PETERSON v. BASF: FRAUD TO FARMERS OR THREAT TO THE HERBICIDE INDUSTRY?

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I. INTRODUCTION

In 1997, eleven Midwest farmers brought suit in Minnesota state court complaining that the herbicide company BASF marketed and sold identical herbicides at different prices.[1] The farmers alleged that BASF had violated the New Jersey Consumer Fraud Act ("NJCFA") because "the cheaper Poast Plus, sold to soybean growers, a 'major' national crop, was approved by the [Environmental Protection Agency] for use on the same crops as the more expensive Poast sold to growers of 'minor' crops."[2] BASF resisted these claims, asserting that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") preempted the farmers' state law claims.[3] However, in December 2001, a Norman County Minne-

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1. News Release, Lockridge Grindal Nauen P.L.L.P., Minnesota Supreme Court Upholds $52 Million Class Action Judgment Against BASF Corporation, Announces Lockridge Grindal Nauen (Feb. 19, 2004), http://www.primenewswire.com/newsroom/news.html?d=52946.

2. News Release, Douglas J. Nill, P.A., Minnesota Supreme Court Reaffirms National Consumer Fraud Class Action Jury Verdict Judgment of About $62 Million for U.S. Farmers After Remand from U.S. Supreme Court (Mar. 30, 2006) (on file with author).

3. Barbara L. Jones, *Farmers Prevail in Nine-Year Class Action Suit*, MINN. LAW., Apr. 3, 2006, at 5.

sota jury awarded the farmers $15 million (which was raised in accordance with the trebling provision of the New Jersey statute to $52 million).[4]

The Minnesota Court of Appeals and Minnesota Supreme Court affirmed the award, leading BASF to seek United States Supreme Court review in 2004.[5] The Supreme Court remanded the case to the Minnesota Supreme Court with directions to apply a new standard "after ruling in another case that federal law does not necessarily pre-empt state law in cases involving . . . [FIFRA]."[6] The Minnesota Supreme Court said the claims were not pre-empted because they "concerned nonlabel deceptive statements and conduct and did not constitute a requirement for labeling or packaging."[7] On March 30, 2006, the Minnesota Supreme Court reaffirmed the award.[8] This amount has risen to over $62 million due to interest since the 2004 verdict.[9]

On November 13, 2006, the U.S. Supreme Court "declined without comment to hear" BASF's petition from the latest Minnesota Supreme Court ruling ending this nine-year dispute.[10] This note will examine the history and background of FIFRA and case law in relation to the landmark decision of *Peterson v. BASF*.

II. FEDERAL LAW AND CONSUMER FRAUD LITIGATION

BASF is a New Jersey corporation that "develops, produces, and markets herbicides."[11] In 1997, farmers nationwide accused BASF of violating the NJCFA by deceptively advertising two of its herbicides.[12] BASF claimed that the farmers' state consumer fraud claims were preempted under FIFRA, which regulates pesticides and preempts certain state law claims.[13] In light of the U.S. Supreme Court's decision in *Bates v. Dow Agrosciences*, which established the standard for a state law claim under FIFRA, a state law claim is not preempted under the Act unless it imposes a requirement for labeling or packaging that is in

4. Lockridge Grindal Nauen, *supra* note 2.

5. Maureen Conley, *BASF Will Appeal Minn. Court Ruling that Upholds Award to Farmers*, PESTICIDE & TOXIC CHEMICAL NEWS, Apr. 3, 2006 (on file with author).

6. Jones, *supra* note 4.

7. *Id.*

8. Nill, *supra* note 3.

9. Pesticide.Net, *$52 Million Award Against BASF for Pesticide Consumer Fraud Reaffirmed on Appeal*, INSIDER EJOURNAL, Apr. 11, 2006 (on file with author).

10. Peterson v. BASF Corp., 711 N.W.2d 470 (Minn.), *cert. denied*, 127 S. Ct. 579 (2006); *U.S. Supreme Court Rules $62M Consumer Fraud Verdict Will Stand*, MINN. LAW., Nov. 20, 2006, *available at* 2006 WLNR 20260359 [hereinafter *Verdict Will Stand*].

11. *Peterson*, 711 N.W.2d at 473.

12. Id.

13. *Id.* at 475.

addition to or different from FIFRA requirements.[14] Therefore, the Court was forced to make yet another landmark decision on this statute.

