The "Roundup" Round-Up: Will a Recent Third Circuit Ruling Spell the End for Roundup Products Liability Litigation in Pa. State Courts?

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Over 100,000 cases have been brought against Monsanto Corporation nationwide, claiming its Roundup™ weed-killer contains a carcinogenic active ingredient, namely, glyphosate. Hundreds of such cases are pending in Pennsylvania alone. But for over 30 years, the U.S. Environmental Protection Agency ("EPA") has found evidence of glyphosate's non-carcinogenicity for humans, and in 2015, the EPA determined "that glyphosate is not likely to be carcinogenic to humans." EPA, "Glyphosate," https://www.epa.gov/ingredients-used-pesticide-products/glyphosate.

This long-held conclusion regarding the non-carcinogenicity of glyphosate informed the EPA's decision to approve a label for Roundup that omitted any cancer warning. By approving (and reapproving, over decades) Roundup's label—pursuant to its authority under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* ("FIFRA")—the EPA effectively foreclosed litigants from asserting state-law product liability claims against Monsanto based on a purported duty to warn for failing to include a cancer warning on Roundup's label. This is so because, as the U.S. Court of Appeals for the Third Circuit recently held in *Schaffner v. Monsanto Corp.*, 113 F.4th 364 (3d Cir. 2024), FIFRA expressly preempts any such claims.

To many, *Schaffner* appeared to provide the last word on the subject. But some Pennsylvania state courts have declined to adhere to FIFRA-preemption in the wake of the decision. Last month, for example, the Philadelphia Court of Common Pleas concluded a trial—involving, in part, the same state-law failure-to-warn claim deemed preempted in *Schaffner*—resulting in a $78 million verdict for the plaintiffs. *Melissen v. Monsanto Co.*, No. 210602578 (Phila. Cnty. C.C.P. Oct. 10, 2024). To borrow from Dickens, there appears to be a Tale of Two Courts within Pennsylvania—federal courts (where FIFRA-preemption applies), and state courts (where it does not)—resulting in, among other problems, discord, non-uniformity, confusion, and incentivization of forum-shopping.

FIFRA

FIFRA is a comprehensive regulatory statute that regulates pesticides and empowers the EPA to "supervise the pesticide industry" generally. *Schaffner*, 113 F.4th at 372. FIFRA prohibits manufacturers from misbranding pesticides, including by prohibiting them from omitting certain warnings or cautioning statements that, if complied with, are "adequate to protect health and the environment." 7 U.S.C. § 136(q)(1)(G). It also prohibits manufacturers from distributing or selling unregistered pesticides.

The EPA is tasked with determining whether to register a pesticide under FIFRA, a process that requires manufacturers to submit proposed labels for the pesticides, among other things. Once registered, a pesticide cannot be distributed or sold unless it retains the same composition and labeling as presented to the EPA during the registration process. Any manufacturer that modifies a pesticide's preapproved label must apply for an amended registration; failure to do so bars the manufacturer from distributing or selling the pesticide. The EPA is also charged with reviewing pesticide registrations every 15 years. Notably, FIFRA contains a "uniformity" provision that prohibits states from imposing "any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b). This provision "*mandates* nationwide uniformity in pesticide labeling . . . ." *Schaffner*, 113 F.4th at 371 (emphasis added).

Schaffner

In *Schaffner*, a husband and wife sued Monsanto, claiming the husband's use of Roundup as a professional landscaper and as a property owner caused him to develop non-Hodgkin's lymphoma and asserting a failure-to-warn claim under Pennsylvania law. Although they filed their claim in Pennsylvania state court, the case was removed to Pennsylvania federal court, transferred to a California federal court involved in multidistrict litigation ("MDL") proceedings, and then transferred back to the same Pennsylvania federal court before being appealed to the Third Circuit. The MDL court rejected Monsanto's argument that FIFRA precluded the couple from asserting a state-law failure-to-warn claim based on the Roundup label's omission of a cancer warning. When the case returned to Pennsylvania—the U.S. District Court for the Western District of Pennsylvania, specifically—the parties settled all aspects of the case excepting Monsanto's FIFRA-preemption argument, which it expressly reserved for appeal.

On appeal, Monsanto prevailed on its FIFRA-preemption argument. In siding with Monsanto, the Third Circuit made several rulings that cast (arguably conclusive) doubt on any state-court proceedings that recognize a failure-to-warn claim premised on the omission of a cancer warning on Roundup's label. At its core, *Schaffner* represents a straightforward application of FIFRA's statutory framework and corresponding precedent. As the Third Circuit noted, preemption under Section 136v(b) of FIFRA—which, again, prohibits states from imposing different or additional labeling requirements than under FIFRA itself—applies if two conditions are met: (1) the state law imposes a requirement for "labeling or packaging"; and (2) that requirement is "in addition to or different from those required" under FIFRA. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 444 (2005). The U.S. Supreme Court has held that a common-law duty to warn satisfies the first requirement. *Id.* at 446.

