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INSIDE

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IN FUTURE ISSUES

Key eminent domain case to be decided by U.S. Supreme Court

The eminent domain clause of the Fifth Amendment to the U.S. Constitution provides "nor shall private property be taken for public use, without just compensation." The clause has two prohibitions: (1) all takings must be for public use, and (2) even takings that are for public use must be accompanied by compensation. A case presently before the U.S. Supreme Court will test the limits of the public use requirement of the eminent domain clause in situations when the "use" is largely commercial.[1] The case is of primary importance to all private landowners, urban as well as rural.

Facts of *Kelo v. City of New London*[2]

In 1998, pharmaceutical company Pfizer announced that it would develop a waterfront global research facility in New London, Connecticut.[3] As a result, the city created a private development corporation to revitalize the area around the new facility, and granted the corporation the power of eminent domain. The corporation filed condemnation proceedings against the plaintiffs in an attempt to condemn their homes – some of which had been in their families for over a century. This property was to be used to create an office park, a parking lot, and a new park. In response to the condemnation action, the homeowners initiated a civil action seeking a declaration that the city's delegation of its eminent domain power to a private entity was unconstitutional and an injunction that would prevent the city from taking their property.[4] The Connecticut Supreme Court found that the city's use of eminent domain for the purpose of "economic development" did not violate either the state or U.S. Constitution.[5] The court held that economic development was a constitutionally valid public use because the legislature rationally determined that the taking was reasonably necessary to implement a development plan that increased tax revenue, created jobs, and improved the local economy. In addition, the court found that any private benefit from economic development was "secondary to the public benefit that results from significant economic growth and revitalized financial stability in a community."[6] The court also held that the taking of private property on one of the tracts at issue for office space and parking was not impermissibly speculative, and that the trial court erred when it did not defer to the legislative finding that the taking of another parcel was reasonably necessary to the development plan.

The U.S. Supreme Court and the "public use" requirement

The U.S. Supreme Court agreed to hear the case on September 28, 2004.[7] The case

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Federal Register summary to April 1, 2005

ALTERNATIVE MINIMUM TAX. The IRS has adopted as final regulations governing the time and manner of making an election under I.R.C. § 59(c) for the ten-year write-off of certain tax preferences. **69 Fed. Reg. 76614 (Dec. 22, 2004)**.

BIOTERRORISM. The APHIS has adopted as final regulations governing the possession, use, and transfer of biological agents and toxins that have been determined to have the potential to pose a severe threat to public health and safety, to animal health, to plant health, or to animal or plant products. **70 Fed. Reg. 13241 (March 18, 2005)**.

CONSERVATION SECURITY PROGRAM. The CCC has adopted as final regulations for administering the Conservation Security Program which provides financial and technical assistance to agricultural producers who, in accordance with certain requirements, conserve and improve the quality of soil, water, air, energy, plant and animal life, and support other conservation activities. **70 Fed. Reg. 15201 (March 25, 2005)**.

CORPORATIONS

REORGANIZATIONS. The IRS has adopted as final regulations governing the requirements for meeting the requirement of continuity of interest (COI) for

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represents the first time in 20 years that the Supreme Court agreed to hear a case involving the question of whether a "public use" exists when private property is condemned and transferred to private developers and long-term tenants in an area struggling economically. Historically, the "public use" requirement operated as a major constraint on government action. For many years, the requirement was understood to mean that if property was to be taken, it was necessary that it be used by the public – the fact that the taking was "beneficial" was not enough. Eventually, however, courts concluded that a wide range of uses could serve the public even if the public did not, in fact, have possession.[8] Indeed, so many exceptions were eventually built into the general rule of "use by the public" that the rule itself was abandoned.[9]

Two U.S. Supreme Court cases illustrate the Court's willingness to expansively define "public use." In *Berman v. Parker*,[10] the Court upheld the District of Columbia's use of eminent domain to develop slum areas for possible sale to private interests. The purpose of the act in question was to improve areas of Washington that were "injurious to the public health, safety, morals, and welfare" of the community. The landowners, however, argued that their specific properties neither imperiled health or safety nor contributed to the making of a slum, and that the project amounted to "taking from one businessman for the benefit of another businessman."[11] Based on the general principle of judicial deference to legislative acts, the Court held that the legislature was free to define the means by which it attained its valid purpose, and noted that ruling otherwise would harm integrated plans for redevelopment. In the second case, *Hawaii Housing Authority v. Midkiff*,[12] the Court upheld Hawaii's use of eminent domain to take titles from landlords and resell them to tenants in an attempt to reduce the concentration of land ownership resulting from Hawaii's historic system of land oligopoly that deterred the normal functioning of the land market and forced many individual homeowners to lease, rather than buy, the land underneath their homes.[13] The Court's opinion confirmed the ability of a state to use eminent domain power to transfer property outright to a private party, so long as the "exercise of the eminent domain power is rationally related to a conceivable public purpose."[14]

Thus, the Court will grant a great deal of deference to state and local governmental bodies using eminent domain for purposes that are legitimately related to the protection of the public. While economic development is not as important as protecting the public health, safety, morals and welfare, the Court will defer to a state legislature (or even a city council) if the condemnation of property is rationally related to a legitimate purpose of government.

How is the Supreme Court likely to rule in *Kelo*?

Past precedent makes it likely that the Court will approve New London's use of eminent domain.[15] However, if the state is allowed to take property for the purpose of economic development (or delegate the power to a private entity), a significant question is raised as to whether *any* purpose would not constitute a valid public use. Consequently, if the U.S. Supreme Court upholds the Connecticut Supreme Court's opinion, the opinion could be seen as allowing limitless government intrusion on the right to own private property. That would be a significant concern for private landowners, particularly those owning tracts that have commercial development potential.

