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ENVIRONMENTAL UPDATES

UNITED STATES SUPREME COURT

Bates v. Dow Agrisciences, LLC, 125 S.Ct. 1788 (2005).

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §136, was first enacted in 1947 to deal with licensing and labeling of poisonous substances. In 1972, Congress amended the statute in order to transform the statute into a, "comprehensive regulatory statute." The amendments allowed for the regulation of pesticides produced and sold in intrastate commerce and allowed for the review, cancellation, and suspension of a pesticides registration. In order for a pesticide to be registered, its label cannot contain a false or misleading statement regarding its efficacy. The Environmental Protection Agency is responsible for enforcement of the statute.

Dow Agrisciences received a conditional registration for its pesticide Strongarm in March 2000. Strongarm was a weed killer that was to be used in conjunction with peanut crops. Dow registered the pesticide in time to market it to peanut farmers who plant their crop in early May. The 29 petitioners in this case used the pesticide. When they used the pesticide, it stunted the growth of their peanut crop and did not kill weeds. They claim the pesticide did not work because the pH level of their soil was above 7.0 and that Dow should have known the pesticide did not work when used on soils with a pH level above 7.0. However, the label on the pesticide stated, "[u]se of Strongarm is recommended in all areas where peanuts are grown."

The farmers informed Dow of their intent to sue for the damage to their crops. Dow then sought declaratory judgment on the grounds the farmers claims were pre-empted by FIFRA. The farmers counterclaimed in tort and alleged fraud, breach of warranty and violation of the Texas Deceptive Trade Practices-Consumer Protection Act. The major premise of the case was that Dow violated the statute's prohibition on misbranding by not putting the information regarding the pH level of the soil on the label. The specific provision of the statute, 7 U.S.C. § 136v(b) stated, "[s]uch State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."

The Court had never addressed the issue of whether FIFRA pre-empted tort or other common-law claims arising under state law. The Court stated an occurrence that motivates an optional decision does not fit with in the definition of requirement under 7 U.S.C. § 136v(b). The court further reasoned that for a state law to be preempted under FIFRA, it must meet two conditions. The law must pertain to a requirement for labeling or packaging and the requirement must be, "in addition to or different from those required under this subchapter." Under this reasoning, the farmers' claims were not preempted because their claims were based upon the Dow's duty to market a reasonably safe product, the duty to conduct appropriate testing and Dow's duty to honor its stated warranty; none of these dealt directly with the labeling of the product.

The court further stated that if a state law was a direct copy of FIFRA, the state's law would not be preempted. Furthermore, because states are traditionally viewed as independent from the federal system of government a statute does not preempt state law unless Congress, "clearl[ly] and manifest[ly]" expresses this intent. The Court further reasoned Congress had no intent of depriving parties injured by poisonous substances, such as pesticides, of a form of compensation. Under this analysis, the labeling provision of 7 U.S.C. 136 "retains a narrow, but still important, role."

AMY OHNEMUS

UNITED STATES COURT OF APPEALS

Consolidated Edison Company of New York, Inc. v. UGI Utilities, Inc., 423 F.3d 90 (2d Cir. 2005)

Consolidated Edison ("Con Ed") brought suit against UGI Utilities ("UGI") under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") seeking reimbursement for costs incurred to clean up contaminated sites in Westchester County, New York. The sites were contaminated as a result of the operations at Manufactured Gas Plants. Those plants produced gas from coal, oil, and other sources.

Con Ed entered into a "Voluntary Cleanup Agreement" with the New York State Department of Environmental Conservation on August 15, 2002 to clean up more than 100 sites Con Ed or its predecessors owned or operated Manufactured Gas Plants. Con Ed claims that UGI or its predecessors operated several of those plants and should be liable for part of the cleanup costs. Con Ed has already spent $4 million on the cleanup, but the total expenses are estimated to be at least $100 million.

