

PRODUCTS LIABILITY LAW & LITIGATION REPORT

In-depth Analysis of Today's Complex Products Liability Cases

June 2005

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SPECIAL REPORT:

TASERS: Get ready for more products litigation involving the stun guns with our exclusive interviews and company guide.

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Have a question or comment? Email Editor-in-Chief Deanne Morgan at deannem@litigationbureau.com.

Mission Statement

Products Liability Law and Litigation Report provides up to the minute information and analysis on what works — and what doesn't — in products liability lawsuits. Each month, PRLLR keeps its readers on the cutting edge of products liability litigation, with everything plaintiffs' attorneys need to know about recent judicial decisions, legislation impacting their practices, and trial strategies from your colleagues.

PREEMPTION

Supreme Court Uses Pesticide Labeling Case To Clarify Preemption

► **Caution:** *The decision may overrule precedent in your circuit.*

In a victory for the plaintiffs' bar, the **U.S. Supreme Court** has decided that a federal statute regulating pesticides does not preempt state law claims for breach of express warranty, fraud, strict liability (including defective design and manufacture) and negligent testing. The decision is good news for plaintiffs because it rejects the inducement test.

The inducement test holds that any event — such as a jury verdict — that might induce a manufacturer to change its label becomes a requirement that is in addition to or different from the federal requirements. The majority opinion **Justice John Paul Stevens** authored explains why the test is the wrong standard for courts to apply (to read the opinion, go to pg. 320).

In the case before the Court, 29 Texas peanut farmers sued **Dow Agrosciences** contending that in the 2000 growing season, their crops sustained severe damage after they applied Dow's pesticide "Strongarm." The complaint alleged Dow violated Texas' Deceptive Trade Practices-Consumer Protection Act (DTPA).

Dow responded with a declaratory judgment action asserting that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempted the plaintiffs' claims. The farmers counterclaimed, alleging strict liability, negligence, fraud, breach of warranty and violations of the DTPA.

The **U.S. District Court for the Western District of Texas** granted the defendants' summary judgment motion and the **Fifth U.S. Circuit Court of Appeals** affirmed. The farmers appealed to the **U.S. Supreme Court**.

FIFRA Regulates The Use, Sale And Labeling Of Pesticides

Under FIFRA, a pesticide's label must comply with the statute's prohibition against misbranding. A pesticide is misbranded if its label contains a statement that is "false or misleading in any particular." For example, the product is misbranded if its label does not contain adequate instructions for use or if it omits necessary warnings or cautionary statements.

Section 136v of the statute (7 U.S.C. § 136v) addresses the states' role in pesticide regulation. The provision lets states review pesticide labels for compliance with federal and state laws and impose sanctions for violating state rules that "mere-

ly duplicate federal requirements," the Supreme Court noted. Additionally, nothing in FIFRA precludes states from making the violation of a federal labeling or packaging requirement a state offense.

FIFRA Did Not Preempt The Farmers' State-Law Claims

A state law is preempted if it meets two conditions. First, the law must be a requirement for labeling or packaging. Rules governing a product's design are not preempted. Second, it must impose a labeling or packaging requirement that is in addition to or different from those FIFRA requires.

The common-law rules the farmers relied on do not satisfy the first requirement, the Supreme Court ruled. For example, common-law rules requiring that manufacturers design reasonably safe products, use due care in testing, market products free of manufacturing defects and honor express warranties do not qualify as require-

ments for labeling or packaging.

The Fifth Circuit reached a different conclusion, finding that liability on the farmers' claims would "induce Dow to alter its label." The Supreme Court rejected the inducement test because it has no support in FIFRA.

Public Policy Supports The Decision Against Preemption

The majority opinion also concluded that public policy supported its decision. Private remedies that enforce federal regulations against misbranding aid rather than hinder FIFRA's functioning. Further, "Dow and the United States exaggerate the disruptive effects of using common-law suits to enforce the prohibition of misbranding," Justice Stevens declared.

Note: The Court did not decide whether FIFRA preempted the farmers' fraud and failure-to-warn claims.

Bates v. Dow Agrosciences, <<http://a257.g.akamaitech.net/7/257/2422/27apr20050800/www.supremecourtus.gov/opinions/04pdf/03-388.pdf>> (U.S. Apr. 27, 2005). ❖

We have been pointed to no evidence that such tort suits led to a "crazy-quilt" of FIFRA standards or otherwise created any real hardship for manufacturers or EPA. Indeed, for much of this period EPA appears to have welcomed these tort suits.

– U.S. Supreme Court

FROM THE FRONT LINES

Plaintiffs' Lawyers Plan To Stun TASER With Their Failure-To-Warn Suits

► *Stay tuned: The first TASER products liability suit is scheduled to go to trial June 28.*

Stun gun manufacturer **TASER International, Inc.** is a named defendant in at least 18 products liability lawsuits. The **National Litigation Bureau (NLB)** interviewed two plaintiffs' attorneys with cases pending against the company. Here's what the lawyers have to say about the litigation and what you need to know if you're considering a suit against TASER.

We spoke to **John Dillingham**, a member of **Dillingham & Reynolds** in Phoenix. He represents a police officer injured during a training exercise. We also talked to **Andrew Schwartz**, a member of **Casper Meadows & Schwartz** in Walnut Creek, CA. Along with **Mark Merin**, he represents the 2-year-old son of a man who fled police and died after being hit with a TASER.

The allegations in Dillingham's case: Sam Powers, 44, was a sergeant with the Maricopa County, CA sheriff's department. He attended a department-run TASER training class in July 2002, because he wanted to become a certified TASER user.

All participants who wanted certification had to take a "sample" hit from a TASER. Two deputies held Powers to prevent him from falling when he received the electrical shock. When he was hit, he felt excruciating pain in his back.

Eventually doctors diagnosed a T7 compression fracture. They also diagnosed preexisting osteoporosis. Powers took medical retirement from the police force, and will never do police work again. "He has significant earnings problems," Dillingham added.

The case is slated to go to trial June 28, 2005.

The allegations in Schwartz' case: Andrew Washington, 21, borrowed a friend's car. He'd been drinking and probably had too much alcohol in his system to drive, Schwartz says. When police pulled him over, Washington ran from them. He was hopping a fence when police officers hit him with the first TASER blast. He fell from the fence and the police hit him several more times. Washington died. He was a healthy young man with no history of heart problems, Schwartz tells the NLB.

If You're Suing TASER, Failure To Warn Is The Name Of The Game

Both Dillingham and Schwartz based their complaints on TASER's failure to warn. The captain who taught the training course Powers participated in had attended three TASER-sponsored certified instructor courses. He believed the weapon had been tested on humans and was safe. The training manual the sheriff's department used, version 7, contained no warnings at all, according to Dillingham. In fact, the manual "said the gun can't hurt you and causes no long-term effects," he notes.

"TASER had no basis to make that claim," Dillingham insists. The company tested the product only on pigs and a few dogs, and the tests looked only at problems with heart fibrillation, not any other type of injury. "We've known for decades that being hit with electricity can cause bones to break," he continues. Usually the hits involve alternating current, but with TASERs, "you're getting direct current," he adds. The problem is that TASER has created the perception that its weapons are safe, Dillingham stresses.

Schwartz agrees. Although he's just filed the complaint in the Washington case and has not received TASER's answer or taken any depositions, at this point in the litigation Schwartz believes TASER knew its stun guns were more dangerous than it let on. For example, the company did not put a limit on the times a person can be hit with the weapon, at 50,000 volts per hit (for more information on the guns and the company, see accompanying story on pg. 317).

Important: The trial judge in Dillingham's case allowed him to amend the complaint to add a count for punitive damages.