While most herbicide litigation concerns property injury, two similar cases of deceptive advertising were settled in the late 1990s involving contact lenses.[15] Bausch & Lomb and Johnson & Johnson sold one lens as several different lenses classifying them as "daily . . . weekly . . . [or] extended wear" lenses.[16] The contacts were given different names and prices, and designated for different use, which is considered fraudulent.[17] The cases were ultimately settled.[18]

Both parties awaited the U.S. Supreme Court's decision, knowing much was at stake. The Norman County verdict in *Peterson v. BASF* ranked as the forty-seventh largest verdict nationwide in 2001, and is one of the highest ever in Minnesota.[19] BASF voluntarily equalized the product prices when the fraud emerged in 1997, but one of the farmers' attorneys, Douglas Nill, maintains BASF was deceitful throughout the entire drawn-out litigation.[20] BASF maintains the award "is a threat to the industry" because it "limits the ability of crop protection manufacturers to develop and offer specific products for specific markets, especially for high-risk minor crop markets."[21] On the other side, the farmers alleged BASF lied to state regulatory authorities, food processors, and farmers to conceal their registration and marketing of the two identical products.[22] They alleged, and BASF conceded, that the price differential between the two products was about $4 per acre.[23]

The stakes were substantial for both BASF and farmers nationwide, and the implications of the U.S. Supreme Court decision in *Peterson v. BASF* will undoubtedly affect FIFRA litigation, future legislation, farmers' rights as consumers, and the herbicide industry.

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14. *Id.* at 476 (citing Bates v. Dow Agrosciences LLC, 544 U.S. 431, 444 (2005), in which the Court held the claims for negligence and breach of warranty on the label were not preempted but claims for fraud and failure to warn still need to be determined).
15. *See* Pesticide.net, *supra* note 10.
16. *Id.*
17. *Id.*
18. *Id.*; Barbara L. Jones, *Norman County Prepares for Farmers' Class Action*, MINN. LAW. (1999), *available at* http://www.farmlaw.com/press_class.html (the Bausch & Lomb case settled for $68 Million).
19. Lockridge Grindal Nauen, *supra* note 2.
20. Pesticide.net, *supra* note 10.
21. *Id.*
22. Nill, *supra* note 3.
23. Jones, *supra* note 19.

A. *Federal Insecticide, Fungicide, and Rodenticide Act*

The federal government has regulated pesticide use for nearly a century; however, FIFRA was not adopted until 1947.[24] "As first enacted, FIFRA was primarily a licensing and labeling statute. It required that all pesticides be registered with the Secretary of Agriculture prior to their sale in interstate or foreign commerce."[25] FIFRA "was designed to assure that economic interest[s] of farmers and other consumers would be fully considered before any pesticide was withdrawn from [the] market."[26] FIFRA's legislative history "suggests that rights of non-registrants were recognized in statutes because certain Congressmen were concerned that pesticide producer[s] would choose not to defend particular registration that was of a small importance to [the] manufacturer, but of great importance to particular agricultural groups."[27] FIFRA's objectives include the strengthening of federal standards, increased EPA authority, and providing a comprehensive regulation scheme.[28]

FIFRA prohibited disclosure of "any information relative to formulas of products," but did not involve disclosure of "the health and safety data submitted with an application."[29] In 1972, Congress performed a comprehensive revision of FIFRA by enacting the Federal Environmental Pesticide Control Act.[30] "The[se] amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute."[31] In effect, FIFRA now regulated the use, sale, labeling, and production of pesticides in interstate as well as intrastate commerce.[32] Amended FIFRA also provided for the "review, cancellation, and suspension of registration [of pesticides]; and gave the EPA greater enforcement authority," such as determining "unreasonable adverse effects [of products] on the environment."[33]

"The 1972 FIFRA amendments did not specify standards for . . . trade secrets or commercial or financial information," and consequently much litigation on these definitions ensued.[34] The 1978 amendments granted applicants a "10-year period of exclusive use for data on new active ingredients contained in

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24. 7 U.S.C.S. § 136 (LexisNexis 2007); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 990 (1984).
25. *Id.* at 991.
26. 7 U.S.C.S. §136 (LexisNexis 2007).
27. *Id.*
28. Worm v. Am. Cyanamid Co., 5 F.3d 744, 747 (4th Cir. 1993) (citing Worm v. Am. Cyanamid Co., 970 F.2d 1301, 1305 (4th Cir. 1992)).
29. *Ruckelshaus*, 467 U.S. at 991.
30. *Id.*
31. *Id.*
32. *Id.* at 991-92.
33. *Id.* at 992.
34. *Id.* at 993.

pesticides."[35] Congress also added a subsection providing for the "disclosure of all health, safety, and environmental data to qualified requesters," providing disclosure was permissive from a trade secret standpoint.[36]