The district court dismissed Con Ed's claims and instead granted UGI's motion for summary judgment in its entirety. The court dismissed the claims because Con Ed previously granted a release to UGI. It further held that there was no reasonable basis under which UGI could be subject to CERCLA's operator liability.

The court of appeals discussed three sections of CERCLA under which suits can be brought to seek reimbursement from other parties. First, § 107(a) allows for general recovery of costs. Second, § 113(f)(1) allows a contribution right for parties that have been held liable, or potentially liable, under CERCLA. Finally, § 113(f)(3)(B) allows a right of contribution for parties that have resolved their liability under CERCLA by settlement.

Con Ed originally filed its claim for reimbursement against UGI under § 113(f)(1) on the basis that it could potentially be held liable under CERCLA. The court of appeals held that Con Ed could not bring its claim under this section because it has not yet been sued in a civil action, which is required under the section. Con Ed then argued that it should be allowed to bring its reimbursement suit against UGI under § 113(f)(3)(B) because the Voluntary Cleanup Agreement represents an administrative settlement that satisfies the requirements of the section. The court held that Con Ed's Voluntary Cleanup Agreement resolved liability under state law, and not CERCLA, therefore the suit could not be brought under § 113(f)(3)(B). Finally, the court held Con Ed could bring its reimbursement suit against UGI under § 107(a). The court reasoned Con Ed's costs are "costs of response" as required by the section. Further, it held § 107(a) allows a party that has not yet been sued, but that could be held liable under § 107(a) if they were sued, to recover voluntarily incurred response costs.

ERIN C. BARTLEY

Wuebker v. Wilbur-Ellis Co, 418 F.3d 883 (8th Cir. 2005).

Wayne Wuebker utilized Agrox Premiere, a hopper box seed pesticide manufactured by Wilbur-Ellis Co. in his farming operation. During the application of the pesticide, Wuebker failed to use protective gear despite the application label's instruction to do so. After applying the pesticide, Wuebker fell seriously ill. Wuebker and his wife subsequently filed a lawsuit against Wilbur-Ellis Co. alleging that Wilbur-Ellis Co. should be liable for the injury resulting from use of the hopper box seed pesticide. He claimed the product was defective because the pesticide resembles the color of the soil so that applicators cannot determine whether the soil or the pesticide is on their skin. Thus, Wuebker argued that because of the defect in design, the federal

pesticide labeling laws contained in the Federal Insecticide, Fungicide, and Rodentcide Act ("FIFRA") and a related Environmental Protection Agency ("EPA") regulation should not pre-empt his state tort claim.

The U.S. District Court for the Southern District of Iowa granted Wilbur-Ellis Co.'s motion for summary judgment and Wuebker appealed. The Eighth Circuit Court of Appeals reversed, holding that Wuebker's state law tort claims were not pre-empted by the FIFRA or by the EPA's regulation. FIFRA provides that a state "shall not impose . . . any requirements for labeling or packaging." The EPA regulation specifically exempts hopperbox seed treatment products from the coloration requirement. The Court found neither of these provisions preempted the Wuebkers' claims, thereby allowing his suit to proceed.

The Eighth Circuit relied upon the recently decided United States Supreme Court decision in *Bates v. Dow AgroSciences LLC*, 125 S. Ct. 1788 (2005), where the Court found that, "[r]ules that require manufacturers to design reasonably safe products, . . . to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for 'labeling or packaging.'" The Eighth Circuit held Wuebker's claims, like those approved by the Supreme Court in *Bates*, are not pre-empted by FIFRA because the rules underlying the state tort claims do not require anything in the way of labeling or packaging.

In like turn, the Court found nothing in the EPA regulation or its history that indicated whether the EPA intended to prohibit or allow the states to require that pesticides used exclusively on hopper box seeds be colored or discolored. Thus, the "presumption against preemption oblige[d] [the Court] to conclude that the regulation does not preempt Wuebker's claim."

The Court reversed the district court's order of summary judgment in favor of Wilbur-Ellis Co. and remanded, allowing the Wuebker's suit to move forward.