Dillingham Questions The Company's Integrity

Dillingham tells the NLB that one reason he took Powers' case was that the company lied to the federal government about the extent of Powers' injuries. TASER's

From The Front Lines *continued on page 316*

From The Front Lines *continued from page 315*

Securities & Exchange Commission filings said Powers' sustained a shoulder injury. An independent medical exam conducted by TASER's physician said the TASER caused Powers' T7 fracture. A 10-KSB report filed with SEC after the medical exam still said Powers had a shoulder injury. Although they knew and still know that their weapons are injuring and killing people,

TASER's owners refuse to accept any accountability, Dillingham contends.

"This was not an isolated event," Dillingham says regarding Powers' injury. Other police officers have sustained compression fractures during training exercises, and those officers did not have osteoporosis, he claims. ❖

**From The Front Lines, part 2 is on
the next page**

DEFECTIVE FOOD

Use Circumstantial Evidence To Prove Your Defective Food Product Case

► *Find out how this defective muffin suit will help you win.*

If your state still uses the foreign-natural test to assess defective food product cases, rely on a recent state supreme court case to bolster your arguments against that test and in favor of the reasonable expectation test — which should improve your chances of winning.

The decision is from the **Supreme Court of Minnesota** and involves a defective muffin. **Karen Schafer** met friends for a meal at a Perkins restaurant in St. Cloud, MN. She took a bite of a pumpkin muffin, swallowed and felt a sharp pain in her throat. She notified management and went straight to a hospital emergency department. The physician who examined her found a cut on her throat. The cut later became infected and Schafer spent three days in the hospital.

Schafer sued **JLC Food Systems, Inc.**, d/b/a **Perkins Family Restaurant** and **The Restaurant Company**, d/b/a **Foxtail Foods**. Her complaint alleged negligence.

The defendants moved for summary judgment, arguing that Schafer could not establish a prima facie case of negligence because she could not identify the object in the muffin that caused her injury. The trial court granted the motion and an intermediate appeals court affirmed. Schafer took her case to the Minnesota Supreme Court.

The Reasonable Expectation Test Wins Over The Foreign-Natural Test

The state supreme court's first task was to determine which standard to use to assess a defective food case. The majority of courts in the nation use the reasonable expectation test. That test, considered in the *Restatement (Third) of Torts: Products Liability*, § 7, focuses on what the consumer reasonably expects in the food product as

served. The defendant has the duty of ordinary care to eliminate or remove harmful substances that the consumer would not expect or guard against. The Minnesota Supreme Court adopted the test, rejecting the alternative: the foreign-natural test.

The foreign-natural test distinguishes between the "foreign" and "natural" characteristics of a food product ingredient. If an object or substance in a food product is natural to any of the product's ingredients, the producer cannot be liable for injuries consumers suffer. The producer may be liable if the object or substance is foreign to any of the product's ingredients. For example, a Massachusetts court held that fish bone in a bowl of New England clam chowder was not a foreign object.

Circumstantial Evidence Depends On A Three-Part Test

The supreme court held that in a defective food product case and plaintiff may reach the jury, without direct proof of the specific injury-causing object or substance, if the plaintiff establishes by reasonable inference from circumstantial evidence that:

1. The injury-causing event was of a kind that would ordinarily only occur as a result of a defective condition in the food product;
2. The defendant was responsible for a condition that caused the injury; and
3. The injury-causing event was not caused by anything other than a food product defect existing at the time of the food product's sale.

Schafer case continued on page 318

FROM THE FRONT LINES

Do You Want To Take Aim At TASER? Here's Help.

► *Clip and save our guide to TASER — the company and the weapons.*

During January 2005, TASER International, Inc. announced a campaign to sell its stun guns to private individuals. As law enforcement agencies — and now the general public — buy more of TASER's products, you can expect more injuries and deaths from the weapons. And that means more products liability litigation. Start gearing up now to sue TASER with our guide to the company and its products.

How TASERS Work — Laser Sights, Triggers And 50,000 Volts

TASERS look like black plastic handguns, and operate in much the same way. Laser sights help users take aim and the weapons fire when users pull a trigger. TASERS use compressed nitrogen to fire two small, electrified probes up to 25 feet. After firing, the probes discharge a 50,000-volt burst of electricity. The electrical burst “temporarily overwhelms the normal electrical signals within the body's nerve fibers, impairing subjects' ability to control their bodies or perform coordinated actions. The initial effect lasts up to 10 seconds and the charge can be repeated for up to approximately 10 minutes by repeatedly firing the device, if required,” according to the company's latest 10-KSB report filed with the **Securities and Exchange Commission**.

Company Information For Your File

Company Name:	TASER International, Inc.
State of Incorporation:	Delaware
Company Headquarters:	7860 E. McClain Drive, Suite 2 Scottsdale, Arizona 85260
Telephone Number:	(480) 991-0791
Directors:	Patrick “Rick” Smith (also CEO), Thomas Smith, Phillips Smith, Matthew McBrady, Bruce Culver, Bernard Kerik and Mark Kroll
SIC Code:	3480 <i>ordinance and accessories (no vehicles/guided missiles)</i>
Pending Litigation:	As of Dec. 31, 2004, TASER is a defendant in 18 products liability suits. Nine of the suits are for wrongful death and nine for injuries sustained during police training exercises or arrests. Of the 18 suits, one has been dismissed with prejudice and one without prejudice. The remaining 16 suits are in the discovery phase.
Information source:	Annual Report (Form 10-KSB) for year ended Dec. 31, 2004, available at www.sec.gov .
Additional Information:	For more information on the company, its products and its legal trouble, read a series of articles in <i>The Arizona Republic</i> at www.azcentral.com/specials/taser/ . ❖

Schafer case continued from page 316

The court ruled that Schafer met all three elements. She presented evidence that her injury was the kind that would occur only if the muffin was defective, Perkins made the

muffin and her injury was not caused by anything other than a defect in the muffin.

Schafer v. JLC Food Systems, Inc., 2005 Minn. Lexis 216 (Apr. 28, 2005). ❖

SPOLIATION OF EVIDENCE

Fight Back When The Defense Moves To Dismiss Your Case — Here's How

► **Hint: Dismissal for spoliation of evidence should be the court's last resort.**

Case law from the **Illinois Supreme Court** left lawyers scratching their heads over when to file a claim for negligent spoliation of evidence and when to push for dismissal of the suit under state supreme court rule 219(c). A recent decision from a state appeals court interprets that case law and offers an answer.

The two remedies, a suit for negligent spoliation and dismissal are separate and distinct, the **Appellate Court of Illinois** ruled. "The mode of relief most appropriate will depend upon the opponent's culpability in the destruction of the evidence," the court explained.

Dismissal: Imposition of this drastic sanction requires conduct by your opponent that is deliberate, "contumacious," or evidences an unwarranted disregard of the court's authority. Dismissal is appropriate only as a last resort and after all the court's other enforcement powers "have failed to advance the litigation," the panel held.

Lawsuit for negligent spoliation: When your opponent's negligence leads to destruction of evidence, your remedy is a claim for negligent spoliation.

Case Provides Example Of Negligent Spoliation

In the case before the appeals court, **Steve Adams** sued **Bath & Body Works, Inc.** (BBW) and **Globaltech Industries, Inc.** contending a candle Globaltech manufactured and BBW sold caused the fire that destroyed the apartment he rented, injured him and killed his wife.

Six days after the fire, Adams retained counsel. Based on comments from city fire inspectors, Adams and his attorney believed two living-room lamps very likely caused the fire. Adams' attorney removed the lamps from the rubble. **State Farm insurance Co.**,

the landlord's insurer, also conducted an investigation shortly after the fire. That investigation revealed that the candle, which sat on a living-room end table, most likely started the fire.

