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## CALIFORNIA SUPREME COURT RULES THAT EPA LAW PREEMPTS STATE LAWSUITS

(*Etcheverry v. Tri-Ag Services, et al.*)

The California Supreme Court ruled last week that a federal pesticide labeling law preempts lawsuits filed in California courts under state law that claim that the labels on the chemicals did not adequately warn purchasers of the possible adverse effects of the product. In doing so, the California Supreme Court handed a victory to the Washington Legal Foundation (WLF) which had argued that the state claims were preempted by federal law, and dealt a blow to the Environmental Protection Agency (EPA) which had argued the opposite.

In *Etcheverry v. Tri-Ag Services*, the plaintiffs claimed that they suffered injuries from the use of certain pesticide chemicals manufactured by Bayer Corporation. Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA requires manufacturers to provide specific information on the labels of such products. The plaintiffs argued that the information, even though in full compliance with EPA regulations, was not a sufficient warning, and sued the manufacturer and retailer for damages to their crops. The companies successfully argued in the trial court that the federal law preempts any state law requirements, and that they should not be held liable for following the federal law. A California court of appeal, however, reversed that decision.

On appeal to the California Supreme Court, the plaintiffs and the California Rural Legal Assistance, Inc., petitioned the Court to take judicial notice of an EPA informational release, entitled Pesticide Regulation (PR) Notice 96-4. The PR Notice states that state tort claims for mislabeling are not preempted by FIFRA. WLF argued in its brief that the PR Notice is procedurally and substantively defective and should not be considered by the Court. The PR Notice is not the official position of the EPA, was not promulgated under the Administrative Procedure Act, and in any event, is beyond the powers of the EPA since Congress did not authorize the agency to dictate to the courts how to decide whether federal law preempts state law claims.

In an unprecedented maneuver, the EPA filed a brief in the case supporting the plaintiffs' attorneys, arguing that FIFRA does not preempt state common law damages

claims. Heretofore, the courts were almost uniform in their rulings that FIFRA does preempt state law claims. The EPA unsuccessfully argued to the California Supreme Court that its jurisdiction under FIFRA extends only to the labeling that describes the effect of the pesticide and the natural environment, leaving state tort liability as a remedy to resolve efficacy claims.

The Court, in a divided opinion, rejected EPA's argument. Five out of the seven justices squarely rejected EPA's argument that FIFRA does not preempt state tort claims. The Court recognized that Congress sought to have FIFRA preempt conflicting state laws, and thereby promote uniform regulation in this area. The Court found that other decisions which held that FIFRA does preempt state tort claims were "numerous, consistent, pragmatic, and powerfully reasoned."

In reaching its conclusion, the California Supreme Court applied the U.S. Supreme Court's 1992 decision in *Cipollone v. Liggett Group, Inc.* In *Cipollone*, the Court held that a 1969 Act of Congress that stated that no state law "requirement or prohibition" based on smoking and health shall be imposed with respect to cigarettes that are properly labeled under federal law, preempted lawsuits based on state common law. The language in FIFRA is almost identical to the language chosen by the Congress in the 1969 cigarette labeling law. Accordingly, the *Etchverry* Court concluded that FIFRA's labeling requirement preempts state law "requirements or prohibitions" regarding the labeling of the pesticide.

The California Supreme Court remanded the case to the Court of Appeal to consider whether any off-label statements, that is, those made orally or outside the context of labeling, could nevertheless be subject to a state tort suit, if those statements did more than repeat the information on the label.

WLF's brief was drafted with the *pro bono* assistance of Elizabeth R. Jones of the law firm of Holland & Hart, LLP in Denver, Colorado.

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For further information, contact Paul D. Kamenar, WLF Senior Executive Counsel at 202-588-0302.