FIFRA also established a complex review process for label marketing approval.[37] "Pesticide manufacturers must submit draft labels addressing several topics including ingredients, directions for use, and adverse affects."[38] The EPA must first decide if the "pesticide will perform its intended function without causing unreasonable adverse effects on the environment."[39] FIFRA specifically "prohibits states from imposing any requirements for labeling or packaging in addition to or different from those required under FIFRA."[40] When a label is approved, FIFRA then provides "a defense, arising from preemption, against certain state law claims."[41]

The Washington Court of Appeals has considered this issue and held that state common law claims based on labeling are preempted under FIFRA.[42] FIFRA can preempt state law "in three ways: a federal statute expressly preempts state law, federal law occupies an entire field of regulation, or state law conflicts with federal law."[43] FIFRA only preempts causes of action that "would have the effect of imposing a requirement in addition to or different from [what is] imposed by FIFRA."[44] Finally, if premised on inadequate labeling or a failure to warn, the impact of allowing a state claim would be to impose further requirements for the labels and packages.[45]

B. *FIFRA Cases*

In 2004, the Fourth District Court of Appeals of Florida used FIFRA to preempt a state law claim for negligent distribution and extend preemption internationally.[46] In *E.I. Du Pont de Nemours & Co. v. Aquamar S.A.*, E.I. Du Pont de

35. *Id.* at 994.
36. *Id.* at 995-96.
37. Hardin v. BASF Corp., 290 F. Supp. 2d 964, 967-68 (E.D. Ark. 2003).
38. *Id.* at 968.
39. *Id.*
40. *Id.* (citing 7 U.S.C. § 136v(b) (2006)).
41. *Id.* at 972 (quoting Nat'l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co., 165 F.3d 602, 608 (8th Cir. 1999)).
42. Didier v. Drexel Chem. Co., 938 P.2d 364, 370 (Wash. Ct. App. 1997).
43. *Id.* at 366 (citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1068-69 (Wash. 1993)).
44. *Id.* at 367.
45. *Hardin*, 290 F. Supp. 2d at 968 (citing *Nat'l Bank of Commerce*, 165 F.3d at 608).
46. E.I. Du Pont de Nemours & Co. v. Aquamar S.A., 881 So. 2d 1, 5 (Fla. Dist. Ct. App. 2004).

Nemours & Co. ("Du Pont") manufactured the fungicide Benlate, which "was applied to banana farms in Ecaudor to prevent the spread of a disease called Black Sigatoka."[47] Aquamar, a nearby shrimp farm using the local rivers as a water source, began experiencing massive shrimp mortalities.[48] They filed suit against Du Pont and were awarded more than $12 million in damages.[49] Du Pont appealed, asserting among other things, that FIFRA preempted Aquamar's claims of negligent distribution.[50]

Du Pont acknowledged Benlate's toxic effect on shrimp and that it never tested benomyl's effects, specifically on Pacific White Shrimp (the variety farmed at Aquamar).[51] However, Du Pont claimed Aquamar could not link the chemical found in the dead shrimp to its product and suggested the problem was from other fungicides used in the area.[52]

The trial court concluded that FIFRA was not applicable "because the plaintiff's claims arose from use of the pesticide in Ecuador."[53] The Florida Court of Appeals for the Fourth Circuit disagreed.[54] It found that "[a]lthough producers of pesticides intended for export are exempted from FIFRA's registration requirements . . ., exported pesticides must nevertheless be labeled accurately and include certain information."[55] Although Aquamar argued FIFRA was "not intended to bar foreign plaintiffs from asserting claims against U.S. corporations in state courts," the court found Aquamar had "elected to proceed in the State of Florida and under Florida law."[56] Therefore, the question became "whether Aquamar's negligent distribution claim, the only claim upon which it prevailed at trial, [was] truly nothing more than a disguised labeling claim."[57] The court used the commonly accepted test of "whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or label."[58] While the court found Du Pont negligent, Aquamar's claim was essentially "challenging the product's label and the failure

47. *Id.* at 2.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 2-3.
52. *Id.* at 2.
53. *Id.* at 4.
54. *Id.*
55. *Id.* (citing 7 U.S.C. § 136o(a)(1)-(2)).
56. *Id.* at 5.
57. *Id.*
58. *Id*.; Arnold v. Dow Chem. Co., 110 Cal. Rptr. 2d 722, 736 (Cal Ct. App. 2001). *See* Dow Agrosciences L.L.C. v. Bates, 332 F.3d 323, 331 (5th Cir. 2003) (where the court held that farmers' claims were preempted by federal law when a judgment would force Dow to alter its labeling).