The landlord hired a company to clean up the mess, and that company hauled away the end table, sofa and carpeting, destroying the evidence Adams needed to show that the candle caused the fire.

The defendants moved to dismiss the lawsuit as a sanction for Adams' failure to preserve the end table, couch and carpet. The trial court granted the motion and Adams appealed. The appeals court reversed.

Dismissal was not appropriate for four reasons, the court wrote. First, Adams did not engage in any knowing and willful defiance of discovery rules or court orders. The destruction of the evidence happened long before he filed his lawsuit.

Second, the carpet belonged to the landlord, and the court doubted Adams could have forced her to preserve it.

Next, even if he had preserved the evidence, Adams had no way to know it was relevant and material because he believed the lamps caused the fire.

Fourth, Adams played no role in destroying the evidence, nor did he have any notice of it.

The appeals court reversed and remanded the case to the trial court.

Plaintiff's attorneys: Robert Wadington and Jeffrey Kasten, Robert Wadington & Assoc., Chicago.

Defendants' attorneys: Robert Burke and Jon Szostak, Johnson & Bell, Chicago; et al.

Adams v. Bath and Body Works, Inc., 2005 Ill. App. Lexis 238 (Mar. 17, 2005). ❖

LITIGATION BRIEFS

► Don't File A Federal Complaint Unless You're Sure The Court Has Personal Jurisdiction

A federal court in a state an aircraft engine passed through does not have personal jurisdiction to hear a products liability case involving the engine. The **Eleventh U.S. Circuit Court of Appeals** issued that ruling April 22.

New Jersey resident **Theodore Koziol** was a passenger in an ultralight aircraft when it crashed in New Jersey. He sustained injuries in the accident and sued the engine's manufacturer, **Bombardier-Rotax GMBH, Motorenfabrik**, (Rotax) an Austrian company, and Kodiak Research Ltd., an intermediate seller based in the Bahamas. Kodiak shipped the engine to a Florida delivery company, which trucked it to a Mississippi company that sold it to the plane's builder in New Jersey.

Koziol's lawsuit eventually landed in the **U.S. District Court for the Southern District of Florida**. That court dismissed the case for lack of personal jurisdiction and Koziol appealed to the Eleventh Circuit.

The appellate panel affirmed, because the only contact between the engine and Florida was that the product flew over the state on its way from the Bahamas to Mississippi. Additionally, none of the defendants maintained a place of business in Florida. Finally, the appeals court wrote, if the Florida court heard the case it would violate "traditional notions of fair play and substantial justice." *Koziol v. Bombardier-Rotax GMBH*, 2005 U.S. App. Lexis 7205 (11th Cir. Apr. 22, 2005).

► Judge Who Invented A New Rule Of Evidence Must Retry The Case

Thirteen-month-old **Joel Stokes** sustained severe burns when he pulled over a Kitchen Kettle deep fryer and poured hot oil on himself. Stokes' parents sued Kitchen Kettle's manufacturer, **National Presto Industries, Inc.**, among others.

The trial judge restricted evidence of other pullover accidents to incidents involving only Kitchen Kettles. He refused to allow evidence of pullover accidents involving other National Presto deep fryers. The judge repeatedly said during the trial that he was limiting the evidence to the "single product idea" or "one product idea."

The jury returned a verdict for the defense and the plaintiffs appealed to the **Court of Appeals of Missouri**.

Held: The judge applied the wrong standard of law and in so doing, abused his discretion. No "single product idea" rule exists, the appeals court wrote.

Lesson learned: Evidence of accidents similar to the accident your client suffered is admissible in products liability actions. The key is the similarity of the incidents. To be sufficiently similar, the accidents "must be (1) of like character, (2) occur under substantially the same circumstances, and (3) result from the same cause," the appellate panel explained. *Stokes v. National Presto Industries, Inc.*, 2005 Mo. App. Lexis 542 (Apr. 12, 2005). ❖

PHARMACEUTICAL LITIGATION UPDATE

► Judge Postpones First Vioxx Trial

The first trial against **Merck & Co.** involving Vioxx was scheduled to begin May 23 in Montgomery, AL. Circuit Judge **John Rochester** May 6 postponed the trial indefinitely at the request of Judge **Eldon Fallon** of the **U.S. District Court for the Eastern District of Louisiana**. Judge Fallon is presiding over all federal Vioxx cases, and asked the Alabama judge to delay the trial so it would not conflict with the federal litigation.

► Glaxo Signs \$650 Million Penal Bond And Consent Decree

The **Food and Drug Administration** and **GlaxoSmithKline** announced April 28 that the company has signed a consent decree agreeing to correct deficiencies at its manufacturing facility in Cidra, Puerto Rico. Federal marshals raided the plant March 4 and seized Paxil and Avandamet, a drug used to treat Type II diabetes. Citing the drugs' poor quality, the FDA sent the law enforcement officers to the plant. The FDA says Paxil tablets may split apart leaving the patient with a portion of a tablet with no active ingredient or too much active ingredient. Some Avandamet tablets do not have an accurate dose of the drug's active ingredient.

The consent decree requires Glaxo to post a penal bond of \$650 million contingent on either successful reconditioning the drugs seized in March or destroying them and paying costs to the government. ❖

Industry Notes are on pg. 332

Cite as: 544 U. S. ____ (2005)

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 03–388

DENNIS BATES, ET AL., PETITIONERS v. DOW AGROSCIENCES LLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 27, 2005]

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners are 29 Texas peanut farmers who allege that in the 2000 growing season their crops were severely damaged by the application of respondent’s newly marketed pesticide named “Strongarm.” The question presented is whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U. S. C. §136 et seq. (2000 ed. and Supp. II), pre-empts their state-law claims for damages.

I

Pursuant to its authority under FIFRA, the Environmental Protection Agency (EPA) conditionally registered Strongarm on March 8, 2000, thereby granting respondent (Dow) permission to sell this pesticide—a weed killer¹—in the United States. Dow obtained this registration in time to market Strongarm to Texas farmers, who normally plant their peanut crops around May 1. According to petitioners—whose version of the facts we assume to be true at this stage—Dow knew, or should have known, that Strongarm would stunt the growth of peanuts in soils with pH levels of 7.0 or greater.² Nevertheless, Strongarm’s label stated, “Use of Strongarm is recommended in all areas where peanuts are grown,” App. 108, and Dow’s agents made equivalent representations in their sales pitches to petitioners. When petitioners applied Strongarm on their farms—whose soils have pH levels of 7.2 or higher, as is typical in western Texas—the pesticide severely damaged their peanut crops while failing to control the growth of weeds. The farmers reported these problems to Dow, which sent its experts to inspect the crops.

Meanwhile, Dow reregistered its Strongarm label with EPA prior to the 2001 growing season. EPA approved a “supplemental” label that was for “[d]istribution and [u]se [o]nly in the states of New Mexico, Oklahoma and Texas,” *id.*, at 179, the three States in which peanut farmers experienced crop damage. This new label contained the following warning: “Do not apply Strongarm to soils with a pH of 7.2 or greater.” *Id.*, at 181.

After unsuccessful negotiations with Dow, petitioners gave Dow notice of their intent to bring suit as required by the Texas Deceptive Trade Practices-Consumer Protection Act³ (hereinafter Texas DTPA). In response, Dow filed a declaratory judgment action in Federal District Court, asserting that petitioners’ claims were expressly or impliedly pre-empted by FIFRA. Petitioners, in turn, brought counterclaims, including tort claims sounding in strict liability and negligence. They also alleged fraud, breach of warranty, and violation of the Texas DTPA. The District Court granted Dow’s motion for summary judgment, rejecting one claim on state-law grounds and dismissing the remainder as expressly pre-empted by 7 U. S. C. §136v(b), which 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 this subchapter.”

