or misleading statements).

292 [273] See, e.g., Sun Valley Packing v. Consep, Inc., 114 Cal. Rptr. 2d 237 (Cal. Ct. App. 2001) (FIFRA does not preempt claims that are not label-based, for example, when manufacturer has voluntarily warranted product’s fitness for a particular purpose, nor does it preempt state law restrictions on remedy limitation clauses); Dow Chem. Co. v. Ebling, 723 N.E.2d 881 (Ind. Ct. App. 2000) (FIFRA does not occupy the entire field of pesticide regulation; some claims preempted but not design defect claim), aff’d in relevant part, rev’d in part on other grounds, 753 N.E.2d 633 (Ind. 2001); Am. Cyanamid Co. v. Geye, 79 S.W.3d 21 (Tex. 2002) (claims that relate to aspects of products that EPA does not regulate are not preempted).

See, e.g., Dow Agrosciences L.L.C. v. Bates, 332 F.3d 323 (5th Cir. 2003) (claims based on off-label statements preempted unless statements deviate from label; claims based on post-sale off-label statements not preempted), rev’d, 544 U.S. 431 (2005); Andrus v. Agrevo USA Co., 178 F.3d 395 (5th Cir. 1999) (claims based on salesman’s statements preempted when they repeated information contained in the label); Kuiper v. Am. Cyanamid Co., 131 F.3d 656 (7th Cir. 1997) (FIFRA preempts claims of false representations in advertising and marketing). See also Eyl v. Ciba-Geigy Corp., 650 N.W.2d 744 (Neb. 2002) (claim that manufacturer should have supplied flags to warn bystanders and general public is label-based and therefore preempted).

Wuebker v. Wilbur-Ellis Co., 418 F.3d 883 (8th Cir. 2005) (following Bates; noting that implied warranty of merchantability claim that was based on inadequate packaging or labeling might be preempted); Wilgus v. Hartz Mountain Corp., 2013 WL 653707 (N.D. Ind. Feb. 19, 2013) (claims based on failure of EPA-approved flea product’s label to disclose risks to pets are preempted by FIFRA); Smith v. Hartz Mountain Corp., 2012 WL 5451726 (N.D. Ohio Nov. 7, 2012) (FIFRA preempts products liability and UDAP claims based on failure to warn; reaching merits of warranty claim but dismissing it on other grounds); DJ Coleman, Inc. v. Nufarm Americas, Inc., 693 F. Supp. 2d 1055, 1081 (D.N.D. 2010) (UDAP statute preempted to extent it prohibits deceptive labels more broadly than FIFRA does, but warranty claims not preempted). But cf. Martin v. Monsanto Co., 2017 WL 659014 (C.D. Cal. Feb. 16, 2017) (claim that label misrepresented the amount of herbicide that product would produce is not preempted).

Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc., 617 F.3d 207 (3d Cir. 2010) (allowing fraud, negligent misrepresentation, and UDAP claims to go forward). See also In re Dicamba Herbicides Litig., 359 F. Supp. 3d 711, 734 (E.D. Mo. 2019) (failure to warn claims that are based on statements made in in-person discussions, websites, on social media, and so forth, are not preempted).

Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc., 617 F.3d 207, 221–225 (3d Cir. 2010); In re Dicamba Herbicides Litig., 359 F. Supp. 3d 711, 735–736 (E.D. Mo. 2019) (failure to warn claim not preempted even if based on labels, as long as state law is narrower than or the same as FIFRA).


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