June 2003

Nathan Kimmel, Inc. v. DowElanco: Broadening the Preemptive Scope of FIFRA

Michael Shields

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol30/iss3/7

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38QZ86

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Nathan Kimmel, Inc. v. DowElanco: Broadening the Preemptive Scope of FIFRA

Michael Shields*

In Nathan Kimmel, Inc. v. DowElanco, the Ninth Circuit expanded the federal preemption power by allowing the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to preempt a claim for intentional interference with a prospective economic advantage. Kimmel claimed that DowElanco provided fraudulent labeling information to the Environmental Protection Agency (EPA), the agency responsible for approving pesticide labels under FIFRA, which prevented Kimmel from selling a pesticide product. The court held that Kimmel’s state tort claim would interfere with the EPA’s administration of FIFRA, and was therefore preempted. The ruling enlarges FIFRA’s preemptive scope, making it more difficult for plaintiffs to recover from pesticide-related claims.
C. The Ninth Circuit's First Try: FIFRA Does Not Preempt Damages Claims .................................................. 530
D. The Ninth Circuit's Second Try: FIFRA Conflicts with Damages Claims .................................................. 531

III. The Ninth Circuit’s Misapplication of FIFRA and Its Future Implications ........................................... 533
A. Analytical Errors .......................................................... 534
   1. Mischaracterizing the Area of Law: Kimmel's Suit Was About Intentional Interference ........................................... 534
   2. Ignoring FIFRA's Preemption Clause ........................................... 535
   3. Telling the Truth is Not an Additional Requirement ........................................... 536
   4. Over-Reliance on Buckman ........................................... 537
B. Broader Implications .................................................. 538
   1. The Previous Ruling is Left Hanging ........................................... 538
   2. Impact on Health and Safety ........................................... 538
   3. Broadening the Scope of FIFRA Preemption ........................................... 539
   4. Closing Doors for Plaintiffs ........................................... 539
   5. The Purpose of FIFRA ........................................... 540

Conclusion ........................................................................ 540

INTRODUCTION

Nathan Kimmel Company (Kimmel) sells pesticide and pesticide products to be used with Vikane, a fumigant widely used to treat buildings for termite infestation. To prevent human exposure, food and medicine must be covered with plastic bags when Vikane is applied. DowElanco, the sole producer of Vikane, licenses Nylofume brand bags for this purpose. In March 1994, Kimmel notified DowElanco of its intent to produce competing plastic bags for use with Vikane. To prevent this, DowElanco successfully lobbied the Environmental Protection Agency (EPA) to only approve Nylofume bags, effectively preventing Kimmel from introducing its competing product. Kimmel sued DowElanco for the tort of intentional interference with a prospective

2. Nathan Kimmel, Inc. v. DowElanco, 275 F.3d 1199, 1202 (9th Cir. 2002) [hereinafter Kimmel III].
3. Id.
4. Id.
economic advantage, alleging that DowElanco lied in its application to the EPA. The trial court refused to decide the case on its merits, finding that the state-law cause of action was preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

The Ninth Circuit Court of Appeals originally reversed the district court, finding no preemption by FIFRA. The court specifically found that Kimmel's state-law claim did "not impose a requirement in addition to or different from the requirements imposed by FIFRA." However, in an odd reversal, the same panel withdrew its original opinion and affirmed the district court, concluding that the existence of FIFRA requirements was a critical element of Kimmel's claim, and therefore the claim was preempted. The decision was based on a Supreme Court case originally overlooked by the judges, Buckman Co. v. Plaintiffs' Legal Committee, and ignored FIFRA's express preemption clause in favor of analyzing "ordinary conflict preemption principles" to find implied preemption.

This Note critically analyzes the Ninth Circuit's opinion, and examines the larger preemption issues affected by the decision. It shows that the court's second opinion was written as an expedient solution to a perceived error in its original opinion, leading to unintended harmful consequences for plaintiffs in pesticide lawsuits. The Note begins in Part II.A with a brief introduction to FIFRA, and continues in Parts II.B and C with an explanation of federal preemption analysis. Part III summarizes the Ninth Circuit decision and contrasts it with the panel's original decision. The Note then analyzes the court's preemption reasoning in Part IV.A and concludes that the court mistakenly ignored FIFRA's express preemption clause and misapplied the Buckman decision. Finally, in Part IV.B it discusses the potential negative effects the decision could have on victims' tort suits, especially in the context of pesticide misuse.