The state courts are deeply divided on the issue. Recently, the Michigan Supreme Court[16] ruled that a county could not use eminent domain to condemn 19 parcels for a new commercial center, and the facts of the case are very similar to the facts of *Kelo*.[17] The Illinois Supreme Court has reached a similar conclusion.[18] Other courts have held otherwise, including the Kansas Supreme Court.[19] To date, state law has been construed in 11 states to disallow such condemnations for lack of adequate public use.[20] Conversely, state law has been construed in favor of developers in six states.[21]

Conclusion

In any event, the *Kelo*[2] case is critical for private property ownership in the United States. Many farm groups, private property advocacy groups and developers are anxiously waiting the Court's opinion, which is anticipated by the end of June.

--Roger A. McEowen, Associate Professor of Agricultural Law, Iowa State University, Ames, Iowa

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purposes of the nonrecognition of gain or loss in a corporate reorganization. **70 Fed. Reg. 9219 (Feb. 25, 2005)**.

REORGANIZATIONS. The IRS has issued proposed regulations which provide rules requiring the exchange (or, in the case of I.R.C. § 332, a distribution) of net value for the nonrecognition rules of subchapter C (I.R.C. §§ 351, 354, 361) to apply to the transaction. **70 Fed. Reg. 11903 (March 10, 2005)**.

DISASTER PROGRAMS. The CCC has adopted as final regulations implementing portions of the Military Construction, Appropriations and Emergency Hurricane Supplemental Appropriations Act of 2005 to authorize crop-loss disaster assistance for producers who suffered 2003, 2004, or 2005 crop losses caused by damaging weather and related conditions. **70 Fed. Reg. 15725 (March 29, 2005)**.

DISASTER PROGRAMS. The CCC has adopted as final regulations implementing the 2003-2004 Livestock Assistance Program (LAP) as provided for by the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act of 2005. Under LAP, assistance will be available to livestock producers for either 2003 or 2004 grazing losses in a county that was designated as a primary disaster county by the President or the Secretary of Agriculture after January 1, 2003, for certain losses occurring through December 31, 2004. **70 Fed. Reg. 16392 (March 31, 2005)**.

EMERGING MARKETS PROGRAM. The CCC has adopted as final regulations implementing the Emerging Markets Program authorized by Section 1542(d) of the Food, Agriculture, Conservation, and Trade Act of 1990. **70 Fed. Reg. 253 (Jan. 4, 2005)**.

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University of Arkansas School of Law launches new specialty journal on food law

This spring the University of Arkansas School of Law and its National Agricultural Law Center will launch the first student-edited specialty law journal in the nation exclusively devoted to the dynamic area of food law. *The Journal of Food Law & Policy* is a natural complement to the Law School's Graduate Program in Agricultural Law and the National Agricultural Law Center, the latter of which is lending its help and support to the start-up of the journal.

The timing for the appearance of this new journal is ideal. Popular media is replete with headline stories concerning food and nutrition topics. Nearly every day a story features the safety of our food supply, an ethical debate on biotechnology or other technological advances that effect food, or advice about which foods to eat or which to avoid. Tommy G. Thompson, who recently resigned as the U.S. Secretary of Health and Human Services, declared publicly his concern that terrorists might attack the nation's food supply. The outcome of complex food issues impact dramatically on the physical and financial health of our local, national, and international communities.

The journal will be published twice yearly and will feature articles from top academics and professionals addressing such timely issues as biotechnology, BSE (mad cow disease), food safety, food security and bio-terrorism, obesity litigation, international food trade, food technology, and the regulation of nutrition, dietary supplements, and medical foods. Special attention will be given to global food law developments, with each edition featuring updates on U.S. and European food law that will eventually expand to other parts of the world.

The journal articles are designed to help a wide variety of academics and practitioners understand the rapidly changing world of food law. Lawyers who represent local school districts, farmers who are concerned with crop drift, plaintiffs and defendants concerned with food safety are but a sampling of those individuals and entities that will find interesting and helpful articles in the *Journal of Food Law & Policy.*

Several prestigious authors have committed to contribute to the inaugural issue, among them Peter Barton Hutt, co-author of *Food and Drug Law: Cases and Materials*, former Chief Counsel for the Food and Drug Administration, and a Lecturer on Law at Harvard Law School. The first issue will also feature a trio of articles by prominent scholars in the area of biotechnology, a rousing article on food policy by noted scholar and Arkansas guest lecturer Neil Hamilton, and a fascinating look at the regulation of food-borne illnesses by noted Washington, D.C. lawyer Dennis Johnson, who represents Tyson Foods. The second edition is also fully committed and will feature an analysis of the newly formed European Food Safety Authority and developing legal issues involving food traceability.

The journal is also pleased to announce that the prominent Washington, D.C. law firm of Arent Fox will sponsor an "Arent Fox/Dale Bumpers Excellence in Writing Award" that will be presented each year to the outstanding student paper published in the journal. Former Senator Bumpers, a lifelong champion of agricultural and food law and development in Arkansas, is of counsel to Arent Fox and was instrumental in the development of the National Agricultural Law Center at the University of Arkansas School of Law.

Those interested in obtaining more information on the journal are encouraged to visit the publication's Web site at http://law.uark.edu/student/orgs/foodlaw/index.htm. Subscriptions to the journal are $32 a year and can be ordered from the Web site. Authors who are interested in submitting articles for publication may contact the staff at foodlaw@uark.edu.