The Court of Appeals affirmed. It read §136v (b) to preempt any state-law claim in which “a judgment against Dow would induce it to alter its product label.” 332 F. 3d 323, 331 (CA5 2003). The court held that because petitioners’ fraud, warranty, and deceptive trade practices claims focused on oral statements by Dow’s agents that did not differ from statements made on the product’s label, success on those claims would give Dow a “strong incentive” to change its label. Those claims were thus preempted. *Id.*, at 331–332. The court also found that petitioners’ strict liability claim alleging defective design was essentially a “disguised” failure-to-warn claim and therefore pre-empted. *Id.*, at 332. It reasoned: “One cannot escape the heart of the farmers’ grievance: Strongarm is dangerous to peanut crops in soil with a pH level over 7.0, and that was not disclosed to them. . . . It is inescapable that success on this claim would again necessarily induce Dow to alter the Strongarm label.” *Id.*, at 332–333. The court employed similar reasoning to find the negligent testing and negligent manufacture claims pre-empted as well. *Id.*, at 333.

This decision was consistent with those of a majority of the Courts of Appeals,⁴ as well of several state high courts,⁵ but conflicted with the decisions of other courts⁶ and with the views of the EPA set forth in an amicus curiae brief filed with the California Supreme Court in 2000.⁷ We granted certiorari to resolve this conflict. 542 U. S. ____ (2004).

II

Prior to 1910 the States provided the primary and possibly the exclusive source of regulatory control over the distribution of poisonous substances. Both the Federal Government’s first effort at regulation in this area, the Insecticide Act of 1910, 36 Stat. 331, and FIFRA as originally enacted in 1947, ch. 125, 61 Stat. 163, primarily dealt with licensing and labeling. Under the original version of FIFRA, all pesticides sold in interstate commerce had to be registered with the Secretary of Agriculture. The Secretary would register a pesticide if it complied with the statute’s labeling standards and was determined to be efficacious and safe.⁸ In 1970, EPA assumed responsibility for this registration process.

In 1972, spurred by growing environmental and safety concerns, Congress adopted the extensive amendments⁹ that “transformed FIFRA from a labeling law into a comprehensive regulatory statute.” *Ruckelshaus v. Monsanto Co.*, 467 U. S. 986, 991 (1984). “As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority.” *Id.*, at 991–992. The 1972 amendments also imposed a new criterion for registration—environmental safety. *Id.*, at 992. See generally 4 F. Grad, *Treatise on Environmental Law* §§8.02–8.03 (2004) (tracing FIFRA’s statutory evolution).

Under FIFRA as it currently stands, a manufacturer seeking to register a pesticide must submit a proposed label to EPA as well as certain supporting data. 7 U. S. C. §§136a(c)(1)(C), (F). The agency will register the pesticide if it determines that the pesticide is efficacious (with the caveat discussed below), §136a(c)(5)(A); that it will not cause unreasonable adverse effects on humans and the environment, §§136a(c)(5)(C), (D); §136(bb); and that its label complies with the statute’s prohibition on misbranding, §136a(c)(5)(B); 40 CFR §152.112(f) (2004). A pesticide is “misbranded” if its label contains a statement that is “false or misleading in any particular,” including a false or misleading statement concerning the efficacy of the pesticide. §136(q)(1)(A); 40 CFR §156.10(a)(5)(ii). A pesticide is also misbranded if its label does not contain adequate instructions for use, or if its label omits necessary warnings or cautionary statements. §§136(q)(1)(F), (G).¹⁰

Because it is unlawful under the statute to sell a pesticide that is registered but nevertheless misbranded, manufacturers have a continuing obligation to adhere to FIFRA’s labeling requirements. §136j(a)(1)(E); see also §136a(f)(2) (registration is prima facie evidence that the pesticide and its labeling comply with the statute’s requirements, but registration does not provide a defense to the violation of the statute); §136a(f)(1) (a manufacturer may seek approval to amend its label). Additionally, manufacturers have a duty to report incidents involving a pesticide’s toxic effects that may not be adequately reflected in its label’s warnings, 40 CFR §§159.184(a), (b)(2004), and EPA may institute cancellation proceedings,

7 U. S. C. §136d(b), and take other enforcement action if it determines that a registered pesticide is misbranded.¹¹

Section 136v, which was added in the 1972 amendments, addresses the States' continuing role in pesticide regulation. As currently codified, §136v provides: “

(a) In general

“A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.”(b) Uniformity

“Such 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.”(c) Additional uses “

(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State. . . .”

In 1978, Congress once again amended FIFRA, 92 Stat. 819, this time in response to EPA's concern that its evaluation of pesticide efficacy during the registration process diverted too many resources from its task of assessing the environmental and health dangers posed by pesticides. Congress addressed this problem by authorizing EPA to waive data requirements pertaining to efficacy, thus permitting the agency to register a pesticide without confirming the efficacy claims made on its label. §136a(c)(5). In 1979, EPA invoked this grant of permission and issued a general waiver of efficacy review, with only limited qualifications not applicable here. See 44 Fed. Reg. 27932 (1979); 40 CFR §158.640(b) (2004). In a notice published years later in 1996, EPA confirmed that it had “stopped evaluating pesticide efficacy for routine label approvals almost two decades ago,” Pesticide Registration Notice 96-4, p. 3 (June 3, 1996), available at www.epa.gov/opppmsd1/PR_Notices/pr96-4.html, App. 232, and clarified that “EPA's 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.” *Id.*, at 5, App. 235. The notice also referred to an earlier statement in which EPA observed that “‘pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use.’” *Id.*, at 5, App. 230 (quoting 47 Fed. Reg. 40661 (col. 2) (1982)). This general waiver was in place at the time of Strongarm's registration; thus, 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.”

Although the modern version of FIFRA was enacted over three decades ago, this Court has never addressed whether that statute pre-empts tort and other common-law claims arising under state law. Courts entertained tort litigation against pesticide manufacturers since well before the passage of FIFRA in 1947,¹² and such litigation was a common feature of the legal landscape at the time of the 1972 amendments.¹³ Indeed, for at least a decade after those amendments, arguments that such tort suits were pre-empted by §136v(b) either were not advanced or were unsuccessful. See, e.g., *Ferebee v. Chevron Chemical Co.*, 736 F. 2d 1529 (CA DC 1984). It was only after 1992 when we held in *Cipollone v. Liggett Group, Inc.*, 505 U. S. 504, that the term “requirement or prohibition” in the Public Health Cigarette Smoking Act of 1969 included common-law duties, and therefore pre-empted certain tort claims against cigarette companies, that a groundswell of federal and state decisions emerged holding that §136v(b) pre-empted claims like those advanced in this litigation.

This Court has addressed FIFRA pre-emption in a different context. In *Wisconsin Public Intervenor v. Mortier*, 501 U. S. 597 (1991), we considered a claim that §136v(b) pre-empted a small town's ordinance requiring a special permit for the aerial application of pesticides. Although the ordinance imposed restrictions not required by FIFRA or any EPA regulation, we unanimously rejected the pre-emption claim. In our opinion we noted that FIFRA was not “a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States.” *Id.*, at 607.

“To the contrary, the statute leaves ample room for States and localities to supplement federal efforts even absent the express regulatory authorization of §136v(a).” *Id.*, at 613. As a part of their supplementary role, States have ample authority to review pesticide labels to ensure that they comply with both federal and state labeling requirements.¹⁴ Nothing in the text of FIFRA would prevent a State from making the violation of a federal labeling or packaging requirement a state offense, thereby imposing its own sanctions on pesticide manufacturers who violate federal law. The imposition of state sanctions for violating state rules that merely duplicate federal requirements is equally consistent with the text of §136v.