5. The tort almost always requires some otherwise tortious conduct, such as the purported fraud in this case. See RESTATEMENT (SECOND) OF TORTS § 766B (1979); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 130 (4th ed. 1971).
6. Id.
8. Nathan Kimmel, Inc. v. DowElanco, 255 F.3d 1196, 1205 (9th Cir. 2001) [hereinafter Kimmel II]. This opinion has been removed from the usual online legal databases, because it was it was vacated by Kimmel III. However, the opinion may be found online at http://www.pestlaw.com/x/courts/kimmel01.html (last visited July 4, 2003).
9. Id. (quoting the FIFRA preemption clause, see infra at II.C.).
I. LEGAL BACKGROUND

A. Federal Regulation of Pesticides

Pesticides are an integral part of life as we know it, used in massive quantities to preserve our homes, businesses, and agriculture. There are about 890 active ingredients registered as pesticides in the U.S., including wood preservatives and other non-traditional pesticides. About 4.5 billion pounds of these active ingredients are used in a year, with chlorine and bleach making up half that amount. Conventional pesticides comprise about one quarter of the total; about three quarters of these conventional pesticides are used in agriculture to produce food and fiber, and the rest are used commercially or at home. The U.S. accounts for one quarter of the total world consumption of traditional pesticides. The U.S. per capita consumption of traditional pesticides is 4.7 pounds per year, and 17 pounds per capita for all pesticides. In 1997, Americans spent $11.9 billion on pesticides, or $44 per capita.

Pesticides cause a variety of health problems, including birth defects, nerve damage, and cancer. Exposure to Vikane, for example, has resulted in injury and death. Because of the harmful effects of pesticides, Congress created FIFRA to control their production and use. This is accomplished by requiring pesticide registration with the EPA. The EPA approves a label for each registered pesticide, and the label becomes a binding regulation on the use of that pesticide. This seems relatively straightforward, but legal conflicts arise over whether this law preempts plaintiffs from bringing state-law claims for pesticide-related harms.

13. Pesticides include any product used to kill pests, defined by FIFRA as any organism (including viruses) that the EPA determines to be injurious to health or the environment, other than those living on or in humans or other living animals. See 7 U.S.C. §§ 136(t), 136w(c)(1) (2003).
15. Id.
16. Id. at 3.
17. Id.
18. Id.
19. Id.
B. How Courts Determine When a State Law Cause of Action is Preempted

The Supremacy Clause of the Constitution provides that any state law conflicting with federal law is preempted by the federal law and is without effect. Courts go through a somewhat complicated analysis to determine which state laws are actually preempted. Determining when state and local laws are preempted is a question of determining congressional intent. First, there is a background presumption against preemption for those areas of law that are traditionally within the purview of the states. Thus, for Congress to preempt state law in these areas, they must make their intent to preempt clear and manifest. It is not always clear, however, what areas of law a statute is regulating. How a court characterizes the area of law therefore has a great impact on how it decides the preemption issue.

After determining the area of law being regulated by the state, courts look at the specific federal law that allegedly preempts state law. The court must analyze congressional intent behind the federal statute at issue. Congress' intent to preempt a law "may be either express or implied, and preemption is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."  

1. Express Preemption

Express preemption occurs when Congress has included a preemption clause in a statute. When a federal statute contains an express preemption clause, courts begin by determining whether the state law in question is covered by the preemption clause. If so, the state law is preempted. If not, a court may decide to end the discussion and find no preemption, without considering implied congressional intent. In Cipollone v. Liggett Group, Inc., for example, the Court found that Congress had included an express preemption clause that provided a

---

23. U.S. CONST. art. VI, § 1, cl. 2.
25. FMC Corp. v. Holliday, 498 U.S. 52, 56-57 (1990); Cipollone, 505 U.S. at 516.
26. FMC Corp., 498 U.S. at 56-57 (citations omitted).
27. For examples of cases dealing with express preemption, see Cipollone, 505 U.S. at 516; Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).
28. Cipollone, 505 U.S. at 517 (holding that Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted).
29. The clause states:
   a) Additional statements. No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
“reliable indicium” of Congress’ intent regarding preemption, and so analysis of implied preemption was not necessary. In such cases, the language of the statute limits the preemptive scope to the language of the preemption clause.

2. **Implied Preemption**

However, sometimes courts look beyond the words of the federal statute. Even if a state law is not covered by an express preemption clause, courts may look for implied preemption. For instance, in *Freightliner Corp. v. Myrick*, the Supreme Court considered implied preemption even though the federal statute contained an express preemption clause.

Implied conflict preemption is found “where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” The Supreme Court has held that principles of implied conflict preemption nullify state law that

(b) State regulations. No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.


32. 514 U.S. at 287-89 (analyzing the National Traffic and Motor Vehicle Safety Act (NTMVSA)). For comparison to FIFRA (see infra Part II.C), the NTMVSA’s preemption clause at the time stated:

Whenever a federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.

*Id.* at 284. The preemption provision was revised and is now contained at 49 U.S.C. § 30103(b) (2003).