Arent Fox/Dale Bumpers "Excellence in Writing" award announced

The University of Arkansas School of Law's National Agricultural Law Center and its new *Journal of Food Law and Policy* are pleased to announce that the prominent Washington DC law firm of Arent Fox and former Senator Dale Bumpers, of counsel with Arent Fox, will sponsor a cash award to be presented each year to the outstanding student article published in the *Journal*, the national's first student-edited legal journal devoted to studying the relationships that exist among food, law, and society. Each year's chosen article will also be posted to the Arent Fox Web site.

Senator Bumpers is well known for his long and distinguished career in public service in the U.S. Senate and as Governor of Arkansas. He and his wife Betty are also both known for their dedication to the cause of childhood immunization, with the Dale and Betty Bumpers Vaccine Research Center named in honor of their tireless efforts by the National Institute of Allergy and Infectious Diseases. In 1998, the Wilderness Society honored Senator Bumpers for his fervent commitment to the protection of America's wild lands by presenting him its prestigious Ansel Adams Award. His autobiography, *The Best Lawyer in a One-Lawyer Town: A Memoir*, published by Random House in 2003, tells of his early legal practice in Charleston City, Arkansas, where he also owned and operated a hardware store, raised cattle, and became active in community affairs. Serving in the Senate from 1975 to 1999, he chaired the Committee on Small Business and was known as a skilled orator.

Arent Fox is a recognized leader in many areas, including real estate, life sciences, and intellectual property. With offices in Washington, DC and New York, the firm has a wide range of expertise, including food and drug law.

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EMPLOYEE STOCK OWNERSHIP PLANS. The IRS has issued temporary regulations governing the requirements of ESOPs holding stock in S corporations, providing guidance on the definition and effects of a prohibited allocation under I.R.C. § 409(p), identification of disqualified persons and determination of a nonallocation year, calculation of synthetic equity under I.R.C. § 409(p)(5), and standards for determining whether a transaction is an avoidance or evasion of I.R.C. § 409(p). **69 Fed. Reg. 75455 (Dec. 17, 2004)**.

FARM PROGRAMS. The CCC has announced the extension, until October 31, 2005, of the period in which CCC will automatically reduce any Direct and Counter-Cyclical Payments to satisfy a producer's obligation to repay unearned 2003-crop advance counter-cyclical payments. **70 Fed. Reg. 13443 (March 21, 2005)**.

FEDERAL FARM PRODUCTS RULE. The GIPSA has announced the approval of the addition of embryos and genetic products to the list of products certified for the Nebraska central filing system for purposes of Section 1324 of the Food Security Act of 1985. **70 Fed. Reg. 11933 (March**

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Supreme Court considers preemption of state law claims under the Federal, Insecticide, Fungicide, and Rodenticide Act

By Harrison M. Pittman[1]

In *Dow Agrosciences v. Bates*,[2] several Texas peanut farmers contended that their peanut crops were damaged when a herbicide manufactured by Dow Agrosciences, LLC (Dow) was applied to their peanut crops. The farmers submitted demand letters to Dow that threatened to sue Dow for false advertising, breach of warranty, and fraudulent trade practices under the Texas Deceptive Trade Practices Act. Dow responded by seeking a declaratory judgment that, among other things, the farmers' claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[3] The farmers filed a counterclaim against Dow for "negligence, breach of implied and express warranties, fraud, fraud in the inducement, defective design, estoppel, and waiver."[4] The United States District Court for the Northern District of Texas ruled that the farmers' claims were preempted by FIFRA because they "constituted 'requirements for labeling and packaging in addition to those required under' FIFRA."[5] The farmers appealed the decision to the Fifth Circuit.

The Fifth Circuit held that the farmers' claims were preempted by FIFRA because success on the claims would have the "'undeniable practical effect' of inducing a manufacturer to alter the product or label to avoid liability."[6] The holding in *Bates* is not altogether unusual but is significant because it is currently being reviewed by the United States Supreme Court.[7]

In light of the Supreme Court's review of *Bates*, this article discusses the FIFRA, the evolution of courts' views regarding FIFRA preemption of state law claims,[8] and the Fifth Circuit's decision in *Bates*. The article also briefly discusses *Hardin v. BASF Corp.*,[9] the most recent federal circuit court decision on FIFRA preemption. *Hardin* relied on *Bates* to hold that several farmers' state law claims against a herbicide manufacturer were preempted by FIFRA because "a favorable outcome for ... [the farmers] would induce, if not require, BASF to alter its label."[10]

FIFRA

FIFRA regulates the use and distribution of "pesticides"[11] through comprehensive labeling and registration requirements.[12] FIFRA provides the federal government wide latitude to regulate pesticides but authorizes states to play a role as well. In particular, FIFRA provides that "[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."[13] It also provides that "[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."[14] Essentially, this statutory language "gives states the authority to regulate the *use* of pesticides more strictly, while denying states the power to regulate the *labeling* of such pesticides either more or less strictly than the federal government."[15]

The issue arises as to whether state common law tort claims are preempted by FIFRA because the claims impose requirements "in addition to or different" from those imposed by the Environmental Protection Agency (EPA), the federal agency responsible for implementing FIFRA.[16] The predominant view among state and federal courts is that all common law tort claims that challenge the adequacy of pesticide labels are preempted by FIFRA.[17] In particular, state law claims for failure to warn, actual defective-label claims, and claims for breach of express and implied warranties are preempted by FIFRA.[18] Courts have expressly recognized, however, that not all state law claims are preempted by FIFRA.[19]

Evolution of courts' views on FIFRA preemption

In *Ferebee v. Chevron Chemical* Co.,[20] the D.C. Circuit held, *inter alia*, that FIFRA did not preempt state law damage actions but rather operated to preclude states from directly mandating that EPA-approved labels be altered.[21] *Ferebee* was the prevailing view for several years, with a substantial majority of courts adopting its holding.[22]

Another view emerged, however, when the United States District Court for the Eastern District of Michigan held in *Fitzgerald v. Mallinckrodt*[23] that state common law claims that conflict with FIFRA were preempted.[24] A few years later, the holdings set forth in *Fitzgerald* and its progeny were cemented in *Cipollone v. Liggett Group*[25] when the Supreme Court held in a plurality decision that federal cigarette labeling regulations expressly preempted certain state laws brought against cigarette manufacturers, including state common law claims.