to warn," which is well within the purview of FIFRA.[59] Therefore, FIFRA preempted this state law claim.[60]

Another FIFRA preemption case is *Didier v. Drexel Chemical Co*.[61] Drexel manufactured Super Sprout Stop, a liquid growth retardant used to prevent potato sprouting.[62] The Didiers purchased this product to "size their potatoes . . . [which] stops very small or newly formed potatoes from reducing the potential size of a potato in an existing crop."[63] However the application of Super Sprout Stop actually damaged their crop.[64] The Didiers sued Drexel under a number of theories, claiming their crop's damage was the result of Drexel's failure to supply information regarding the temperature restrictions associated with using Super Sprout Stop.[65]

Drexel had dispersed a sheet to distributors regarding appropriate temperatures for Super Sprout Stop to be applied, but it failed to supply that information with the product.[66] The court used the preemption test, "whether a manufacturer, in seeking to avoid liability, would reasonably choose to alter the product or the label."[67] The court found that Drexel would have an incentive to alter its label to avoid liability for failing to provide the product's information.[68] Although the distribution sheet was not part of the label, the question was "whether, by imposing liability for failure to distribute the information sheet, a requirement in addition to those contained in the label is imposed."[69] Therefore, FIFRA preempted the Consumer Protection Act claim.[70]

In addition, the Didiers claimed the distributor and retailer were negligent for failing to advise them of the application temperature restrictions.[71] The court found "[t]he effect of imposing liability against the distributor or retailer would be to create a state labeling requirement contrary to FIFRA's preemption provisions."[72] Therefore, the Didiers' claims were preempted once again.[73]

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59. *E.I. Du Pont*, 881 So. 2d at 6.
60. *Id.*
61. *Didier*, 938 P.2d 364.
62. *Id.* at 366.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 369 (citing Hue v. Farmboy Spray Co., 896 P.2d 682 (Wash. 1995)).
68. *Id.*
69. *Id.* (citing *Hue*, 896 P.2d 682).
70. *Id.*
71. *Id.* at 370.
72. *Id.*
73. *Id.*

C. *Approaching* Peterson v. BASF

FIFRA state law preemption has been plainly understood to "limit[] the ability of injured parties to sue pesticide manufacturers in state court on either an inadequate labeling or wrongful death theory."[74] However, in 2005 the U.S. Supreme Court ruled in *Bates v. Dow Agrosciences L.L.C.* that "state law claims for defective design, defective manufacture, negligent testing and breach of express warranty with respect to a pesticide that damaged . . . peanut crops . . . were not preempted."[75] The U.S. Court of Appeals for the Fifth Circuit held the claims to be preempted because "if the claims were successful, the pesticide manufacturer would be induced to change its label."[76] However, the Supreme Court held this test was too broad, and that it should be "whether successful claims would actually require a pesticide label to be changed. The key is whether state law imposes broader obligations on pesticide manufacturers than does FIFRA."[77] The U.S. Supreme Court's holding in *Bates v. Dow Agrosciences L.L.C.* led the Court to remand *Peterson v. BASF Corp.* back down to the Minnesota Supreme Court to apply the new test.[78] However, the Minnesota Supreme Court decided the new test did not change the holding because the "farmers' claim challenged not the label, but BASF's misrepresentations concerning the two herbicides."[79]

1. Bates v. Dow

In 2000, twenty-nine Texas peanut farmers alleged their crops had been damaged from the use of the Dow Agroscience pesticide Strongarm.[80] This pesticide had been conditionally registered with the EPA just months before its application in May.[81] Dow's agents, as well as the labels on the Strongarm product, stated the pesticide was recommended for use in any place peanuts are grown.[82] However, when applied to soils with pH levels of 7.2 or higher (as in much of western Texas) the pesticide severely damaged the crops and failed to control weed growth.[83]

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74. Roger McEowen, *Farmers Win Multi-Million Dollar Judgment Against Herbicide Manufacturer for Deceptive Advertising and Marketing Practices*, Apr. 2006, http://www.calt/iastate.edu/herbicidemanuf.htm (last visited Nov. 1, 2007).

75. *Id. See Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431 (2005).

76. McEowen, *supra* note 75. *See Bates*, 544 U.S. at 431.

77. McEowen, *supra* note 75. *See Bates*, 544 U.S. 431.

78. McEowen, *supra* note 75; *Peterson*, 544 U.S. 1012 (2005).

79. McEowen, *supra* note 75.

80. *Bates*, 544 U.S. at 434.