33. The Court recognizes two types of implied preemption, conflict and field preemption. See Freightliner Corp., 514 U.S. at 287. Field preemption occurs when Congress intended federal law to occupy an entire legal field, leaving no room for state legislation. Only conflict preemption is discussed in this note, because field preemption was not analyzed by the Ninth Circuit or its supporting authorities. This is probably because Congress has clearly left the States some room to regulate within the field of pesticide law.

34. *Id.* (citations omitted).
“under the circumstances of the particular case... stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress—whether that 'obstacle' goes by the name of conflicting; contrary to;... repugnance; difference; irreconcilability; inconsistency; violation; curtailment;... interference, or the like.”

C. Judicial Interpretation of FIFRA's Preemption Clause

FIFRA contains an express preemption clause that states:
(a) In general. A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.
(b) Uniformity. Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this Act.

This provision allows states some regulatory powers while mandating uniform labeling and packaging requirements throughout the nation. The federal government requires uniform labeling in order to promote interstate trade in pesticides.

FIFRA's preemption clause has driven most of the FIFRA preemption analysis. Until 1992, much of the debate was about whether state law claims for damages were 'requirements' within the meaning of FIFRA's preemption clause. That question was put to rest in Cipollone v. Liggett Group, Inc., where the Supreme Court ruled that claims for damages may be 'requirements' just like positive enactments of state law. While damage awards may be requirements, courts still disagree about whether Congress specifically intended FIFRA's preemption clause to apply to state law damage claims.

The majority of cases hold that FIFRA does preempt the multitude of tort actions that may be brought in claims related to pesticide use. Generally, federal courts find preemption more often than state courts.

35. Geier, 529 U.S. at 873 (citations omitted).
39. The Supreme Court has only addressed FIFRA preemption once. In Wisconsin Public Intervenor v. Mortier, the Court held that FIFRA's preemption clause did not apply to local governments. 501 U.S. 597, 614-15 (1991). The ruling adds nothing to the Kimmel analysis, which was a suit under state tort law.
In fact, state courts have recently been more likely to prevent FIFRA from preempting state law claims.\(^4\)

Overall, there is not much cohesion among the FIFRA preemption rulings.\(^4\) One thing that can be said is that the nature of the specific claim brought in a given FIFRA preemption case will determine how likely FIFRA is to preempt the claim. For example, failure to warn claims, which usually indicate that a pesticide’s label was somehow inadequate, are most likely to be preempted.\(^3\) On the other hand, defective design claims are less likely to be preempted, because they do not depend on a pesticide’s label.\(^4\) Kimmel, however, defies preemption analysis under FIFRA precedent for two reasons: the nature of the claim was fairly unique and the Ninth Circuit elected not to discuss FIFRA’s express preemption clause. As is described below, the court did not consider other FIFRA preemption cases, but instead relied only on implied preemption analysis from other regulatory schemes.


44. When plaintiffs claim defective design, they do not state that the label is inadequate, but that no matter what the label states, the product is defective, because the product’s aggregate risks are greater than its aggregate utilities. See, e.g., Wright, 845 F. Supp. at 507; Reutzel, 903 F. Supp. at 1281-82; Arkansas-Platte, 886 F. Supp. at 766-67; Seger, 886 F. Supp. at 773; Kawamata Farms, 948 P.2d at 1076-77.
II. THE KIMMEL DECISIONS

A. Procedural History

Nathan Kimmel, Inc. of Pasadena, CA, brought two California state law claims against Indianapolis-based DowElanco. Kimmel sought an injunction requiring DowElanco to change its Vikane label, and damages for intentional interference with prospective economic advantage. The federal district court heard the case based on diversity jurisdiction, and dismissed both complaints for failure to state a claim, finding both preempted by FIFRA. Kimmel appealed. Originally, the Ninth Circuit panel affirmed the dismissal of the claim for injunctive relief, but reversed the dismissal of the damages claim, finding no preemption of the tort claim. However, on DowElanco's request, the same three-judge panel agreed to rehear the case. Upon rehearing, the panel withdrew its original opinion and issued a second, finding both claims to be preempted by FIFRA, thus affirming the district court opinion in its entirety.