III

Against this background, we consider whether petitioners’ claims¹⁵ are pre-empted by §136v(b), which, again, reads as follows: “Such 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 introductory words of §136v(b)—“Such State”—appear to limit the coverage of that subsection to the States that are described in the preceding subsection (a). Texas is such a State because it regulates the sale and use of federally registered pesticides and does not permit any sales or uses prohibited by FIFRA. It is therefore beyond dispute that subsection (b) is applicable to this case.

The prohibitions in §136v(b) apply only to “requirements.” An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might “induce” a pesticide manufacturer to change its label should be viewed as a requirement. The Court of Appeals did, however, correctly hold that the term “requirements” in §136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties. Our decision in *Cipollone* supports this conclusion. See 505 U. S., at 521 (plurality opinion) (“The phrase ‘[n]o requirement or prohibition’ sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules”); see also *id.*, at 548–549 (SCALIA, J., concurring in judgment in part and dissenting in part). While the use of “requirements” in a pre-emption clause may not invariably carry this meaning, we think this is the best reading of §136v(b).

That §136v(b) may pre-empt judge-made rules, as well as statutes and regulations, says nothing about the scope of that pre-emption. For a particular state rule to be preempted, it must satisfy two conditions. First, it must be a requirement “for labeling or packaging”; rules governing the design of a product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is “in addition to or different from those required under this subchapter.” A state regulation requiring the word “poison” to appear in red letters, for instance, would not be pre-empted if an EPA regulation imposed the same requirement.

It is perfectly clear that many of the common-law rules upon which petitioners rely do not satisfy the first condition. Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their 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.” None of these common-law rules requires that manufacturers label or package their products in any particular way. Thus, petitioners’ claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted.

To be sure, Dow’s express warranty was located on Strongarm’s label.¹⁶ But a cause of action on an express warranty asks only that a manufacturer make good on the contractual commitment that it voluntarily undertook by placing that warranty on its product.¹⁷ Because this common-law rule does not require the manufacturer to make an express warranty, or in the event that the manufacturer elects to do so, to say anything in particular in that warranty, the rule does not impose a requirement “for labeling or packaging.” See *id.*, at 525–526 (plurality opinion).¹⁸

In arriving at a different conclusion, the court below reasoned that a finding of liability on these claims would “induce

Dow to alter [its] label.” 332 F. 3d, at 332.19 This effects-based test finds no support in the text of §136v(b), which speaks only of “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, see *Cipollone*, 505 U. S., at 524; 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).

The inducement test is unquestionably overbroad because it would impeach many “genuine” design defect claims that Dow concedes are not pre-empted. A design defect claim, if successful, would surely induce a manufacturer to alter its label to reflect a change in the list of ingredients or a change in the instructions for use necessitated by the improvement in the product’s design. Moreover, the inducement test is not entirely consistent with §136v(a), which confirms the State’s broad authority to regulate the sale and use of pesticides.²⁰ Under §136v(a), a state agency may ban the sale of a pesticide if it finds, for instance, that one of the pesticide’s label-approved uses is unsafe. This ban might well induce the manufacturer to change its label to warn against this questioned use. Under the inducement test, however, such a restriction would anomalously qualify as a “labeling” requirement. It is highly unlikely that Congress endeavored to draw a line between the type of indirect pressure caused by a State’s power to impose sales and use restrictions and the even more attenuated pressure exerted by common-law suits. The inducement test is not supported by either the text or the structure of the statute.

Unlike their other claims, petitioners’ fraud and negli-gent-failure-to-warn claims are premised on common-law rules that qualify as “requirements for labeling or packaging.” These rules set a standard for a product’s labeling that the Strongarm label is alleged to have violated by containing false statements and inadequate warnings. While the courts of appeal have rightly found guidance in *Cipollone*’s interpretation of “requirements,” some of those courts too quickly concluded 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.²¹

Unlike the pre-emption clause at issue in *Cipollone*²², §136v(b) prohibits only state-law labeling and packaging requirements that are “in addition to or different from” the labeling and packaging requirements under FIFRA. Thus, a state-law labeling requirement is not pre-empted by §136v(b) if it is equivalent to, and fully consistent with, FIFRA’s misbranding provisions. Petitioners argue that their claims based on fraud and failure-to-warn are not pre-empted because these common-law duties are equivalent to FIFRA’s requirements that a pesticide label not contain “false or misleading” statements, §136(q)(1)(A), or inadequate instructions or warnings. §§136(q)(1)(F), (G). We agree with petitioners insofar as we hold that state law need not explicitly incorporate FIFRA’s standards as an element of a cause of action in order to survive preemption. As we will discuss below, however, we leave it to the Court of Appeals to decide in the first instance whether these particular common-law duties are equivalent to FIFRA’s misbranding standards.

The “parallel requirements” reading of §136v(b) that we adopt today finds strong support in *Medtronic, Inc. v. Lohr*, 518 U. S. 470 (1996). In addressing a similarly worded pre-emption provision in a statute regulating medical devices, we found that “[n]othing in [21 U. S. C.] §360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements.” *Id.*, at 495.²³ As JUSTICE O’CONNOR explained in her separate opinion, a state cause of action that seeks to enforce a federal requirement “does not impose a requirement that is ‘different from, or in addition to,’ requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. Section 360k does not preclude States from imposing different or additional remedies, but only different or additional requirements.” *Id.*, at 513 (opinion concurring in part and dissenting in part). Accordingly, 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 remedy.

Dow, joined by the United States as *amicus curiae*, argues that the “parallel requirements” reading of §136v(b) would

“give juries in 50 States the authority to give content to FIFRA’s misbranding prohibition, establishing a crazy-quilt of anti-misbranding requirements different from the one defined by FIFRA itself and intended by Congress to be interpreted authoritatively by EPA.” Brief for Respondent 16; see also Brief for United States as Amicus Curiae 25–27. In our view, however, the clear text of §136v(b) and the authority of *Medtronic* cannot be so easily avoided. Conspicuously absent from the submissions by Dow and the United States is any plausible alternative interpretation of “in addition to or different from” that would give that phrase meaning. Instead, they appear to favor reading those words out of the statute, which would leave the following: “Such State shall not impose or continue in effect any requirements for labeling or packaging.” This amputated version of §136v(b) would no doubt have clearly and succinctly commanded the preemption of all state requirements concerning labeling. That Congress added the remainder of the provision is evidence of its intent to draw a distinction between state labeling requirements that are pre-empted and those that are not.

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. “[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.” *Medtronic*, 518 U. S., at 485. 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.’” *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U. S. 645, 655 (1995) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)); see also *Medtronic*, 518 U. S., at 485. Our reading is at once the only one that makes sense of each phrase in §136v(b) and the one favored by our canons of interpretation. The notion that FIFRA contains a nonambiguous command to pre-empt the types of tort claims that parallel FIFRA’s misbranding requirements is particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today.²⁴

The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly. See *Silkwood v. Kerr-McGee Corp.*, 464 U. S. 238, 251 (1984).²⁵ Moreover, this history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items. See *Mortier*, 501 U. S., at 613 (stating that the 1972 amendments’ goal was to “strengthen existing labeling requirements and ensure that these requirements were followed in practice”). Particularly given that Congress amended FIFRA to allow EPA to waive efficacy review of newly registered pesticides (and in the course of those amendments made technical changes to §136v(b)), it seems unlikely that Congress considered a relatively obscure provision like §136v(b) to give pesticide manufacturers virtual immunity from certain forms of tort liability. Overenforcement of FIFRA’s misbranding prohibition creates a risk of imposing unnecessary financial burdens on manufacturers; under-enforcement creates not only financial risks for consumers, but risks that affect their safety and the environment as well.