81. *Id.* at 434-35.

82. *Id.* at 435.

83. *Id.*

The farmers reported these problems to Dow, who in turn sent its experts to inspect the crops.[84] Then, prior to the 2001 growing season, Dow registered a supplemental label with the EPA limiting Strongarm's use to three states, Oklahoma, Texas and New Mexico.[85] The supplemental label also contained the warning: "Do not apply Strongarm to soils with a pH of 7.2 or greater."[86] Therefore, farmers alleged "Dow knew, or should have known, that Strongarm would stunt the growth of peanuts in soils with pH levels of 7.0 or greater" when the farmers first applied it in 2000.[87]

After failed negotiations, the farmers brought suit in Texas District Court.[88] The court granted Dow's motion for summary judgment on the grounds that FIFRA preempted the claims.[89] The Court of Appeals affirmed, holding that because the farmers' "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."[90] The court also found the strict liability claim was preempted in that it "was essentially a disguised failure-to-warn claim."[91]

The Supreme Court found the Court of Appeals to be "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."[92] FIFRA prohibitions apply only to requirements involving more than motivating an optional decision.[93] The Court adopted a two condition standard for evaluating whether a particular state rule is pre-empted.[94] "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."[95]

When the Supreme Court applied this new test, it found the common law rules relied upon by Bates (such as rules requiring safety in the design of products, appropriate testing, etc.) did not qualify as labeling or packaging requirements, and therefore, the "claims for defective design, defective manufacture,

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84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 436.
90. *Id.*
91. *Id.*
92. *Id.* at 443.
93. *Id.*
94. *Id.* at 444.
95. *Id.*

negligent testing, and breach of express warranty [were] not pre-empted."[96] The Court further explained that the "effects-based test" is not supported by FIFRA, which speaks only of requirements.[97] "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."[98] Therefore, mere speculation as to the effect a jury verdict may have in causing a manufacturer to take action is inappropriate.[99]

Although some of the claims were allowed, the claims for fraud and negligent failure to warn were found to be "premised on common-law rules that qualify as requirements for labeling or packaging."[100] However, "state law need not explicitly incorporate FIFRA's standards as an element of a cause of action in order to survive pre-emption."[101] In addition, nothing in FIFRA precludes states from providing remedies to farmers that are injured as a result of labeling violations.[102] This interpretation must be weighed against the risk of unnecessarily placing burdens on manufacturers, as well as consumers.[103] Nonetheless, the Court found "[p]rivate remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA."[104] The Court summarized its holding in regards to FIFRA by stating:

> In the main, it pre-empts 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. The provision also pre-empts 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.[105]

The case settled in the fall of 2005.[106]

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96. *Id.*
97. *Id.* at 445.
98. *Id.*
99. *Id.*
100. *Id.* at 446.
101. *Id.* at 447.
102. *Id.* at 448. *See* N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) (noting that "where federal law is said to bar state actions in fields of traditional state regulation, . . . we have worked on the assumption that historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").
103. *Bates*, 544 U.S. at 450.
104. *Id.* at 451.
105. *Id.* at 452.
106. Conley, *supra* note 6.

III. *PETERSON V. BASF*

In light of the United State Supreme Court's holding in *Bates*, the Minnesota Court was then faced with applying the new standard to another FIFRA claim in *Peterson v. BASF*.[107] Farmers from Minnesota, Montana, and North Dakota originally filed *Peterson* in 1997[108] after a group of North Dakota farmers settled fraud allegations regarding price increases with BASF.[109] The farmers alleged that the BASF Corporation's "marketing misled and deceived American farmers into believing that a BASF herbicide, Poast Plus, could not be used on [minor] crops."[110]

BASF is incorporated in Delaware, but its principal place of business is in New Jersey.[111] In the late 1970s, the company started developing the Poast herbicide.[112] Poast was registered with the EPA around 1982 as "a post-emergent grass herbicide," and was eventually registered for use on over sixty crops (both major and minor).[113] Major crops, such as soybeans, corn, and cotton, are farmed on large acres and "provide a relatively low financial return per acre."[114] In contrast, minor crops such as vegetables and citrus fruits, "are farmed on fewer acres, but yield a much greater profit per acre."[115] Research has indicated that little competition exists in the minor crops market, which gives agricultural companies little incentive to develop the data necessary to register herbicides for individual minor crops.[116]