B. The Facts

From 1993 to 1996, Vikane's label stated that all food and drugs must be covered or placed in nylon polymer plastic bags during application of the pesticide. In early 1994, Kimmel notified DowElanco that it planned to manufacture a new plastic bag for use with Vikane application. DowElanco responded by applying to EPA for a modification to the Vikane label, saying that its trademarked Nylofume bags had "proven to be the most reliable" and had "proven to be best suited for this use." EPA accepted DowElanco's amendments, and the label changed accordingly. However, prior to 1993, DowElanco had tested certain plastic bags to determine how effectively they protected food and drugs from exposure to Vikane. The results of the tests allegedly showed that

45. Kimmel III, supra note 2, at 1203.
46. Id. See also CAL. BUS. & PROF. CODE § 17200 (2003). The section states "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1."
47. FED. R. CIV. P. 12(b)(6).
48. Kimmel III, supra note 2, at 1208.
49. Kimmel II, supra note 8, at 1205.
50. See Appellee's Petition for Rehearing or Rehearing en banc, Kimmel III, supra note 2, 275 F.3d 1199.
51. Kimmel III, supra note 2, at 1208.
52. Id. at 1202.
53. Id.
54. Id.
55. Id.
DowElanco's own Nylofume did not perform as well as comparable bags." In 1998, after the State of California began prosecuting applicators who used bags other than Nylofume during Vikane application, Kimmel claimed that since DowElanco's tests showed Nylofume bags performing worse than other bags, the information DowElanco provided to the EPA was fraudulent. Kimmel alleged that, by providing this fraudulent information, DowElanco engaged in an unfair business practice that caused Kimmel monetary damages through loss of sales.

C. The Ninth Circuit's First Try: FIFRA Does Not Preempt Damages Claims

A Ninth Circuit panel originally found that Kimmel's state-law claim for injunctive relief would force DowElanco to change its label, and that such a state-mandated labeling requirement is explicitly preempted by FIFRA. The panel then considered the claim for damages. The appellate panel originally found that the claim for damages was not preempted by FIFRA. The court first said that state laws regulating activities that have historically fallen under the police power of the states are preempted by federal laws only when Congress clearly intended such preemption. Presumably, the court found that fraud was historically policed by the states, since it then proceeded to analyze congressional intent. The court considered whether Congress had expressly or impliedly intended to preempt state claims. After describing FIFRA, the court found that the law's express preemption clause sufficiently expressed Congress' intentions regarding preemption, limiting an analysis of whether the claim was preempted to the terms of that express preemption clause alone. It did not analyze implied intent.

---

56. Id.
57. Id.
58. Id. at 1203.
59. Kimmel II, supra note 8, at 1198 n.2.
60. Id.
61. Id. at 1205.
62. Id. at 1199.
63. Id.
64. FIFRA requires manufacturers to register pesticides with the EPA before introducing them to the market. 7 U.S.C. § 136a (2003). Part of the registration includes submitting a proposed label to the EPA for approval. § 136a(c)(1)(C). FIFRA specifically prohibits the knowing falsification of any application for the registration of a pesticide, including the falsification of "any information relating to the testing of any pesticide ... including the nature of any ... observation made, or conclusion or opinion formed ...." §§ 136j(a)(2)(M), 136j(a)(2)(Q).
65. 7 U.S.C. § 136v, supra Part II.C.
66. Kimmel II, supra note 8, at 1199.
The court then discussed whether a state damages ruling constituted a “requirement” under the FIFRA preemption clause. After discussing arguments both for and against finding state damage claims to be requirements, it decided not to rule directly on the issue. The court instead found that whether or not state damage claims were requirements, they were not requirements that were “in addition to or different from” those required by FIFRA.

The court relied on Medtronic, Inc. v. Lohr, a recent Supreme Court decision on the preemptive power of the Medical Devices Amendments (MDA), to find that the damage claims sought by Kimmel would not impose any new requirements on pesticide manufacturers. In Medtronic, the Court allowed plaintiff to bring a tort claim after a pacemaker failed since such claim would not impose requirements different from or in addition to federal requirements under the MDA. Similarly, Kimmel did not claim that DowElanco should have included warnings on its Vikane label in addition to those accepted by the EPA, but rather merely claimed that DowElanco failed to meet FIFRA's requirement not to submit false information to the EPA. A ruling for Kimmel would therefore not conflict with FIFRA's preemption clause. Allowing state damages claims would give manufacturers additional impetus to comply with FIFRA requirements, not impose new requirements.

D. The Ninth Circuit's Second Try: FIFRA Conflicts with Damages Claims

DowElanco then petitioned the court for a rehearing of the case en banc. The panel granted the rehearing, although as a panel, not en banc. On rehearing, the panel reversed its prior decision and found that Kimmel's claim for damages was preempted by FIFRA. The court based its reversal on Buckman Co. v. Plaintiffs' Legal Committee. That case