TRAVIS A. ELLIOTT

Green Acres Enterprises, Inc. v. United States, 418 F.3d 852 (8th Cir. 2005).

Plaintiffs Green Acres Enterprises et al. appealed from a district court ruling that dismissed their claim due to lack of subject matter jurisdiction. Plaintiffs were the former landowners of two large properties located along the Marmaton River in Missouri. These properties were protected from flooding by two large levee systems, which included the levees themselves, a drainage ditch system, and pumps which drew water from the properties and ditches to the river through internal pipes. These integral levee systems suffered significant damage in the flood of 1993 and required repairs to make them function again.

The government attempted to halt these repairs by asserting that to undertake them would violate easements granted to the Army Corps of Engineers ("Corps"). While an injunction against the landowners was obtained, the decision was reversed on appeal. Subsequently, the landowners sought to continue the levee system repairs and requested a formal determination from the Corps whether the repairs would be subject to the Clean Water Act ("CWA"). The Corps determined that under the CWA's coverage of discharging dredged or fill material into the wetlands surrounding a levee system, the requested work would require CWA authorization, specifically, a Section 404 permit. Furthermore, the Corps asserted that utilizing generalized individual permits would be unacceptable, and various other exemption opportunities were inapplicable because they only applied to activities on the levee itself, not the project's required excavation or dredging activities.

The landowners contended that a recently issued "nationwide injunction" against the Corps prevented it from exercising jurisdiction over excavation activities regardless of the project size. In other words, the landowners believed the repair activities in this situation did not rise to the level requiring Corps intervention. The Corps refused to waiver from its position that the reconstruction work would produce more than the allowed "incidental fallback." Faced with the possibility of owning land that would repeatedly flood, the

landowners sold the properties to the Missouri Department of Conservation, and shortly thereafter, filed an action against the United States pursuant to the Federal Tort Claims Act ("FTCA") focused on trespass and nuisance. The FTCA permits waiver of federal sovereign immunity only to the extent that a private person, under like circumstances, would be liable to the plaintiff under the law of the state where the alleged wrongful conduct occurred.

The United States District Court for the Western District of Missouri concluded a waiver of sovereign immunity was not allowed under these circumstances because there was no private analogue, and therefore, it lacked subject matter jurisdiction to hear the case. In the instant case, and affirming the decision of the district court, the Eighth Circuit held that because the Corps *alone* has enforcement authority regarding the CWA, no private analogue exists for the conduct in this case. Thus, the waiver of sovereign immunity proscribed by the FTCA is not effectuated and there is a lack of subject matter jurisdiction.

ERIC S. OELRICH

UNITED STATES DISTRICT COURT

State of Conn. v. Am. Elec. Power Co., Inc., No. 04 Civ. 5669 (LAP), 2005 WL 2347900 (S.D.N.Y. Sept. 25, 2005).

After recognizing that greenhouse gases posed a danger to the environment, in 1978 Congress began national and international programs for research, data collection, and information dissemination to better understand global climate change and global warming. Congress, in 1987, 1992, and 1997 entered into international agreements to negotiate for improved policy concerning global warming. However, since Congress believed the burden for improving the global climate would be shouldered primarily by developed nations, Congress never instituted formal limits such as mandatory reductions or caps on the emission of greenhouse gases or carbon dioxide.

Concerned with the protection of property as well as health, safety, and well-being of its citizens from the high levels of greenhouse gases in the atmosphere, the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin, along with several private companies, undertook a suit against American Electric Power Company, one of its subsidiaries, and several other electric power plants for violation of federal and state common law nuisance for emission of greenhouse gases and global warming. Plaintiffs alleged the defendants were responsible for ten percent of total greenhouse gas emissions worldwide. The plaintiffs sought relief for the dangerous emissions, asking the court for an injunction to abate the contribution of gases into the atmosphere by a specific percentage for a period of ten years. Defendants argued there is no common law action for emission of greenhouse gases, separation of powers prevents adjudication of the issue, and the court lacks jurisdiction regarding both plaintiffs' standing and failure to state a claim on which relief can be granted.