Finally, we find the policy objections raised against our reading of §136v(b) to be unpersuasive. Dow and the United States greatly overstate the degree of uniformity and centralization that characterizes FIFRA. In fact, the statute authorizes a relatively decentralized scheme that preserves a broad role for state regulation. See *id.*, at 613. Most significantly, States may ban or restrict the uses of pesticides that EPA has approved, §136v(a); they may also register, subject to certain restrictions, pesticides for uses beyond those approved by EPA, §136v(c). See also §136w– 1 (authorizing EPA to grant States primary enforcement responsibility for use violations). A literal reading of §136v(b) is fully consistent with the concurrent authority of the Federal and State Governments in this sphere.

Private remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA. Unlike the cigarette labeling law at issue in *Cipollone*, which prescribed certain immutable warning statements, FIFRA contemplates that pesticide labels will evolve over time, as manufacturers gain more information about their prod-

ucts' performance in diverse settings. As one court explained, tort suits can serve as a catalyst in this process:

“By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides such as [the pesticide there at issue], a state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed labelling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits. In addition, the specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement.” *Ferebee*, 736 F. 2d, at 1541–1542.

Dow and the United States exaggerate the disruptive effects of using common-law suits to enforce the prohibition on misbranding. FIFRA has prohibited inaccurate representations and inadequate warnings since its enactment in 1947, while tort suits alleging failure-to-warn claims were common well before that date and continued beyond the 1972 amendments. We have been pointed to no evidence that such tort suits led to a “crazy-quilt” of FIFRA standards or otherwise created any real hardship for manufacturers or for EPA. Indeed, for much of this period EPA appears to have welcomed these tort suits. While it is true that properly instructed juries might on occasion reach contrary conclusions on a similar issue of misbranding, there is no reason to think such occurrences would be frequent or that they would result in difficulties beyond those regularly experienced by manufacturers of other products that everyday bear the risk of conflicting jury verdicts. Moreover, it bears noting that lay juries are in no sense anathema to FIFRA's scheme: In criminal prosecutions for violation of FIFRA's provisions, see §136l(b), juries necessarily pass on allegations of misbranding.

In sum, under our interpretation, §136v(b) retains a narrow, but still important, role. In the main, it preempts competing state labeling standards—imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings—that would create significant inefficiencies for manufacturers.²⁶ The provision also preempts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations. It does not, however, pre-empt any state rules that are fully consistent with federal requirements.

Having settled on our interpretation of §136v(b), it still remains to be decided whether that provision pre-empts petitioners' fraud and failure-to-warn claims. Because we have not received sufficient briefing on this issue,²⁷ which involves questions of Texas law, we remand it to the Court of Appeals. We emphasize that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption. For example, were the Court of Appeals to determine that the element of falsity in Texas' common-law definition of fraud imposed a broader obligation than FIFRA's requirement that labels not contain “false or misleading statements,” that state-law cause of action would be pre-empted by §136v(b) to the extent of that difference. State-law requirements must also be measured against any relevant EPA regulations that give content to FIFRA's misbranding standards. For example, a failure-to-warn claim alleging that a given pesticide's label should have stated “DANGER” instead of the more subdued “CAUTION” would be pre-empted because it is inconsistent with 40 CFR §156.64 (2004), which specifically assigns these warnings to particular classes of pesticides based on their toxicity.²⁸

In undertaking a pre-emption analysis at the pleadings stage of a case, a court should bear in mind the concept of equivalence. To survive pre-emption, the state-law requirement need not be phrased in the identical language as its corresponding FIFRA requirement; indeed, it would be surprising if a common-law requirement used the same phraseology as FIFRA. If a case proceeds to trial, the court's jury instructions must ensure that nominally equivalent labeling requirements are genuinely equivalent. If a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards. For a manufacturer should not be held liable under a state labeling requirement subject to §136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Cite as: 544 U. S. ____ (2005)

BREYER, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 03–388

DENNIS BATES, ET AL., PETITIONERS v. DOW AGROSCIENCES LLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 27, 2005]

JUSTICE BREYER, concurring.

I write separately to stress the practical importance of the Court’s statement that state-law requirements must “be measured against” relevant Environmental Protection Agency regulations “that give content to [the Federal Insecticide, Fungicide, and Rodenticide Act’s] misbranding standards.” Ante, at 21. In *Medtronic, Inc. v. Lohr*, 518 U. S. 470 (1996), I pointed out that an administrative agency, there the Food and Drug Administration, had the legal authority within ordinary administrative constraints to promulgate agency rules and to determine the preemptive effect of those rules in light of the agency’s special understanding of “whether (or the extent to which) state requirements may interfere with federal objectives.” *Id.*, at 506 (opinion concurring in part and concurring in judgment). The EPA enjoys similar authority here. See 7 U. S. C. §136w(a)(1). As suggested by *Medtronic*, the federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements. Thus, the EPA may prove better able than are courts to determine whether general state tort liability rules simply help to expose “new dangers associated with pesticides,” ante, at 18 (quoting *Ferebee v. Chevron Chemical Co.*, 736 F. 2d 1529, 1541 (CA5 1984)), or instead bring about a counterproductive “crazy-quilt of anti-misbranding requirements,” ante, at 15 (quoting Brief for Respondent 16). And, within appropriate legal and administrative constraints, it can act accordingly. Cf. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U. S. 707, 721 (1985) (agencies can monitor the dynamic between federal and local requirements and promulgate regulations pre-empting local legislation that interferes with federal goals). Emphasizing the importance of the agency’s role in overseeing FIFRA’s future implementation, I join the Court’s opinion.

Cite as: 544 U. S. ____ (2005)

Opinion of THOMAS, J.

SUPREME COURT OF THE UNITED STATES

No. 03–388

DENNIS BATES, ET AL., PETITIONERS v. DOW AGROSCIENCES LLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 27, 2005]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment in part and dissenting in part. I agree with the Court that the term “requirements” in §24(b) of the Federal Insecticide, Fungicide, and Rodenticide

Act (FIFRA), 7 U. S. C. §136v(b), includes common-law duties for labeling or packaging. Ante, at 10. I also agree that state-law damages claims may not impose requirements “in addition to or different from” FIFRA’s. Ante, at 19–21. While States are free to impose liability predicated on a violation of the federal standards set forth in FIFRA and in any accompanying regulations promulgated by the Environmental Protection Agency, they may not impose liability for labeling requirements predicated on distinct state standards of care. Section 136v(b) permits States to add remedies—not to alter or augment the substantive rules governing liability for labeling. See *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 513 (1996) (O’CONNOR, J., concurring in part and dissenting in part). Because the parties have not argued that Dow violated FIFRA’s labeling standards,* the majority properly remands for the District Court to consider whether Texas law mirrors the federal standards.

However, the majority omits a step in its reasoning that should be made explicit: A state-law cause of action, even if not specific to labeling, nevertheless imposes a labeling requirement “in addition to or different from” FIFRA’s when it attaches liability to statements on the label that do not produce liability under FIFRA. The state-law cause of action then adds some supplemental requirement of truthfulness to FIFRA’s requirement that labeling statements not be “false or misleading.” 7 U. S. C. §136(q)(1)(A). That is why the fraud claims here are properly remanded to determine whether the state and federal standards for liability-incurring statements are, in their application to this case, the same. See ante, at 20–21.