---

67. Id. at 1200; see 7 U.S.C. § 136v(b).
68. Kimmel II, supra note 8, at 1202.
69. Id. at 1205.
72. 518 U.S. at 494-95.
74. Kimmel III, supra note 2, at 1201.
75. Id.
76. Id. at 1208.
77. 531 U.S. 341 (2001). The court did not discuss this case at all in the first opinion. Buckman was published after the original Kimmel briefs had been written. DowElanco submitted Buckman as supplemental authority just after the Buckman opinion came out in
involved regulatory approval by the Food and Drug Administration (FDA) of surgical bone screws manufactured by the Buckman Company. Patients claimed that Buckman made fraudulent representations to the FDA regarding the safety of bone screws, allowing the devices to be marketed, causing injury to patients. They claimed that but for the fraud, they would not have been injured. The Supreme Court held that the fraud claim was preempted by the Medical Devices Amendment to the Food, Drug, and Cosmetics Act (FDCA). Since the FDA had the power to punish and deter fraud against it, allowing the claim would upset the delicate regulatory balance established by the FDCA.

In its second opinion, the Kimmel court stated that a federal statute's express preemption provision does not bar a court from considering implied preemption. The court then proceeded to completely disregard FIFRA's express preemption clause.

The court then discussed the area of law at issue in the case, determining that the crux of the claim was not fraud or pesticide misuse, but rather administrative law. The court stated that "the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law." Thus, the court concluded that, unlike claims related to health and safety (which are within the purview of the states), Kimmel's claim hinged on DowElanco's relationship with the EPA, so there was no presumption against preemption in this case.

Following Buckman, the court next found that because Congress granted the EPA power to enforce provisions of FIFRA, it impliedly preempted any state tort claims that would also enforce FIFRA. "Kimmel's state law claims would stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' in enacting FIFRA," and they were therefore preempted by that scheme. Additionally, the court reasoned, allowing state tort claims would unduly burden pesticide manufacturers, who would not only have

---

February 2001. See Appellee’s Petition for Rehearing or Rehearing en banc at 5 n.3, Kimmel III, supra note 2, 275 F.3d 1199.
78. Buckman, 531 U.S. at 343.
79. Id.
80. Id. at 344.
81. Id. at 348.
82. Kimmel III, supra note 2, at 1203-04.
83. Id. at 1205 (quoting Buckman, 531 U.S. at 347).
84. Id.
85. Buckman, 531 U.S. at 348-51.
86. Id. at 1206.
87. Id. at 1208 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).
to satisfy the EPA, but each state’s tort regimes as well. These burdens on the EPA and manufacturers led the court to believe that Congress had impliedly intended FIFRA to preempt state tort claims challenging the veracity of disclosures made to the EPA.

In an additional shift from its original opinion, the court chose to distinguish Medtronic, again following Buckman’s lead. Since the Medtronic plaintiff’s claim arose out of the defendant’s alleged failure to use adequate care when manufacturing a device, and not solely out of its relationship with the regulatory agency, the claim was not preempted. In contrast, the Kimmel Court found that because Kimmel’s claim did arise solely out of the relationship between DowElanco and the EPA, it was preempted.

Finally, the court addressed an EPA amicus curiae brief that had been filed in Etcheverry v. Tri-Ag Service, Inc., a California case. In that brief, the EPA supported the position that FIFRA should not preempt many state damage claims. The court nevertheless found that because Etcheverry was substantively and materially different than the case before it, and because Etcheverry was decided before Buckman, the EPA’s interpretation of FIFRA preemption was not persuasive.

III. THE NINTH CIRCUIT’S MISAPPLICATION OF FIFRA AND ITS FUTURE IMPLICATIONS

The Ninth Circuit panel reheard the case because it had neglected to discuss Buckman in its original opinion. The hasty reversal of its original opinion led to some analytical errors as the court attempted to apply a case with a different fact pattern and different federal statute at issue. This section discusses those errors and then reflects on the potential wider impact of the ruling.

88. Id. at 1207.
89. Id.
90. Id. at 1206.
91. Id.
92. Id.
93. 993 P.2d 366 (Cal. 2000). Kimmel also submitted the brief as Appendix B to Appellant’s Answer to Petition for Rehearing or Rehearing en banc, Kimmel III, supra note 2, 275 F.3d 1199.
95. Kimmel III, supra note 2, at 1207-08 (distinguishing Etcheverry in three ways: 1) Etcheverry dealt with pesticide efficacy, not labeling, 2) Etcheverry was decided before Buckman, and 3) EPA would be wrong under the Buckman analysis).
96. DowAgro submitted Buckman as supplemental authority on Feb. 27, 2001, while the original Kimmel opinion was filed July 10, 2001. See Answer of Appellants to Petition of Appellee for Rehearing or Rehearing en banc at 3, Kimmel III, supra note 2, 275 F.3d 1199.
A. Analytical Errors