The Court returned to the issue of federal preemption in *Medtronic, Inc. v. Lohr*,[26] where it considered whether amendments to the Food, Drug, and Cosmetics Act (FDCA)[27] preempted state laws and precluded all common law damage claims against manufacturers of a cardiac pacemaker.[28] The statutory provisions at issue in *Medtronic* expressly prohibited states from creating any requirement for medical devices that "is different from, or in addition to, any requirement under this chapter to the device" and that "relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this subchapter."[29] The Court held that although states were prohibited under the FDCA amendments from regulating a device in a manner that conflicted with the federal requirements for the device, states possessed "the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements."[30] It added that "[t]he presence of a damages remedy does not amount to the additional or different 'requirement' that is necessary under the statute; rather, it merely provides another reason for manufacturers to comply with identical existing 'requirements' under federal law."[31]

Neither *Cipollone* nor *Medtronic* directly involved FIFRA but courts that have considered whether FIFRA preempted state law claims have nevertheless looked to these decisions for guidance.[32] Most of these courts "have ... continued to uphold FIFRA's express preemption of state law claims based on inadequate labeling"[33] in accordance with *Cipollone*. Since *Cipollone*, at least nine federal circuit courts, including the Fifth Circuit in *Bates*, have held that "FIFRA expressly preempts state tort claims insofar as those claims would create additional or different labeling requirements from those imposed by FIFRA."[34]

Dow Agrosciences v. Bates

In *Bates*, the Fifth Circuit held that state law claims brought against Dow were preempted by FIFRA. The court explained that "FIFRA preempts state laws that either directly or indirectly impose different labeling requirements" than those imposed by the EPA.[35] In a footnote it added the following: "For example, different requirements may be imposed when a court authorizes a damage award against a manufacturer that has the 'undeniable practical effect' of inducing a manufacturer to alter the product or label to avoid liability. It is this mandate that is fatal to appellants' argument."[36]

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The farmers raised two arguments before the Fifth Circuit: (1) that their claims related to product effectiveness were not within the scope of FIFRA preemption, and (2) that their claims were not "sufficiently related to the content" of the herbicide label to warrant FIFRA preemption.

The court rejected the farmers' first argument, stating that "[f]or a state to create a labeling requirement by authorizing a claim linked to the specifications of a label, even where the EPA has elected not to impose such labeling requirements, would clearly be to impose a requirement 'in addition to or different from those' required under FIFRA."[37] The court thus concluded that all of the farmers' claims, including those related to product effectiveness, are preempted by FIFRA if they relate to the content of the herbicide label.

The court next examined whether the farmers' claims were "sufficiently related" to the product's label. It stated that the claims would be expressly preempted by FIFRA "if a judgment against Dow would induce it to alter its product label"[38] and that each of the farmers' claims would have to be examined to determine whether a judgment against Dow would induce Dow to alter the product label.[39]

The farmers' claims for breach of warranty, fraud, and violations of the Texas Deceptive Trade Practices Act were based on allegedly misleading "off-label" comments made by a Dow retailer. The court explained that breach of warranty claims "based upon an 'off label' representation are [not] preempted by FIFRA only if the representation deviates from the contents of the product label."[40] The court also explained, however, that success on an "off-label" claim would "provide a manufacturer with a strong incentive" to alter the product label.[41] The court held that the breach of warranty and fraud claims were preempted because it agreed with the district court's determination that "the farmers failed to establish a genuine issue of material fact that the Dow retailer's comments differed or strayed in any material manner from the contents of the ... [product's] label."[42] According to the court's reasoning, had the farmers demonstrated a genuine issue of material fact regarding whether the retailer's claims "differed or strayed in any material manner" from the product's label, their claims for breach of warranty and fraud would be preempted because it would provide Dow a "strong incentive" to alter the product label.

Turning to the farmers' claim that Dow violated the Deceptive Trade Practices Act, the court explained that the DTPA did not establish a warranty but rather established "a remedy for the breach of an independent warranty."[43] It concluded that "[b]ecause the only warranty issue at issue is based upon these 'off-label' comments, the farmers' success on a DPTA action would also induce Dow to alter its label. The DPTA is thus necessarily preempted by FIFRA ...."[44]

The court next examined the farmers' defective design claim. It explained that "'[m]erely to call something a design or manufacturing defect claim does not automatically avoid FIFRA's explicit preemption clause.'"[45] The court noted that the farmers' design defect claim "is functionally a disguised claim for failure to warn. It is inescapable that success on this claim would again necessarily induce Dow to alter the ...[product] label."[46] The court therefore affirmed the district court's determination that the design defect claim was preempted by FIFRA.