In the 1980s, BASF developed Poast Plus.[117] The EPA required BASF to register Poast and Poast Plus separately, but Poast Plus was registered for use on the same crops as Poast.[118] However, soybeans, cotton, peanuts, and alfalfa were the only crops that BASF registered for.[119] Poast Plus was sold for $4 less per acre than Poast.[120] During the trial, the plaintiff's presented evidence on the similarities and differences between the two herbicides as well as BASF's strategy to

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107. Peterson v. BASF Corp., 675 N.W.2d 57 (Minn. 2004).
108. Nill, *supra* note 3.
109. Pesticide.net, *supra* note 10.
110. *Peterson*, 675 N.W.2d at 60.
111. *Id.* at 61.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* (stating the "herbicide market for minor crops has little competition because the market potential for a pest control product on specific crops is low").
117. *Id.* at 62.
118. *Id.* (citing the registration requirement contained in 40 C.F.R. § 152.43(a) (2007)).
119. *Id.*
120. *Id.*

"segment the market for the products between major and minor crops."[121] This allowed them to "target the less-expensive Poast Plus in the more competitive major crop market and target Poast for sale in the less competitive minor crop market."[122] In addition to this market division scheme, BASF advertised and sent letters to food suppliers stating Poast was their "only post-emergent grass herbicide registered for use on minor crops."[123] A BASF executive even admitted this was a material omission.[124] After learning of the North Dakota sugar beet farmers' use of the less expensive Poast Plus, BASF told the North Dakota Department of Agriculture, who in turn, fined the farmers and distributors.[125] BASF also submitted an article published in *Sugarbeet Grower* magazine on the increased enforcement of penalties for illegal off-label use of herbicides.[126]

Subsequently, farmers brought a nationwide class-action suit in Norman County, Minnesota, against BASF under the NJCFA.[127] In 2000, the court granted BASF's motion for summary judgment; however, the Minnesota Court of Appeals reversed, finding "a question of fact as to whether BASF had violated the NJCFA."[128] At trial, a unanimous jury found BASF violated the NJCFA and awarded $15 million in damages pursuant to the NJCFA.[129] The Minnesota Court of Appeals and the Minnesota Supreme Court affirmed the verdict on BASF's appeal.[130] The U.S. Supreme Court remanded the case to the Minnesota Supreme Court in light of its holding in *Bates*.[131]

On remand, the Minnesota Supreme Court considered whether FIFRA preempted consumer fraud claims under the *Bates* holding, as well as the appropriateness of certain evidence and jury instructions.[132] After a thorough examination of *Bates*, the Minnesota Supreme Court once again found the farmers' claims of "fraud, deception, and unconscionable conduct in violation of the [NJCFA] [were] based on BASF's marketing and advertising actions and not the content of the product labels."[133] The court found the farmers' claims regarding BASF's conduct did not involve labeling or packaging of the herbicides, but rather "deceptive advertising, literature, magazine articles, and misrepresentations

121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 63.
126. *Id.*
127. *Peterson*, 675 N.W.2d at 63; *Peterson*, 711 N.W.2d at 473.
128. *Peterson*, 675 N.W.2d at 63; *Peterson*, 711 N.W.2d at 474.
129. *Peterson*, 711 N.W.2d at 474.
130. *See Peterson*, 711 N.W.2d at 474.
131. *Id.*
132. *Id.* at 475.
133. *Id.* at 479.

to North Dakota authorities."[134] In addition, BASF's conduct was found to be "analogous to the oral sales representations that the Supreme Court found in *Bates* to be outside the scope of FIFRA preemption."[135]

The Minnesota Supreme Court rejected BASF's three arguments regarding FIFRA preemption: (1) that the farmers' claims require the two products to be labeled as one when they are actually separate products, (2) that the farmers' seek to impose liability for BASF's choice to use subset labeling, which under FIFRA is permissible, and (3) that the farmers' claims would require marketing products in all states, on all crops, irrespective of manufacturer concerns.[136] In rejecting BASF's first and second arguments, the Minnesota Supreme Court found "[t]he duty the farmers' claims imposed on BASF was not to register [both products as one] but rather, having registered and labeled them separately, to refrain from deceptive statements about their EPA registration, their active ingredient composition, and their relative efficacy on major and minor crops."[137] In rejecting BASF's third argument, the court found it to be policy-oriented and, therefore not based within the preemption context.[138] More importantly, the argument lacked credibility.[139] Therefore, under a *Bates* analysis, FIFRA did not preempt the farmers' claims.[140]