1. Mischaracterizing the Area of Law: Kimmel’s Suit Was About Intentional Interference

_Buckman_ and _Kimmel_ both narrowly construe the area of law when determining that there is no presumption against preemption. Both courts determined the area of law to be fraud against an agency, holding that the relationship between an agency and the entity it regulates is inherently federal in nature, deserving no presumption against preemption.\(^97\) Such an assumption renders preemption analysis a formalistic exercise empty of meaning, a tautology. Many preemption cases involve a federal regulatory scheme.\(^98\) The court’s reasoning would challenge the presumption against preemption previously found in other situations, even those which clearly dealt with health and safety issues.\(^99\)

Relying on _Buckman_, the court went on to clarify that Kimmel’s damages claim hinged on DowElanco’s relationship with the EPA, and that without FIFRA, Kimmel would not have a claim.\(^100\) However, this is an oversimplified, unsupported assumption. Kimmel’s claim was not based on DowElanco’s fraudulent representation to the EPA, but on the company’s intentional interference with Kimmel’s economic advantage. If DowElanco or anyone else had made fraudulent representations to the EPA on any subject that did not impact Kimmel’s business, Kimmel would not have sued. Moreover, and crucially, if FIFRA were not present, DowElanco could still have engaged in the same intentional interference and been held liable. If there was no federal regulatory scheme, manufacturers would still have to provide warnings to consumers about the use of their products.\(^101\) If the manufacturer falsely stated that its bags were more protective than another brand in its warnings, the company would be endangering consumer health by allowing a higher level of pesticides to be absorbed into foods and medicines, and would be


\(^{98}\) See, e.g., _Medtronic, Inc. v. Lohr_, 518 U.S. 470 (1996) (presumption against preemption of damages claim for pacemaker failure which was regulated as a medical device by the Food and Drug Administration); _Rice v. Santa Fe Elevator Corp._, 331 U.S. 218 (1947) (presumption against preemption of claim of unsafe sale of grain which was regulated by the Secretary of Agriculture under the U.S. Warehouse Act); _Hillsborough County v. Automated Med. Labs., Inc._, 471 U.S. 707 (1985) (presumption against preemption of claim regarding a county ordinance regulating blood plasma donation which was regulated by the Food and Drug Administration as part of the Health Services Act.).

\(^{99}\) Id.

\(^{100}\) _Kimmel III_, supra note 2, at 1206.

\(^{101}\) WILLIAM L. PROSSER, _LAW OF TORTS_ § 96 (4th ed. 1971).
liable for personal injury damages as well as intentional interference. This indicates that Kimmel's claim is not dependant on FIFRA's regulatory scheme, but on DowElanco's alleged intentionally wrongful act. Therefore, for the court to characterize the area of law for preemption analysis in this case solely as a regulated industry's relationship with the regulatory agency does great injustice to the integrity of true preemption analysis.

2. Ignoring FIFRA's Preemption Clause

The court followed Buckman's lead when it decided to ignore FIFRA's express preemption clause in favor of finding implied preemption. The Kimmel Court relied on Freightliner Corp. v. Myrick and Buckman. The Buckman Court in turn had relied on language in Geier v. American Honda Motor Co. Both Freightliner and Geier are distinguishable from Kimmel. In Freightliner, the Court looked at the express preemption clause of the National Transportation and Motor Vehicle Safety Act, and ruled that because the clause's precondition of a currently active federal motor vehicle safety standard was not met, the express clause did not apply. The Ninth Circuit panel in Kimmel did not have the same reason to avoid FIFRA's preemption clause; FIFRA's clause lacks any preconditions before the clause applies. Thus, Kimmel did not have Freightliner's rationale for avoiding consideration of the express preemption clause.

Geier held that an express preemption clause does not bar the "ordinary working of conflict preemption principles," meaning that a court can still consider implied preemption even if a statute contains an express preemption clause. However, that does not mean a court should entirely ignore an express preemption clause. In Geier, the Court considered the express preemption clause and found that it would not

---

102. Kimmel III, supra note 2, at 1204, 1208 (citing Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)).
104. 15 U.S.C. § 1392(d). The clause states:
Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard.
105. Freightliner, 514 U.S. at 286.
106. See supra Part II.C.
107. Geier, 529 U.S. at 869.
preempt plaintiff's claims. The Court balanced this against ordinary conflict preemption principles and found preemption.

Neither of these authorities stands for the notion that a court can dismiss an express form of congressional will. The Ninth Circuit panel's second opinion did not even consider the express preemptions clause, finding no need to "determine the exact length of the preemptive shadow cast by the express language" in FIFRA's preemption clause. Courts must look to congressional intent to determine whether a federal law preempts a state statute. Accordingly, an express preemption clause provides a truer source of congressional intent than does implied intent. The Ninth Circuit could have found, as indeed it had in its original opinion, that FIFRA's preemption clause provided a reliable indicium of congressional intent, and was worthy of consideration. Instead, the court declined to even address the express clause, in its search for implied intent.