Under that reasoning, the majority mistreats two sets of petitioners’ claims. First, petitioners’ breach-of-warranty claims should be remanded for pre-emption analysis, contrary to the majority’s disposition, see ante, at 11–12. To the extent that Texas’ law of warranty imposes liability for statements on the label where FIFRA would not, Texas’ law is pre-empted. See *Cipollone v. Liggett Group, Inc.*, 505 U. S. 504, 551 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part). Second, the majority holds that petitioners’ claim under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) is not pre-empted to the extent it is a breach-of-warranty claim. Ante, at 12, n. 18. However, the DTPA claim is also (and, in fact, perhaps exclusively) a claim for false or misleading representations on the label. App. 185–186. Therefore, all aspects of the DTPA claim should be remanded. The DTPA claim, like petitioners’ fraud claims, should be pre-empted insofar as it imposes liability for label content where FIFRA would not.

I also note that, despite the majority’s reference to a failure-to-warn claim, ante, at 9–10, n. 15, petitioners have not advanced an actual failure-to-warn claim. Instead, the Court of Appeals treated petitioners’ claims for negligent testing and defective design and manufacture as “disguised claim[s] for failure to warn.” 332 F. 3d 323, 332–333 (CA5 2003). If petitioners offer no evidence on remand that Dow erred in the testing, design, or manufacture of Strongarm, these claims will fail on the merits. On that point, I take the majority to agree. Ante, at 9–10, n. 15.

We need go no further to resolve this case. The ordinary meaning of §136v(b)’s terms makes plain that some of petitioners’ state-law causes of action may be pre-empted. Yet the majority advances several arguments designed to tip the

scales in favor of the States and against the Federal Government. These arguments, in addition to being unnecessary, are unpersuasive. For instance, the majority states that the presumption against pre-emption requires choosing the interpretation of §136v(b) that disfavors preemption. *Ante*, at 16–17. That presumption does not apply, however, when Congress has included within a statute an express pre-emption provision. See *Cipollone v. Liggett Group, Inc.*, *supra*, at 545–546 (SCALIA, J., concurring in judgment in part and dissenting in part); Nelson, Preemption, 86 Va. L. Rev. 225, 291–292, 298–303 (2000). Section 136v(b) is an explicit statement that FIFRA preempts some state-law claims. Thus, our task is to determine which state-law claims §136v(b) pre-empts, without slanting the inquiry in favor of either the Federal Government or the States.

The history of tort litigation against manufacturers is also irrelevant. *Ante*, at 17. We cannot know, without looking to the text of §136v(b), whether FIFRA preserved that tradition or displaced it. The majority notes that Congress must have intended to preserve common-law suits, because the legislative history does not indicate that Congress meant to abrogate such suits. *Ante*, at 19–20, n. 26; see also *Small v. United States*, *ante*, at ___ (THOMAS, J., dissenting) (criticizing novel practice of relying on silence in the legislative history); *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U. S. ___, ___ (2004) (slip op., at 5) (SCALIA, J., dissenting) (same). For the Court, then, enacting a pre-emption provision is not enough: either Congress must speak with added specificity in the statute (to avoid the presumption against pre-emption) or some individual Members of Congress or congressional committees must display their preference for pre-emption in the legislative record (to avoid a new canon of congressional silence). But the Court does not believe its own test, for it agrees that §136v(b) stands to abrogate many common-law causes of action. On remand, for example, petitioners may be unable to pursue a traditional common-law suit under Texas’ law of fraud. Finally, while allowing additional state-law remedies likely aids in enforcing FIFRA’s misbranding requirements, *ante*, at 18, it is for Congress, not this Court, to strike a balance between state tort suits and federal regulation.

Because we need only determine the ordinary meaning of §136v(b), the majority rightly declines to address respondent’s argument that petitioners’ claims are subject to other types of pre-emption. Brief for Respondent 36–37. For instance, the majority does not ask whether FIFRA’s regulatory scheme is “so pervasive,” and the federal interest in labeling “so dominant,” that there is no room for States to provide additional remedies. *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Nor does the majority ask whether enforcement of state-law labeling claims would “stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in enacting FIFRA. *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941). Today’s decision thus comports with this Court’s increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U. S. 564, 617 (1997) (THOMAS, J., dissenting). This reluctance reflects that pre-emption analysis is not “[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives,” *Gade v. National Solid Wastes Management Assn.*, 505 U. S. 88, 111 (1992) (KENNEDY, J., concurring in part and concurring in judgment), but an inquiry into whether the ordinary meanings of state and federal law conflict.

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- 1 Strongarm would more commonly be called a herbicide, but it is classified as a pesticide for purposes of FIFRA. See 7 U. S. C. §§136(t), (u).
 - 2 The term “pH,” which stands for pondus hydrogenii, or “potential hydrogen,” refers to the acidity of the soil.
 - 3 Tex. Bus. & Com. Code Ann. §17.01 et seq. (West 2002).
 - 4 See, e.g., *Grenier v. Vermont Log Buildings, Inc.*, 96 F. 3d 559 (CA1 1996); *Kuiper v. American Cyanamid Co.*, 131 F. 3d 656 (CA7 1997); *Netland v. Hess & Clark, Inc.*, 284 F. 3d 895 (CA8 2002).
 - 5 See, e.g., *Etcheverry v. Tri-Ag Service, Inc.*, 22 Cal. 4th 316, 993 P. 2d 366 (2000).
 - 6 See, e.g., *Ferebee v. Chevron Chemical Co.*, 736 F. 2d 1529 (CAD9 1984); *American Cyanamid Co. v. Geye*, 79 S. W. 3d 21 (Tex. 2002).
 - 7 See Brief Amicus Curiae for United States in *Etcheverry v. Tri-Ag Serv., Inc.*, No. S072524 (Cal. Sup. Ct.) (hereinafter Brief Amicus Curiae for United States in *Etcheverry*). The Solicitor General has since adopted a contrary position. See Brief for United States as Amicus Curiae

