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Do SDWA Public Notice and CCR Rules Preempt State Common Law Claims?

The federal Safe Drinking Water Act (SDWA) requires that public water systems give public notice of any failure to comply with maximum contaminant levels or treatment technique requirements of a national primary drinking water regulation. 42 U.S.C.A. §300g-3(c)(1)(A). The SDWA also prescribes public notice under certain other circumstances. 42 U.S.C.A. §300g-3(c)(1)(B)(C). In addition, public water systems are required to provide annual Consumer Confidence Reports (CCR) to customers. 42 U.S.C.A. §300g-3(c)(4). These CCRs provide information, among other things, on detected regulated contaminants.

If a public water system is in full compliance with the federal public notice and CCR requirements, could a water user still assert a state common law claim against a utility for damages from non-disclosure of a contaminant for which there is no public notice obligation? In other words, does the SDWA preempt state common law claims for nondisclosure?

A recent federal district court decision helps to focus these questions. In *Lucas v. Bio-Lab Inc.*, 51 ERC 1650 (E.D. Va. 2000), the issue was whether a person could assert a claim for alleged injuries from exposure to chemical fumes allegedly caused by defective labeling and packaging of chlorine tablets for use in a swimming pool.

The plaintiff's claim as to insufficient labeling (failure to warn) was dismissed as preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). However, the plaintiff also asserted a state common law claim of defective packaging. The defendant asserted that the claim was preempted by FIFRA and U.S. EPA's packaging regulations under FIFRA.

"Section 136v(b) of FIFRA provides that a State may not 'impose or continue in effect any requirements for *labeling or packaging in addition to or different from those required under this subchapter.* [emphasis added]'" Id. at 1651.

The court in *Lucas* reviewed what it deemed to be relevant precedent. In *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992), the court held that FIFRA preempts any common law duty that would impose a labeling requirement inconsistent with those established under FIFRA (*Worm I*). It also held that state law must yield if complying with it would frustrate the objectives of federal law, which include providing a comprehensive and uniform regulation of the labeling sale and use of pesticides.

The following year, the court rejected the plaintiff's state law defective labeling claims based upon the assertion that a common law duty to warn is not different from FIFRA labeling requirements. *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993) (*Worm II*).

Subsequently, in *Lowe v. Sporicidin International*, 47 F.3d 124 (4th Cir. 1995), a hospital worker sued for alleged injury from inhaling a disinfectant, claiming among other things, a negligent failure to warn. That court held "First, any state law claim that would require the defendant to alter its EPA-approved warning label, labeling or packaging to avoid liability is preempted (citing *Worm I*). Second, a failure-to-warn claim that contends that the same language that constitutes an EPA-approved label, labeling or packaging is inadequate is preempted whether that language appears on a label, labeling, packaging or elsewhere (citing *Worm II*). Third, an express warranty claim based on EPA-approved labeling materials is preempted (citing *Worm II*)." 51 ERC 1652.

However, the court in *Lucas* distinguished these prior cases because, it stated, whether a defective packaging design claim is preempted when U.S. EPA has not approved the packaging is an unresolved issue. The court then discussed *Jeffers v. Wal-Mart Stores, Inc.*, 84 F. Supp. 2d 775 (S.D. W. Va. 2000), where a maintenance worker sued a manufacturer of pesticide products for injuries allegedly resulting from exposure to a pesticide that leaked from a ruptured container. That court found that U.S. EPA had chosen to exercise regulatory authority only over pesticide packaging as related to child-resistant packaging. Therefore, it concluded that FIFRA did not preempt common law claims for defective packaging where the packaging had not been approved by U.S. EPA. A similar result was reached in *Lyall v. Leslie's Pool Mart*, 984 F. Supp. 587 (E.D. Mich. 1997).

The court in *Lucas* concluded that, since U.S. EPA has not promulgated regulations imposing requirements for pesticide packaging except for the limited area of child resistant packaging, the state common law claim was *not* preempted by federal law.

A similar result was reached earlier by the Third Circuit Court of Appeals in *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999). There, a person also claimed injury from exposure to fumes from chlorine tablets. The court held that her claims for failure to warn and inadequate directions properly were dismissed because FIFRA preempts all state law claims that would effectively require a product label other than one approved by U.S. EPA. However, the court held that defective packaging claims based on state common law were not preempted by FIFRA because U.S. EPA had not considered the packaging design at issue or imposed applicable regulations.

Section 1414(c) of the SDWA states that U.S. EPA shall promulgate regulations prescribing the manner, frequency, form and content of the notice to be given by water utilities of noncompliance with an applicable MCL or treatment technique. 42 U.S.C.A. §300g-3(c)(2). U.S. EPA has imposed such regulations at 40 CFR, Part 141, Subpart Q, beginning at Section 141.201.

Section 1414 does provide that a state may, *by rule*, establish alternative requirements that are to provide the same type and amount of information as required by U.S. EPA's regulations.

A similar arrangement appears applicable to CCRs. Section 1414(c)(4) of the SDWA prescribes the requirement for, and contents of, CCRs. 42 U.S.C.A. §300g-3(c)(4)(A)(B). It also provides that a primacy state, *by rule*, may establish alternative requirements. 42 U.S.C.A. §300g-3(c)(4)(E). Again, U.S. EPA has promulgated regulations for CCRs. 40 CFR Parts 141 and 142.

Two arguments may be applicable as to why state common law claims as to nondisclosure of drinking water contaminants are preempted. First, Section 1414(c) of the SDWA makes it clear that any state law alternative to the federal public notice and CCR requirements must be established by rulemaking. Moreover, the state alternative public notice rule must provide the same type and amount of information as federally required.

Second, under the reasoning of the *Lucas* decision and the cases discussed by that court, it would seem that state common law notice obligations are preempted by the SDWA and U.S. EPA's regulations on public notice and CCRs. ■