A. *Outcome*

On November 13, 2006, the United States Supreme Court declined to hear BASF's petition from the latest Minnesota Supreme Court ruling.[141] BASF arranged to wire $62,468,866.57 to the class action account at the U.S. Bank in St. Paul, an amount which included "attorney fees, an incentive award for the 11 farmers who started the case, and a pro rata distribution to the remaining class members who submit[ted] claims."[142] "A pro rata distribution means the entire . . . award, after payment of attorney fees and costs, will be distributed to the class members who make claims."[143] Therefore, if a particular plaintiff does not col-

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134. *Id.* at 480.
135. *Id.* at 481.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 482.
141. *Verdict Will Stand*, *supra* note 11. *See Peterson*, 711 N.W.2d 470, *cert. denied*, 127 S. Ct. 579 (2006).
142. *Verdict Will Stand*, *supra* note 11. *See* Nill, *supra* note 3.
143. Nill, *supra* note 3.

lect, the remaining plaintiffs' shares are increased.[144] An attorney for the farmers, Douglas Nill, expects several thousand farmers to be paid within six months.[145] In fact, Nill himself is expected to receive $3.5 million.[146] Nill believes BASF engaged in "frivolous appeals," allowing the company to "unjustly earn about $5.5 million a year holding farmers' money judgment."[147] Rob Shelquist, another farmers' attorney, hopes to "move forward quickly to get money to the injured farmers."[148] In response to the U.S. Supreme Court's decision, Mark Stephenson, a spokesman for BASF stated, "'[w]hile we are disappointed by the Supreme Court decision not to review the case further, we will abide by the judgment.'"[149]

B. *Commentary*

The recent decision in *Peterson* has sparked both positive and negative discussion. Hugh V. Plunkett, a third attorney for the farmers, believes the $62 million verdict is "warranted," as "'[a]ny individual who committed as many acts of fraud as this company did would be in jail.'"[150] He also notes the farmers went through difficult times throughout the nine-year dispute.[151] Yet, BASF maintained until the end that Poast Plus was in fact a unique product, and that the "price differential reflected the costs associated with developing, and securing registration for, the reformulated herbicide."[152] BASF has also suggested that the farmers should have bought a different product if they thought Poast Plus was overpriced.[153] Defense attorney Winthrop Rockwell characterized the farmers' claims as telling BASF to sell them a product that "'BASF did not wish to sell them, at a price to be regulated by the court'" and indicated that, "in the absence of an antitrust violation, courts do not have the authority to control pricing."[154] In response, attorney Doug Nill asserts that the farmers' "alternative was a hoe."[155] Nill adds, "[i]t's a shame the world's largest chemical company has to resort to mischaracterizing the record to further delay' payment. . . . One has to wonder

144. *Id.*
145. *Verdict Will Stand*, *supra* note 11.
146. Barbara Jones, *MN Court of Appeals Upholds $50 Million Award*, MINN. LAW., Mar. 17, 2003.
147. Nill, *supra* note 3.
148. Lockridge Grindal Nauen, *supra* note 2.
149. *Verdict Will Stand*, *supra* note 11.
150. Jones, *supra* note 147.
151. *Id.*
152. Pesticide.net, *supra* note 10.
153. *Id.*
154. Jones, *supra* note 19.
155. Pesticide.net, *supra* note 10.

about their own judgment of the merits of their claims such that they had a press release already prepared'" when the Minnesota Supreme Court's ruling was announced.[156]

C. *Implications*

The anticipation and conclusion of *Peterson* has sparked much debate nationwide. Attorneys for BASF have characterized the decision as "'a threat to the industry,'" noting "'[t]he decision limits the ability of crop protection manufacturers to develop and offer specific products for specific markets, especially for high-risk minor crop markets.'"[157] BASF attorneys also believe the decision "'discourages thorough and safety testing of agricultural chemicals before sale for use on minor farm crops.'"[158] Further,

> '[i]f companies are not able to price their products adequately to cover their costs to bring a product to market, support their safe use in the specific market and earn a profit, then farmers – and minor crop farmers in particular – are likely to be left without important farming tools that they need.'[159]

Herbicide industry attorney Larry Ebner has characterized the decision as "'a horrible, outcome-driven opinion geared toward finding a way to affirm a finding of liability even in light of *Bates*.'"[160] Ebner continued:

> 'This holding . . . not only is troublesome from the viewpoint of tort law, it poses a direct threat to EPA's regulation of national uniform labeling because what it says is that, no matter how carefully EPA considers its labeling policies, and despite the fact that those policies, in some cases, are in the form of regulations, a registrant can be held liable under state law for following those regulations and policies.'[161]

Ebner also believes the impact of the Minnesota Supreme Court's decision in *Peterson* will be plaintiffs coming "'up with claims that are equivalent to labeling claims but do not purport to be "directly related" to labeling'" to avoid FIFRA preemption.[162]