The court held that the farmers' claims that Dow was negligent in the testing, manufacture, and production of the rice herbicide were preempted by FIFRA. It stated that under Texas law– unlike some other jurisdictions– a negligent testing claim is considered a variation of a failure to warn claim.[47] It rejected the negligent manufacture claim because it was merely a disguised failure-to-warn claim and therefore preempted by FIFRA.

Hardin v. BASF Corp.

Decided in February of 2005, *Hardin* is the most recent federal circuit court decision to consider whether state law claims were preempted by FIFRA. In *Hardin*, several commercial tomato growers brought an action for negligence and strict liability against BASF, alleging that Facet, a rice herbicide manufactured by BASF, damaged their tomato crops when it drifted onto their properties from aerial spraying of nearby rice fields. The United States District Court for the Eastern District of Arkansas held that the growers' action was preempted by FIFRA because "regardless of how the issues were couched by plaintiffs, they were failure-to-warn claims, or if plaintiffs prevailed on another theory, the resolution would require a label change."[48] The growers appealed the decision to the Eighth Circuit.

The growers argued that "they brought a design-defect claim not subject to FIFRA preemption because precautions will not reduce Facet's damage-causing drift" and that "any *response* from BASF as a result of the defective design (i.e., label change), [sic] does not alter the fact that the basis for their claim is a design defect."[49]

The court rejected the growers' arguments, stating the following:

> This reasoning is contrary to our *Netland* decision, where we noted FIFRA preempts *any* cause of action which has the effect of directly, or indirectly, challenging an EPA-approved pesticide label. We stated, "[t]o guide our [preemption] analysis, we must ask whether in seeking to avoid liability for any error, would the manufacturer choose to alter the label or the product." If the manufacturer would choose to alter the label, the claim is preempted.[50]

The court concluded that the growers' claim was preempted by FIFRA because "a favorable outcome for ...[them] would induce, and even require, BASF to alter its label."[51]

Conclusion

The issue of whether FIFRA preempts state law tort claims has arisen on numerous occasions and will continue regardless of the outcome of the Supreme Court's review of *Bates*. Given the express statutory language in FIFRA that prohibits states from imposing "requirements for labeling or packaging in addition to or different from those" established by the EPA, it is highly unlikely that the Court will deviate from the general rule that state law claims that challenge a product label are preempted by FIFRA. However, the Court's decision should clarify whether this general rule is satisfied if, as was held in *Bates* and *Hardin*, a manufacturer would be induced to alter its label in the event that state law tort claims brought against the manufacturer succeeded. The Court's decision will be particularly important because, unlike *Cipollone* and *Medtronic*, *Bates* directly involves the issue of federal preemption under FIFRA.

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[2] 332 F.3d 323 (5th Cir. 2003).

[3] 7 U.S.C. §§ 136-136y.

[4] *Bates*, 332 F.3d at 325-26.

[5] *Id.* at 329.

[6] *Id.* at 329 n.9 (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994)).

[7] The matter was argued before the Supreme Court in January of 2005.

[8] The discussion regarding the evolution of courts' views on FIFRA preemption is significantly generalized. For an excellent and detailed discussion of how courts' views have evolved, *see* Elizabeth C. Brown et al, Pesticide Regulation Handbook, 82-87 (2000), from which much of the historical development discussed in this article is synthesized.

[9] 397 F.3d 1082 (8th Cir. 2005).

[10] *Id.* at 1086. *See id.* at 1086 n.3 (recognizing that *Bates* was argued before the Supreme Court in January of 2005 and stating that "[h]owever, the *Bates* claimants are the intended users of the herbicide, and they assert product effectiveness claims. Accordingly, the Supreme Court's eventual *Bates* decision is unlikely to materially affect our analysis.").

[11] 7 C.F.R. § 136(u) (setting forth statutory definition of "pesticide").

[12] For more information about pesticides and FIFRA, including many summaries of FIFRA preemption cases,

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visit the Pesticides Reading Room at the National Agricultural Law Center w\Web site, www.nationalaglawcenter.org.

[13] 7 C.F.R. § 136v(a).

[14] 7 U.S.C. § 136v(b).

[15] Brown, *supra* note 7, at 78 (emphasis in original).

[16] *See, e.g., Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir. 2002); *King v. E.I. Du Pont De Nemours & Co.*, 996 F.2d 1346 (1st Cir. 1993); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); and Arkansas–*Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

[17] *See* Brown, *supra* note 7, at 89.

[18] *See Hardin*, 397 F.3d at 1085 (citing *Netland*, 284 F.3d at 900). *See also* Brown, *supra* note 7, at 89-90.

[19] *See, e.g., Worm v. American Cyanamid Co.*, 5 F.3d 744 (5th Cir. 1993); *Anderson v. State, Dep't of Resources*, 693 N.W.2d 181 (Minn. 2005); *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004), *pet. for cert. filed*, 73 U.S.L.W. 3076 (July 16, 2004, no. 04-81 (Minn. 2004) (state consumer fraud claim not preempted); and *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000) (negligent misrepresentation and negligent testing claims not preempted). It has been held that state law claims based on "off-label" representations may not be preempted by FIFRA. *See Lowe v. Sporicidin*, 47 F.3d 124 (4th Cir. 1995) (claims based on representations that "substantially differ" from product label not preempted by FIFRA). *But see Papas v. Upjohn Co*, 985 F.2d 516 (11th Cir. 1993) (holding that "claims that point-of-sale signs, consumer notices, or other informational materials failed ... to warn ... necessarily challenge adequacy of ... label" and therefore preempted) and T*aylor AG Indus.v. Pure-Gro*, 54 F.3d 555 (11th Cir. 1993) (quoting *Papas*).