3. Telling the Truth is Not an Additional Requirement

Similarly, where the court originally found that Kimmel's damages claim would impose no new requirements on manufacturers, after the rehearing the court determined that such a claim would impose an undue burden on manufacturers. In a direct and unexplained reversal of its original opinion, the court, quoting Buckman, said that allowing the claim would "force FIFRA applicants to ensure that their disclosures to the EPA would satisfy not only the standards imposed by that agency under federal law, but also the potentially heterogeneous standards propounded by each of the 50 States." If the court had considered another Supreme Court precedent on this issue, Cipollone, it would have found that state prohibitions against "false statements of material fact do not create diverse, nonuniform, and confusing standards. . . . [rather, they] rely only on a single, uniform standard: falsity." Indeed, the burdens of avoiding fraud should not vary from state to state. Yet the court seemingly copied Buckman without mentioning Cipollone.
4. Over-Reliance on Buckman

Much of the Ninth Circuit's second opinion seems to be a rewrite using Buckman as the template. This did not do Kimmel's claim justice, as that claim was based on an entirely different statute than the one in Buckman. In Buckman, the federal statute at issue was the Medical Device Amendments (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA).117 MDA directs the Food and Drug Administration (FDA) to regulate medical devices.118 The provision at issue in Buckman allows devices that were already on the market before the Amendments were enacted in 1976 to continue to be used at least until the FDA completes reviews of those devices.119 Devices subject to this provision go through a much faster, but much weaker, review process than new devices. Allowing the state tort claim in Buckman would have slowed down a process that Congress meant to be a speedy alternative. No similar provision was at issue in FIFRA. DowElanco's Vikane was subject to a deliberative process, not a fast-track approval, and the court erred in not noting the difference.

Furthermore, Congress, in passing the MDA, stated that the amendments were not intended to disrupt the practice of medicine.120 Since doctors may use medical devices at their discretion in ways that differ from those for which they are certified (as was done by the doctors in Buckman), allowing the state tort claim in Buckman would have hindered the practice of medicine as understood by the MDA. No such policy of discretionary use is present for pesticide fumigators under FIFRA. The approved uses are narrowly defined; a fumigator has no discretion to use a pesticide inconsistently with the instructions on its label. The Vikane label stated that only Nylofume bags were certified for use with Vikane, and there was no room for any other interpretation.122 Because FIFRA contains no discretionary use policy like the MDA, allowing state tort claims will not interfere with a purpose of the regulatory scheme, as they would have under the MDA. Thus, FIFRA is substantively different from the MDA.

118. See id. § 360.
119. See id. § 360e(b)(1)(A).
120. See id. § 396.
121. See Buckman, 531 U.S. at 349-50.
122. Kimmel III, supra note 2, at 1202.
B. Broader Implications

1. The Previous Ruling is Left Hanging

The court, by following Buckman, had to entirely reverse the reasoning in its original opinion. While this is certainly the court’s prerogative, doing it without any analysis of why the original opinion required revision is unfair to the plaintiff. The situation in Buckman is simply not so analogous to the situation in Kimmel that further explanation is unnecessary. In its first opinion, the Kimmel Court had found no need to divine an implied congressional intent since FIFRA provides explicit preemption guidance. Six months later the court decided that implied conflict preemption can exist coextensively with an explicit preemption clause, and Congress meant for FIFRA to implicitly preempt state fraud claims, despite the absence of such language in its explicit preemption clause.

It is a mystery, given the distinguishable factors between Buckman and Kimmel, why the court felt compelled to reverse all of its original reasoning. Nothing in Buckman compelled the court to directly contradict its original opinion, but in any case, it would have been more deliberative of the court to distinguish all or parts of Buckman. While the appellate court was obliged to follow the Supreme Court’s reasoning when applicable, these two cases are very different, and much if not all of the court’s original reasoning was still valid after Buckman.

2. Impact on Health and Safety

What is striking in Kimmel is how the court ignored the health and safety issues implicated by its ruling. If the EPA was defrauded (which was never determined because there was no trial on the merits) then Vikane fumigators are not using the most health-protective bags to cover food and medicine in people’s homes. A ruling for Kimmel would have allowed the trial to proceed on the merits of the claim, determining whether the EPA had in fact been defrauded. While it is true that a court probably does not have the technical expertise to determine the scientific validity of a pesticide label, such determination was not required in this case. Kimmel was not asking that the label be changed, but was

123. Kimmel II, supra note 8, at 1199.
124. Kimmel III, supra note 2, at 1208. The court’s stance on Medtronic, Etcheverry’s EPA brief, and burdens on manufacturers also flipped in Kimmel III.
125. The original claim did include a request for a label change, but it was dismissed in an earlier iteration of the case. Kimmel III, supra note 2, at 1203.
requesting compensation for the harmful results of a fraudulent statement made by a competitor.