Defense Attorney James A. O'Neal explains that the Minnesota court "'certified a national class action under a New Jersey statute in a case with little

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156. Conley, *supra* note 6.
157. *Id.*
158. *Id.*
159. *Id.*
160. Pesticide.net, *An Insider Look at an Industry Lawyer's Reaction to the BASF Ruling*, INSIDER EJOURNAL, Apr. 11, 2006 (on file with author).
161. *Id.*
162. *Id.*

or no tie to New Jersey.'"[163] He adds "'[t]here is almost no limit to the breadth of litigation that could result if that becomes standard operating procedure.'"[164]

Minnesota Court of Appeals Judge G. Barry Anderson, who concurred specially in the court's 2003 decision, cautioned that the Minnesota district court's application of the NJCFA (with few of the plaintiffs residing in New Jersey), assuming the legislative authors did not predict Midwestern farmers would be the protected class, "is not a recipe for uniformity or consistency."[165] Further, "'it is fair neither to claimants nor defendants and it is long past time for national policy makers to address class action procedures.'"[166] Finally, Minnesota House Bill H.F. 2444 was introduced in 2004 "to establish rules for deciding which state's statute of limitations would apply in a Minnesota court action that involves applying the law of one or more other states."[167]

The implications of the decision also go beyond the obvious tort, federal preemption, and herbicide industry concerns. The Tech Law Journal has noted the case's impact on free speech rights.[168] The U.S. Supreme Court's final denial of certiorari also demonstrates a failure, according to the Tech Law Journal, to "protect the free speech rights of publishers of trade publications, and to bring clarity to its regime that affords different levels of constitutional protection to different speakers."[169] In BASF's final petition for writ of certiorari, the company raised the issue of "'[w]hether the First Amendment prohibits a state law claim that a manufacturer committed an unconscionable commercial practice by (a) distributing a truthful magazine article on a subject of public importance and (b) accurately reporting to responsible government officials the unlawful use of the manufacturer's product.'"[170] The U.S. Chamber of Commerce in an amicus brief encouraged the Supreme Court to grant certiorari to clarify the Court's position on "when corporate speech is subject to reduced protection under the First Amendment."[171] Others submitting amicus briefs on BASF's behalf included: CropLife America, National Association of Manufacturers and American Chemi-

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163. Jones, *supra* note 147.

164. *Id.*

165. *Id.*

166. *Id.*

167. Minn House Bill H.F. 2444 (2004); *Minn. Supreme Court Upholds Class Action Certification for Peterson v. BASF*, MIDWEST NEWS, Mar. 12, 2004, http://www.claimsguides.com/news/midwest/2004/03/12/40084.htm (last visited Nov. 1, 2007).

168. Daily E-Mail Alert, *Supreme Court Denies Certiorari in Commercial Speech Case*, Tech Law Journal, Nov. 15, 2006, http://www.techlawjournal.com/alert/2006/11/15.asp.

169. *Id.*

170. *Id.*

171. *Id.*

stry Council, AEI-Brookings Joint Center of Washington D.C., Product Liability Advisory Council, and the Washington Legal Foundation.[172]

IV. CONCLUSION

Only time will be the eventual determinant of the impact and reach of *Peterson v. BASF*. Larry Ebner notes, "'Peterson has been touted as a victory for the American farmer;'" yet, he seriously doubts "'it is a victory when you see a state Supreme Court eroding FIFRA preemption provisions and turning over the authority to regulate pesticide labels to the whims of individual juries in 50 states.'"[173]

Minnesota attorney Steve Aggergaard explains that two important lessons can be learned from *Peterson*. "First, the supreme court has broad discretion to rule on all relevant issues, even when the 'law of the case' doctrine bars the Minnesota Court of Appeals from doing so."[174] Second, in regards to BASF's failure to raise class certification in its first petition for review, "parties should carefully assess which issues are included in a petition for review, lest omitted issues be deemed waived in a subsequent appeal."[175]

The end of this nearly decade-long dispute marks triumph for Midwestern farmers and frustration for the herbicide industry. The magnitude and consequences of *Peterson* will likely be at the center of legal debate for years to come.

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172. Jones, *supra* note 147.

173. Pesticide.net, *supra* note 161.

174. Steve Aggergaard, *Broad Discretion, Broad Scope*, RIDER BENNETT LLP, SEPT 2, 2004, http://75.100.99.194/news_pubs/article_detail.cfm?ARTICLE_ID=3885.

175. *Id.*