[20] 736 F.2d 1529 (D.C.Cir. 1984).

[21] *See id.* at 1540.

[22] *See, e.g., Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992); *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F.Supp. 1339 (D. Mont. 1999); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F.Supp. 1345 (S.D. Ind. 1990); and *Roberts v. Dow Chem. Co.*, 702 F.Supp. 195 (N.D. Ill. 1988).

[23] 681 F.Supp. 404 (E.D. Mich. 1987).

[24] *Fitzgerald* acknowledged *Ferebree* but adopted the reasoning set forth in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), a preemption case that involved a state law claim related to cigarette labeling.

[25] 505 U.S. 504 (1992).

[26] 518 U.S. 470 (1996).

[27] 21 U.S.C. §§ 301-397.

[28] Brown, *supra* note 5, at 85.

[29] 21 U.S.C. § 360k.

[30] *Medtronic v. Lohr*, 518 U.S. 470, 495 (1996).

[31] *Id.*

[32] *See, e.g., Arkansas-Platte Gulf Partnership v. Dow Chemical Co.*, 981 F.2d 1177 (10th Cir. 1993) (holding on remand from the Supreme Court post-*Cipollone* that FIFRA expressly preempted certain state law claims) and *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (per curiam) (holding on remand from the Supreme Court post-*Cipollone* that FIFRA expressly preempted state law claims for failure-to-warn to adequately label product).

[33] Brown, *supra* note 7, at 85. *See also id.* at 85-86 (citing and discussing several cases that have followed the reasoning set forth in *Cipollone*). *See also id.* at 86-87 (citing and discussing several cases that "have found *Medtronic* to be relevant to FIFRA preemption claims.").

[34] Brown, *supra* note 7, at 84 (citing *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Andrus v. Agrevo USA Co.*, 178 F.3d 395 (5th Cir.); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Grenier v. Vermont Log Bldgs. Inc.*, 96 F.3d 559 (1st Cir. 1996); *Taylor AG Indus.v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Bice v. Leslie's Poolmart, Inc.,* 39 F.3d 887 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 5 F.3d 744 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. du Pont de Nemours & Co.*, 996 F.2d 516 (7th Cir. 1993); *Papas,* 985 F.2d at 518; and *Arkansas-Platte*, 981 F.2d at 1179).

[35] *Bates*, 332 F.3d at 329.

[36] *Id.* n.9 (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994)).

[37] *Id.* at 331.

[38] *Id.* (citing *Andrus*, 178 F.3d at 399) (notation omitted).

[39] *Id.* (citing *MacDonald*, 27 F.3d at 1024).

[40] *Id.* (citing *Andrus*, 178 F.3d at 399). The court apparently failed to include the word "not" immediately before the word "preempted."

[41] *Id.*

[42] *Id.* The court added in the following sentence the following: "After reviewing the record, we agree with the district court. Thus the farmers' claims are preempted under FIFRA ...." *Id.*

[43] *Id.* at 332 (citation omitted).

[44] *Id.*

[45] *Id.* (quoting *Grenier v. Vermont Log Buildings, Inc.*, 96 F.3d 559, 564 (1st Cir. 1996)).

[46] *Id.*

[47] *See id.* (citing *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997). Other courts have held that negligent testing and negligent manufacture claims are not preempted. *See, e.g., Worm*, 5 F.3d at 744 (recognizing that "state law claims for negligent testing, formulation, and manufacture ... would not be pre-empted.") and *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000) (negligent misrepresentation and negligent testing claims not preempted).

[48] *Hardin*, 397 F.3d at 1084-85 (citing Hardin v. BASF Corp., 290 F.Supp.2d 964, 970-71 (E.D. Ark. 2003)).

[49] *Id.*

[50] *Id.* (citations omitted).

[51] *Id.* at 1086.

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[1] *Kelo, et al. v. City of New London, et al.,* 268 Conn. 1, 843 A.2d 500 (2004), *cert. granted,* 125 S. Ct. 27 (2004).

[2] *Id.*

[3] The announcement was expected to be a major economic boon to the city. The city's economic condition declined dramatically in the late 1980s and early 1990s when it lost a military facility that provided one-third of the region's jobs. Pfizer's arrival would provide jobs and tax revenue to the city.

[4] The basic claim was that the city had violated the homeowner's rights to equal protection and due process.

[5] 843 A.2d 500 (Conn. 2004).

[6] *Id.* at 532.

[7] *Kelo, et al. v. City of New London, et al.,* 268 Conn. 1, 843 A.2d 500 (2004), *cert. granted,* 125 S. Ct. 27 (2004).

[8] See, for example, the Mill Acts, which permitted riparian owners to erect and maintain dams which flooded neighboring property. For a discussion of the Mill Acts see M. Horwitz, *The Transformation of American Law,* 1780-1860, at 47-53 (1977).

[9] See Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L.J. 599 (1949).

[10] 348 U.S. 26 (1954).

[11] *Id.* at 33-34.

[12] 467 U.S. 229 (1984).

[13] The Hawaii Land Reform Act of 1967 (Haw. Rev. Stat. §516-1 (2004)) created a mechanism for condemning residential tracts and transferring ownership of them to existing lessees. The legislative intent was to make the land sales involuntary and thus the federal tax consequences less severe while still facilitating the redistribution of fees simple. Under the Act's condemnation scheme, tenants living on single-family residential lots were entitled to ask the Hawaii Housing Authority to condemn the property on which they lived. More recently, a local ordinance providing for the involuntary fee conversion of condominiums, cooperatives housing, and planned development units has been held constitutional where the ordinance was modeled after the Hawaii Land Reform Act. See *Leong Kau v. City & County of Honolulu*, 104 Haw. 468, 92 P.3d 477 (2004).

