FIFRA Doesn't Mandate Preemption

The receptionist buzzes your office and says Mr. Jones, a cotton farmer, is present for his appointment. You recall from your phone conversation he and several cotton farmers bought various pesticides and applied them to their crops to control or prevent tobacco budworm infestation. Application of these pesticides to the farmers' crops, according to out-of-state manufacturers and an in-state corporate agent, would enhance production by controlling crop diseases and infestations. But the pesticides never worked although the manufacturers and the agent continued to tout the efficacy of the chemicals. The farmers want you to file suit in state court but you're aware pesticides are federally regulated by the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and must be registered with the EPA. Can you file and keep the suit in state court alleging state causes of action and include the in-state agent as a defendant since he knowingly misrepresented the qualities of the pesticides he sold to the farmers?

In *Hart v. Bayer Corporation*[1], the U.S. Court of Appeals for the Fifth Circuit reversed the district court's denial of a remand motion and dismissal of the action based on the above factual scenario asserted by Mississippi plaintiffs in four state common-law causes of action. Plaintiffs did not assert any federal causes of action and did not fraudulently join the state corporate agent, thus, according to the Fifth Circuit, the district court erred[2] in its conclusion it possessed subject matter based on federal question and diversity jurisdiction. The appellate court held that since the district court erred in concluding that a "FIFRA defense" is sufficient to establish federal question jurisdiction, and that the corporate agent was fraudulently joined, neither it nor the district court had jurisdiction to reach the issue of whether FIFRA bars plaintiffs' state-law claims.[3]

The court began its analysis by pointing out the general rule that if, on its face, the plaintiff's complaint raises no issue of federal law, federal question jurisdiction is lacking[4]. In this case, defendants relied upon the "complete preemption" exception to the well-pleaded - complaint rule in their efforts to establish jurisdiction. According to this exception, if a federal law is found to "completely preempt" a field of state law, then the state law claims in the complaint will be "recharacterized" as stating a federal cause of action[5]. The mere fact a given federal law might "apply" or even provide a federal defense to a state law cause of action is insufficient alone to establish federal question jurisdiction; instead, the court must find complete preemption[6]. The defendant must demonstrate Congress intended not just to "preempt a state law to some degree," but to altogether substitute "a federal cause of action for a state cause of action[7]." The court found defendants' contention of complete preemption a fundamental misreading of FIFRA's preemption language[8] and relevant case law[9]. The court also resisted defendants' contention that the state common law causes of action were disguised labeling claims.[10]

Thus, the district court's ability to hear the case rested solely upon the existence of diversity. That determination depended upon whether the in-state agent had been fraudulently joined to defeat diversity. The burden of proving fraudulent joinder is on the removing party and is a heavy one[11]. The court must resolve all disputed questions of fact and all ambiguities in the

controlling state law in favor of the non-removing party[12] and "[removing parties] must demonstrate that there is no possibility that [plaintiff] would be able to establish a cause of action against them in state court" [13]. Plaintiffs alleged in their complaint that [the agent] "breached his duty by continuing to represent that [defendant's] products would effectively control budworms when he knew or should have known that the chemicals were failing to control the budworms as represented." This fact situation, if true, could result in liability against the agent for his alleged misrepresentations.[14] Since plaintiffs' complaint raised the possibility that they could prosecute a viable claim against the agent under Mississippi law his citizenship could not be ignored and complete diversity didn't exist.

The pertinent case involving Louisiana law outlining criteria for holding corporate employees individually liable to third parties (thus defeating diversity) is *Ford v. Elsbury*[15]. It holds the employer must owe a duty of care to the third party and delegate the duty to the individual defendant/employee. The employee must have breached the duty through personal (as contrasted with technical or vicarious) fault, by misfeasance, malfeasance, or nonfeasance, including "not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty[16]." The corporate employee cannot be held liable because of a general administrative responsibility, or a responsibility delegated to a subordinate unless he knew or should have known of a failure to perform and failed to cure risk of harm.

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1 199 F.3d 239 (5th Cir. 2000).

2 *Id*. at 243. The proper standard for review of the district court's decision was de novo as it involved questions of law. *Id*. at 243, citing *Voest-Alpine Trading USA Corp. v Bank of China,* 142 F.3d 887, 891 (5th Cir. 1998). *Hook v. Morrison Milling Co.,* 38 F.3d 776, 780 (5th Cir. 1994).

3 *Id*. at 243.

4 *Id*. at 243, citing *Louisville & Nashville R.R. v. Mottley,* 211 U.S. 149, 152-53, 29 S.Ct. 42, 53 L.Ed. 126 (1908). *Franchise Tax Bd. v. Laborers Vacation Trust,* 463 U.S. 1, 10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

5 *Id*. at 244, citing *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

6 *Id*. at 244, citing *Franchise Tax Bd. v. Laborers Vacation Trust,* 463 U.S. 1, 10, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

7 *Id*. at 244, citing *Schmeling v. NORDAM,* 97 F.3d 1336, 1341 (10th Cir. 1996).

8 *Id*. at 244. FIFRA's preemption language is found in 7 U.S.C. § 136v(b) (1994), which provides:

(b) Uniformity

[The States] shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

9 *Id*. at 244, citing *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597, 613-14, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991). *Id*. at 245, citing *Ell v. S.E.T. Landscape Design, Inc.,* 34 F.Supp.2d 188, 193 (S.D.N.Y. 1999). *Id*. at 245, citing *MacDonald v. Monsanto,* 27 F.3d 1021, 1024 (5th Cir. 1994).

10 *Id*. at 244. See footnote 3 where the court wrote, in pertinent part,

Defendants contend that all [state] claims are really disguised labeling claims which fall within the preemptive (read preclusive) scope of FIFRA. This is the question that we cannot reach, because even if all of plaintiffs' claims are in fact barred because FIFRA provides a federal defense to each of these state law claims, the fact that many state law causes of action survive means that the statute does not establish federal question jurisdiction over the case. Therefore, defendants are not deprived of their FIFRA defenses, they are only deprived of a federal forum in which to utilize their defense.

[11] *Id*. at 246, citing *B., Inc. v. Miller Brewing Co.,* 663 F.2d 545, 549 (5th Cir. 1981).

[12] *Id*. at 246, citing *Dodson v. Spiliada Maritime Corp.,* 951 F.2d 50 (5th Cir. 1992).

[13] *Id*. at 246, citing *Dodson*.

[14] *Id*. at 248. The court agreed that Fed. R.Civ.P. 9(b) imposes a heightened level of pleading for fraud claims: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity," *Tuchman v. DSC Communications Corp.,* 14 F.3d 1061, 1067 (5th Cir.1994), but pointed out a plaintiff's failure to meet the specific pleading requirements should not automatically or inflexibly result in dismissal of the complaint with prejudice to re-filing. See *Cates v. International Telephone and Telegraph Corp.,* 756 F.2d 1161, 1180 (5th Cir. 1985) ("such deficiencies do not normally justify dismissal of the suit on the merits without leave to amend, at least not in the absence of special circumstances.").

[15] 32 F.3d 931 (5th Cir.1994).

[16] Injuries to third parties under Louisiana law were explained in *Canter v. Koehring Co.,* 283 So.2d 716 (La.1973).

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