3. **Broadening the Scope of FIFRA Preemption**

Furthermore, Congress did not intend for FIFRA to regulate unfair business practices. Instead, FIFRA was meant to protect the public welfare by enforcing uniform standards for pesticide labeling, allowing the public to make informed decisions as to the risks associated with pesticides and the steps they can take to protect themselves.\(^{126}\) By allowing FIFRA to preempt a tort claim for intentional interference with a prospective economic advantage, the court unreasonably expanded FIFRA's preemptive power. If a claim so unrelated to the actual dangers of pesticides is preempted, the court might find preemption of claims that are actually related to the dangers of pesticides, seriously limiting the ability of plaintiffs to recover from pesticide-related injuries. *Kimmel* casts an irresponsibly broad shadow of preemption that is not compelled by *Buckman*.

4. **Closing Doors for Plaintiffs**

One potential consequence of the court's ruling is the effect on pesticide-induced personal injury claims. *Kimmel* was not about personal injury, but about fraudulent intentional interference. However, the ruling falls within the larger body of FIFRA preemption jurisprudence. While more state courts are accepting the idea that a labeling statute should not block victims from recovering for injuries caused by pesticide manufacturers,\(^{127}\) the *Kimmel* Court's reversal makes it that much harder for injured parties to recover in the Ninth Circuit. It buttresses the side of the debate that is pro-business at the expense of consumers. Rather than allowing a trial on the merits to proceed, the court killed the allegations at an early stage and did potentially serious harm to further parties who may no longer be able to sue for other claims related to pesticides. The court did not determine whether DowElanco defrauded the EPA and exposed Vikane users to unnecessary risks. Instead, it allowed the substantive issue to sink into bureaucratic oblivion.\(^{128}\)

---


\(^{127}\) *See supra* Part II.C.

\(^{128}\) The court stated that Kimmel could possibly pursue an administrative action within the EPA or sue EPA under the Administrative Procedures Act. *Kimmel III*, *supra* note 2, at 1208.
5. The Purpose of FIFRA

Finally, one must ask, what would be the harm in allowing the court to enforce state tort law in this case? The court would be helping to enforce FIFRA by encouraging businesses to tell the truth when applying for pesticide labels. This would not hinder EPA's enforcement of FIFRA. Nor would it impose an undue burden on manufacturers, because it would not add any new requirements on them, but would merely reinforce the obligation to provide truthful information. Perhaps manufacturers would be more careful when submitting applications, ensuring that they do not inadvertently provide any false information. Surely the court is not suggesting that part of the congressional balance established under FIFRA allows businesses to slip fraudulent information past the EPA hoping that the fact that EPA, overworked and understaffed, will not monitor submissions very closely.

CONCLUSION

Kimmel holds that state law claims of intentional interference with a prospective economic advantage caused by fraudulent pesticide labeling information provided to the EPA conflict with FIFRA's delicate statutory balance and are therefore preempted. The court determined that fraud against a federal agency is not a field that the states have traditionally occupied, hence there was no presumption against preemption. Additionally, the court held that under an implied preemption analysis, because Kimmel's claim hinged on its relationship to the federal regulatory agency, and the EPA is empowered to police fraud against itself, the claim was preempted. The final opinion, based almost entirely on a case not discussed in its prior opinion, Buckman Co. v. Plaintiffs' Legal Committee, is a direct reversal of the original opinion, without any effort to explain its errors.

The court's decision to completely ignore FIFRA's express preemption clause in its analysis will potentially weaken the force of other statutes' express preemption clauses. This ruling could allow courts more leeway, more power to interpret congressional intent via implied preemption analysis, and ultimately, more power to ignore explicit congressional language. This increased discretion could in turn lead to inconsistent rulings, varying greatly from the congressional intent embodied by express clauses. Meanwhile, the breadth of FIFRA preemption has been expanded to absurd proportions, potentially limiting the ability of injured plaintiffs to be compensated for pesticide related injuries.

129. Id.
While it is understandable that the Ninth Circuit panel felt an obligation to issue a new opinion more in harmony with *Buckman*, it would have been more helpful to address the precedent in the new opinion and provide rebuttal of the reasoning employed therein. While courts have found FIFRA preemption of a wide variety of claims, it is disappointing that the panel’s original progressive opinion came to nothing. It appears that FIFRA will remain a strong source of federal preemption in the Ninth Circuit, though for the sake of public health and safety, and for states’ abilities to discourage fraudulent business practices that harm consumer health, there should be no rush for other courts to use *Kimmel* as new precedent.