[14] 467 U.S. 229, at 241. Both the *Berman* and *Midkiff* opinions favorably cite *Old Dominion Co. v. United States,* 266 U.S. 55 (1925)*,* where the Court held that judicial deference is due to the legislature for their determination of public use "until it is shown to involve an impossibility."

[15] See *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

[16] *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

[17] *Kelo, et al. v. City of New London, et al.,* 268 Conn. 1, 843 A.2d 500 (2004), *cert. granted,* 125 S. Ct. 27 (2004).

[18] *Southwestern Illinois Development Authority v. National City Environmental, L.L.C., et. al.*, 768 N.E.2d 1 (Ill. 2002), *cert. denied*, 2002 U.S. LEXIS 6453 (Oct. 7, 2002).

[19] *General Building Contractors, L.L.C. v. Board of Shawnee County Commissioners*, 66 P.3d 873 (Kan. 2003). In its 2004 session, the Kansas legislature passed and the governor signed into law S.B. 461. The bill bars Cowley County officials and/or a port authority in Cowley County from using eminent domain power to acquire land for recreational purposes. The bill also amends existing county home rule to provide that counties may not exempt themselves from the law.

[20] The 11 states are Arizona – *Bailey v. Myers,* 206 Ariz. 224, 76 P.3d 898 (2003); Arkansas – *City of Little Rock v. Raines*, 411 S.W.2d 486 (Ark. 1967); California – *99 Cents Only Store v. Lancaster Redevelopment Agency*, 237 F. Supp.2d 1123 (C.D. Cal. 2001); Illinois - *Southwestern Illinois Development Authority v. National City Environmental, L.L.C., et. al.*, 768 N.E.2d 1 (Ill. 2002), *cert. denied*, 2002 U.S. LEXIS 6453 (Oct. 7, 2002); Indiana – *Daniels v. The Area Plan Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002); Kentucky – *Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979); Michigan - *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); Missouri – *Aaron v. Target Corp.*, 269 F. Supp.2d 1162 (E.D. Mo. 2003); New Jersey – *Casino Reinvestment Development Authority v. Banin*, 320 N.J. Super. 342, 727 A.2d 102 (1998); South Carolina – *Georgia Department of Transportation v. Jasper County*, 586 S.E.2d 853 (S.C. 2003); and Virginia – *City of Virginia Beach v. Christopoulos Family, L.C.*, 54 Va. Cir. 95 (2000).

[21] The six states are Connecticut - *Kelo, et al. v. City of New London, et al.,* 268 Conn. 1, 843 A.2d 500 (2004), *cert. granted,* 125 S. Ct. 27 (2004); Kansas - *General Building Contractors, L.L.C. v. Board of Shawnee County Commissioners*, 66 P.3d 873 (Kan. 2003); Louisiana – *City of Shreveport v. Shreve Town Corp.*, 314 F.3d 229 (5th Cir. 2002); Minnesota –*Minneapolis Community Development Agency (MCDA) v. OPUS North-*

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10, 2005).

GRADE STANDARDS. The AMS has announced an intent to revise the grade standards for kale to allow percentages to be determined by count rather than weight. **70 Fed. Reg. 12172 (March 11, 2005)**. The AMS has announced an intent to revise the grade standards for green beans and strawberries to allow percentages to be determined by count rather than weight. **70 Fed. Reg. 12175 (March 11, 2005)**. The AMS has announced an intent to revise the grade standards for green peppers to provide for the reporting of decay affecting the stems under the serious damage tolerance in all grades instead of the more restrictive tolerance of two percent for decay. **70 Fed. Reg. 12176 (March 11, 2005)**.

HONEY. The CCC has adopted as final regulations amending the regulation governing the Honey Nonrecourse Marketing Assistance Loan (MAL) and Loan Deficiency Payment (LDP) Programs of the CCC. **70 Fed. Reg. 3139 (Jan. 21, 2005)**.

INCOME TAX RETURNS. The IRS has adopted as final regulations which remove the requirement of a signature for filing of Form 7004, "Application for Automatic Extension of Time To File Corporation Income Tax Return," to obtain a six-month automatic extension of time to file a corporation income tax return. The final regulations also allow filers and transmitters of information returns on Form 1099 (series), 1098 (series), 5498 (series), W-2 (series), W-2G, 1042-S, and 8027 to request an automatic 30-day extension of time to file without having to sign Form 8809 and provide an explanation. **69 Fed. Reg. 70547 (Dec. 7, 2004)**.

MEAT INSPECTION. The FSIS has issued a notice to inform slaughterers of young calves, including those marketed, slaughtered, and labeled as "veal," of the need for such firms to reassess their Hazard Analysis and Critical Control Point (HACCP) System, including prerequisite programs, with respect to animal drug residues and the use of unapproved new animal drugs. **69 Fed. Reg. 76884 (Dec. 23, 2004)**.

ORGANIC FOODS. The AMS has adopted as final regulations which would exempt any person producing and marketing solely 100 percent organic products from paying assessments to any research and promotion program administered by the AMS. **70 Fed. Reg. 2743 (Jan. 14, 2005)**.

ORGANIC FOODS. The AMS has adopted as final regulations which exempt any person producing and marketing solely 100 percent organic products from paying assessments for market promotion, including paid advertising, activities to marketing order programs administered by the AMS. **70 Fed. Reg. 2763 (Jan. 14, 2005)**.