Federal Rule of Civil Procedure 12(b)(6) requires dismissal of complaints that are not legally sufficient, and Rule 12(b)(1) requires dismissal when the district court lacks statutory or constitutional power to adjudicate. Recognizing these rules, the district court held, "the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked," and noted that jurisdictional requirements were inflexible without exception. The court realized the sweeping implications for national economy, foreign relations, and national security if the court undertook to resolve a question of such a high political nature and recognized this case required a policy determination before discussion of the merits. The scope and magnitude of plaintiffs' request, balanced against other issues, revealed the inherently legislative nature of the litigation at hand, and thus, the court declined to address the issue or make a policy determination

concerning the appropriateness of greenhouse gas emissions. The court quoted congressional debate on the issue stating, "[i]t is hard to imagine any issue in the environmental area having greater economic and social impact than regulation of activities that might lead to global change." Because plaintiffs' complaints were non-judiciable political questions, the district court declined to hear the case. The district court granted the motion to dismiss for lack of jurisdiction.

NATALEE M. BINKHOLDER

Masterpage Communications, Inc. v. The Town Of Olive, No. 1:02 CV 888 NAM/DRH, 2005 WL 2387838 (N.D.N.Y. Sept. 28, 2005).

In August of 2000, Masterpage Communications, Inc. ("Masterpage") filed an application for a special use permit to construct a wireless telecommunications facility to provide paging service from South Mountain in the town of Olive, New York ("Olive"). Although Masterpage desired to construct the facility prior to 2000, Olive's moratorium barring applications to construct wireless facilities was in effect pending the enactment of "A Local Law Regulating the Sitting of Wireless Telecommunications Facilities" ("Tower Law"). The Tower Law required Town Board review and action on special use permit applications to site and construct wireless tower in Olive. Masterpage's application to the Town Board contained FCC licenses and a State Environmental Quality Review Act ("SEQRA") Full Assessment form. By late 2000, the town retained counsel to manage the SEQRA facets of Masterpage's application.

Almost one year after filing the application, Masterpage responded to issues raised at a public hearing by affirming it submitted a detailed environmental assessment form and the facility's construction would not impact the endangered animal and two plant species. In September 2001, Olive's counsel recommended the town take steps in the application process regarding to the facility's environmental impact. Counsel's advice went unheeded and Olive did not act on the environmental impact portion of Masterpage's application. In March 2002, in response to letters from Masterpage questioning the application's delay and demanding a vote, Olive's counsel reiterated the town's need to address serious issues surrounding the application and gave Masterpage assurances the Town Board would take a "hard look" at the environmental impact statement.

Next, Masterpage initiated suit alleging that Olive violated the Federal Telecommunications Act, 47 U.S.C. § 332 ("TCA") and 42 U.S.C. § 1983 vis-à-vis the town's processing and *de facto* denial of Masterpage's application. Among other counts was the allegation Olive unreasonably delayed the processing of Masterpage's application to construct a wireless communications facility and tower in contravention of 47 U.S.C. § 332(c)(7)(B)(ii). The TCA mandates state governments act on wireless facility construction applications, "within a reasonable period of time after the request is made."

The court denied Masterpage's claim of unreasonable delay predicated on the moratorium because Masterpage failed to seek relief prior to the moratorium's expiration. The Town Board's third referral to the Planning Board constituted unreasonable delay as did the Town Board's two years of inactivity regarding the environmental issues and the SEQRA review process. The court declined to remand Masterpage's application to Olive's "swamp of hearings and meetings." Instead, the court issued immediate injunctive relief and directed Olive to issue a special use permit, building permit, and any other permits or approvals necessary to construct and operate Masterpage's South Mountain facility.

SETH OKSANEN