- 20.
- 8 If the Secretary declined registration, and the manufacturer refused to make changes, the Secretary was required to register the pesticide “under protest.” In 1964, however, Congress eliminated this procedure, and required disappointed manufacturers to challenge a denial of registration through administrative review. 78 Stat. 190.
- 9 Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973.
- 10 A pesticide label must also conspicuously display any statement or information specifically required by the statute or its implementing regulations. §136(q)(1)(E). To mention only a few examples, the label must contain the name and address of the producer, the product registration number, and an ingredient statement. 40 CFR §§156.10(a)(1)(ii), (iv), (vi) (2004).
- 11 EPA may issue “stop sale, use, or removal” orders and may seize offending products. §§136k(a), (b). Further, manufacturers may be subjected to civil and criminal penalties for violating FIFRA’s requirements. §136l.
- 12 See, e.g., *Mossrud v. Lee*, 163 Wis. 229, 157 N. W. 758 (1916); *West Disinfecting Co. v. Plummer*, 44 App. D. C. 345 (1916); *McCrossin v. Noyes Bros. & Cutler, Inc.*, 143 Minn. 181, 173 N. W. 566 (1919); *White v. National Bank of Commerce*, 99 Cal. App. 519, 278 P. 915 (1929).
- 13 See Hursh, Annotation, Liability of Manufacturer or Seller for Injury Caused by Animal Feed or Medicines, Crop Sprays, Fertilizers, Insecticides, Rodenticides, and Similar Products, 81 A. L. R. 2d 138, 144 (1962) (“A duty of due, reasonable care binds manufacturers and sellers of products of this kind. This duty of care includes a duty to warn of product-connected dangers, a duty on the part of the manufacturer to subject the product to reasonable tests, and a duty on the part of the seller to subject the product to reasonable inspection” (footnotes omitted)) (collecting cases).
- 14 As the EPA’s Website explains, “Federal law requires that before selling or distributing a pesticide in the United States, a person or company must obtain registration, or license, from EPA. . . . Most states conduct a review of the pesticide label to ensure that it complies with federal labeling requirements and any additional state restrictions of use.” EPA, Pesticides: Regulating Pesticides, Evaluating Potential New Pesticides and Uses, <http://www.epa.gov/pesticides/regulating/index.htm> (all Internet materials as visited Apr. 6, 2005, and available in the Clerk of Court’s case file). See also F. Grad, *Treatise on Environmental Law* §8.05, p. 8–140 (2004) (“All the state[s] have some labeling requirements for pesticides, and these generally parallel [FIFRA] of 1947”); *id.*, at 8–143 to 8–218 (reviewing the pesticide statutes of the 50 States).
- 15 The briefing and the record leave some confusion as to what precise claims are at issue. In light of the posture of this case, we find it appropriate to address the following claims: breach of express warranty, fraud, violation of the Texas DTPA, strict liability (including defective design and defective manufacture), and negligent testing. We will also address negligent failure to warn, since the Court of Appeals read petitioners’ allegations to support such a claim. But because petitioners do not press such a claim here, we leave it to the court below to determine whether they may proceed on such a claim on remand. Of course, we express no view as to whether any of these claims are viable as a matter of Texas law. Nor do we, given the early stage of this litigation, opine on whether petitioners can adduce sufficient evidence in support of their claims to survive summary judgment.
- 16 The label stated: “Dow AgroSciences warrants that this product conforms to the chemical description on the label and is reasonably fit for the purposes stated on the label when used in strict accordance with the directions, subject to the inherent risks set forth below.” App. 111.
- 17 To the extent that petitioners’ warranty and fraud claims are based on oral representations made by Dow’s agents, they fall outside the text of §136v(b) for an independent reason. Because FIFRA defines labeling as “all labels and all other written, printed, or graphic matter” that accompany a pesticide, §136(p)(2), any requirement that applied to a sales agent’s oral representations would not be a requirement for “labeling or packaging.”
- 18 The Court of Appeals held that petitioners’ claim under the Texas DTPA was pre-empted insofar as the Act provides a remedy for the breach of an express warranty. 332 F. 3d 323, 332 (CA5 2003) (citing Texas law). Because petitioners’ warranty claim is not pre-empted, their claim under the Act is not pre-empted to that extent.
- 19 Other Courts of Appeal have taken a similar approach. See, e.g., *Netland*, 284 F. 3d, at 900 (“Thus, our task is to determine whether Netland’s claims are essentially a challenge to Bovinol’s label or the overall design of the pesticide. To guide our analysis, we must ask whether in seeking to avoid liability for any error, would the manufacturer choose to alter the label or the product?”).
- 20 In *Wisconsin Public Intervenor v. Mortier*, 501 U. S. 597 (1991), we noted that §136v(a) is merely declaratory of the authority that the States retained after FIFRA; that provision did not “serve to hand back to the States powers that the statute had impliedly usurped.” *Id.*, at 614.
- 21 See, e.g., *Taylor AG Industries v. Pure-Gro*, 54 F. 3d 555, 559 (CA9 1995) (“There is no notable difference between the language in the 1969 Cigarette Act and the language in FIFRA”); *Shaw v. Dow Brands, Inc.*, 994 F. 2d 364, 371 (CA7 1993) (“Not even the most dedicated hair-splitter could distinguish these statements”).
- 22 “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act].” 15 U. S. C. §1334(b); *Cipollone*, 505 U. S., at 515.
- 23 We added: “Even if it may be necessary as a matter of Florida law to prove that those violations were the result of negligent conduct, or that they created an unreasonable hazard for users of the product, such additional elements of the state-law cause of action would make the state requirements narrower, not broader, than the federal requirement. While such a narrower requirement might be ‘different from’ the federal rules in a literal sense, such a difference would surely provide a strange reason for finding pre-emption of a state rule insofar as it duplicates the federal rule.” 518 U. S., at 495.
- 24 Brief Amicus Curiae for United States in *Etcheverry* 33–35. See also Brief for United States as Amicus Curiae 20 (explaining its subsequent change in view).
- 25 It is no answer that, even if all label-related claims are pre-empted under Dow’s reading, other non-label-related tort claims would remain

intact. Given the inherently dangerous nature of pesticides, most safety gains are achieved not through modifying a pesticide's design, but by improving the warnings and instructions contained on its label. See Brief for American Chemistry Council as Amicus Curiae 3.

26 The legislative history of the 1972 amendments suggests that Congress had conflicting state labeling regulations in mind when crafting §136v(b). As one industry representative testified: "Some States might want the word 'flammable,' some 'inflammable.' . . . Some States might want red lettering; others orange, another yellow, and so forth. We ask this committee, therefore, to recognize, as the Congress has in a number of similar regulatory statutes, the industry's need for uniformity by providing for this in the act." Hearings on Federal Pesticide Control Act of 1971 before the House Committee on Agriculture, 92d Cong., 1st Sess., 281–283 (1971) (statement of Robert L. Ackerly). By contrast, the lengthy legislative history is barren of any indication that Congress meant to abrogate most of the common-law duties long owed by pesticide manufacturers.

27 Dow does not seem to argue that, by their terms, Texas's fraud and failure-to-warn causes of action are not equivalent to FIFRA's misbranding standards. Nor has Dow identified any EPA regulations that further refine those general standards in any way that is relevant to petitioners' allegations. Rather, Dow has chosen to mount a broader attack on the "parallel requirements" interpretation, thus seeming to argue for the pre-emption of even a state-law cause of action that expressly incorporates FIFRA's misbranding provisions. See Brief for Respondent 38, n. 25. Since Dow did not have the benefit of our construction of §136v(b), Dow should be allowed to address these matters on remand.

28 At present, there appear to be relatively few regulations that refine or elaborate upon FIFRA's broadly phrased misbranding standards. To the extent that EPA promulgates such regulations in the future, they will necessarily affect the scope of pre-emption under §136v(b).

* Petitioners' counterclaim expressly disclaims that Dow violated any provision of FIFRA. App. 192 (First Amended Counter claim).

INDUSTRY NOTES

Defective All-Terrain Vehicles Recalled

American Suzuki Motor Corp. and Polaris Industries have announced recalls of certain all-terrain vehicles (ATVs). You can find the specific models affected by checking the Consumer Product Safety Commission's Web site (www.cpsc.gov) and looking at the specific vehicle identification numbers involved.

Company: America Suzuki

<u>Recall Date</u>	<u>Product(s)</u>	<u>Hazard(s)</u>
4/29/05	Suzuki 2005 Model Year Eiger and Vinson (see CPSC Web site for specific VINs affected)	The company made the fuel petcock inserts with the wrong material. As a result, fuel can leak and ignite a fire.

Company: Polaris

<u>Recall Date</u>	<u>Product(s)</u>	<u>Hazard(s)</u>
5/3/05	Polaris 2004.5 Sportsman 500, 2005 Sportsman 400, 500, 600 and 700; 2005 Scrambler 500 (see CPSC Web site for specific VINs affected.)	Certain models have defective electronic control modules. The modules may fail, over-heat and start a fire.

Florida Lawmakers Send Asbestos Bill To Gov. Bush

President Bush hasn't yet convinced Congress to limit asbestos' manufacturers liability, but his brother has such a bill on his desk. The Florida legislature May 5 sent H.B. 1019 to **Gov. Jeb Bush** (R) for his signature. The measure sets minimum medical requirements for assessing whether a victim's injuries are serious enough to warrant litigation. To read the bill, go to www.myfloridahouse.gov. ❖

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