PARTNERSHIPS INSTALLMENT OBLIGATIONS. The IRS has adopted as final regulations governing income tax treatment of installment obligations acquired by partnerships. **70 Fed. Reg. 14394 (March 22, 2005)**.

POULTRY INSPECTION. The FSIS has issued proposed regulations which amend the poultry products inspection regulations by terminating the designation of North Dakota under the Poultry Products Inspection Act as subject to federal poultry products inspection program. The Commissioner of Agriculture of North Dakota has advised the FSIS that, effective November 8, 2004, the state will be in a position to administer a state poultry inspection program that includes requirements that are at least equal to those imposed under the federal poultry products inspection program for poultry and poultry products distributed in interstate commerce. **70 Fed. Reg. 12420 (March 14, 2005)**.

SALE AND LEASEBACK. The IRS has adopted as final regulations which provide that eligible debt under I.R.C. § 263A(f) does not include a purchase money obligation given by the lessor to the lessee (or a party related to the lessee) in a sale and leaseback transaction under former I.R.C. § 168(f)(8) as enacted by ERTA. **70 Fed. Reg. 8729 (Feb. 23, 2005)**.

SUGAR. The CCC has announced the establishment of the sugar overall allotment quantity for the 2004 crop year which runs from October 1, 2004 through September 30, 2005. **69 Fed. Reg. 76684 (Dec. 22, 2004)**.

TOBACCO. The CCC has adopted as final regulations which amend the regulations governing the tobacco price support program to remove the requirement that flue-cured tobacco farmers designate the auction warehouses where they will sell their tobacco and that burley tobacco farmers designate all locations where they will sell their tobacco. **69 Fed. Reg. 70367 (Dec. 6, 2004)**.

TRUSTS. The IRS has adopted as final regulations which amend the regulations under the gift tax special valuation rules to provide that a unitrust amount or annuity payable for a specified term of years to the grantor, or to the grantor's estate if the grantor dies prior to the expiration of the term, is a qualified interest, under I.R.C. § 2702(b), for the specified term. **70 Fed. Reg. 9222 (Feb. 25, 2005)**.

TRUSTS. The IRS has adopted as final regulations governing the ordering rules for classes of income for charitable remainder trusts. **70 Fed. Reg. 12793 (March 16, 2005)**.

WAGES. The IRS has issued proposed regulations which provide that payments received under a statute *in the nature of* a workers' compensation law on account of sickness or accident disability are excluded from wages for purposes of FICA tax. **70 Fed. Reg. 12164 (March 11, 2005)**.

--Robert Achenbach, Executive Director, Amerian Agricultural Law Association

An invitation

I have belonged to the American Agricultural Law Association for many years. In this time when everyone wants you to join a group, attend a meeting, or purchase the latest law update, why do I continue to belong to AALA?

First, the latest agricultural law information is printed in the *Agricultural Law Update*. Second, AALA provides a network of the most knowledgeable and helpful resources on any agricultural law topic that I may be interested in. Third, the Annual Agricultural Law Symposium allows me an opportunity to obtain all of my CLE requirements on topics directly related to my area of interest. And most important, the reason that I continue to belong to AALA is the relationships that I have made with the members.

Why did I join AALA in the first place? I joined because someone that I admired and respected in the agricultural law community asked me. How many friends do you know that would benefit by being a member of AALA? All you need to do is ask.

To provide you with incentive to ask a new member, the AALA Board approved a 2005 Membership Recruitment program. A raffle drawing will be held at the 2005 Annual Symposium in Kansas City, Missouri for a cash prize equivalent to a member conference registration fee ($345 in 2004). For each new member that a current member signs, the current member receives one chance. A member will receive four chances for each nonmember he recruits to attend the Annual Symposium.

Not only will you have a chance to win a free registration, the person that you recruit will have an opportunity to receive the benefits that we enjoy as members of AALA. Membership is the lifeblood of our organization and I hope that you can help.

--Larry Gearhardt, Ohio Farm Bureau

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west, LLC, 582 N.W.2d 596 (Minn. 1998); New York – *In re West 41 Street Realty LLC v. New York State Urban Development Corporation*, 298 A.D.2d 1, 744 N.Y.S.2d 121 (2002); and Ohio – *City of Toledo v. Kim's Auto & Truck Service, Inc.*, No. L-02-1318, 2003 Ohio App. LEXIS 4995 (Ohio Ct. App. Oct. 17, 2003).

[22] *Kelo, et al. v. City of New London, et al.*, 268 Conn. 1, 843 A.2d 500 (2004), *cert. granted*, 125 S. Ct. 27 (2004).

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

From the Executive Director:

Nominations for Annual Scholarship Awards. The scholarship Awards Committee is seeking nominations of articles by professionals and students for consideration for the annual scholarship awards presented at the annual conference. Please contact Jesse Richardson, Associate Professor, Urban Affairs and Planning, Virginia Tech, Blacksburg, Virginia 24061-0113, (540) 231-7508 (phone), (540) 231-3367 (fax), email: jessej@vt.edu

Annual Conference. The 2005 Annual Agricultural Law Symposium is October 7 and 8, 2005 at the Country Club Plaza Marriott in Kansas City, MO.

***Update* articles**. I want to most strongly encourage all AALA members (including students) to submit long and short articles for the *Update*. The value of every member's work in agricultural law can be greatly enhanced when shared with the other members of the agricultural law community. It is difficult enough for one member to be aware of all the continuing rapid economic, technological, and governmental changes in agricultural law. Thus, it is vitally important to hear from all members about the developments in their area. Just let Linda McCormick (aglawupdate@ev1.net) know that you are planning to make a submission so that she can avoid duplication of effort.

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