As to the second requirement, the parties in *Schaffner* sharply disagreed as to its applicability. This requirement implicates the Supreme Court's "parallel requirements" test, under which "a state-law labeling requirement is not preempted if it is 'equivalent to a requirement under FIFRA,' while it is preempted if it 'diverges from those set out in FIFRA and its implementing regulations.'" *Schaffner*, 113 F.4th at 379–380 (quoting *Bates*, 544 U.S. 452–453). The statute operates to preempt "any statutory or common-law rule that would impose [such] a labeling requirement[.]" *Id.* at 382. The test is a simple one—it requires courts to compare FIFRA's labeling requirement to the state's labeling requirement "to determine whether a pesticide label that violates the state requirement would also violate the federal one." *Id.* at 380.

Applying this standard, the Third Circuit held that FIFRA preemption applied to bar the couples' Pennsylvania failure-to-warn claim. The Court first had to identify the FIFRA labeling requirement to compare it to any state-law requirement. The Court concluded that the EPA's "Preapproval Regulation," *i.e.*, the regulation that prohibited Monsanto from modifying Roundup's label to include a cancer warning without further EPA approval, is the relevant FIFRA "requirement" for purposes of applying the parallel-requirements test. In doing so, the Court rejected the couples' argument that it should only compare the Pennsylvania failure-to-warn "with the statutory definition of misbranding"—without regard to the Preapproval Regulation. The Third Circuit then applied the parallel-requirements test and found that, accepting the allegation that Monsanto violated Pennsylvania's duty to warn by omitting a cancer warning on Roundup's label, the omission did not violate the Preapproval Regulation given that Roundup's previously approved label omitted a cancer warning. The test was therefore not satisfied because the FIFRA and state requirements are not equivalent, and accordingly, FIFRA preemption applied.

Subsequent Pennsylvania State Court Rulings

Despite *Schaffner* and its clear holding regarding FIFRA preemption *vis-à-vis* Roundup's label, uncertainty has been sown by subsequent Pennsylvania state-court proceedings. One example is *Melissen*, which resulted in a nuclear verdict and is but one of hundreds of similar actions pending as part of the Roundup Products Liability cases in the Philadelphia Court of Common Pleas. There, Monsanto moved for summary judgment, invoking *Schaffner* and seeking judgment in its favor on plaintiffs' failure-to-warn claims under FIFRA preemption. The court denied the motion, along with Monsanto's motion for a stay and request that the court certify the FIFRA-preemption issue for immediate appeal. Monsanto then filed an emergency application for permission to appeal to the Pennsylvania Superior Court, but that, too, was denied.

Although *Schaffner* is not binding on Pennsylvania state courts, non-adherence to its holding is problematic for several reasons. For one, and as *Melissen* demonstrates, the Roundup cases have been catapulted into irreconcilable trajectories. In federal court, under *Schaffner*, the Melissens' failure-to-warn claim would have been preempted; in Pennsylvania state court, it was not. Meanwhile, state courts in other jurisdictions have begun to follow *Schaffner*. *See, e.g.*, *Cardillo v. Monsanto Co.*, No. 2177CV00462, at 12–19 (Mass. Super. Oct. 21, 2024). This tension presents a classic *Erie* problem.

Moreover, ignoring *Schaffner* promotes discord and non-uniformity, which is doubly concerning in this context given FIFRA's mandate of nationwide uniformity in pesticide labeling. It also clearly violates the statutory bar on states "imposing labeling requirements that are in addition to or different from the requirements imposed under FIFRA itself." *Schaffner*, 113 F.4th at 371. If states can unilaterally decide when they can impose additional labeling requirements, *e.g.*, cancer warnings not approved by the EPA, it would undermine FIFRA entirely.

And this raises still other concerns. States that decide to entertain failure-to-warn claims contra *Schaffner* will put manufacturers in the intractable position of having to decide between two competing alternatives: follow a federal statute aimed at promoting nationwide uniformity—or attempt to conform pesticide labels to predictions of what one or more states might ultimately require notwithstanding FIFRA. This dilemma implicates "conflict preemption," which applies when "it is impossible to comply with both state and federal requirements," or when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Roth v. Norfalco LLC*, 651 F.3d 367, 374 (3d Cir. 2011) (cleaned up).

A related concern is forum shopping. "[P]art of the policy underlying preemption . . . is to prevent litigants from forum shopping to achieve a different result in federal court than they could obtain in state court." *Stone Crushed P'ship v. Kassab Archbold Jackson & O'Brien*, 908 A.2d 875, 887 (Pa. 2006). If state courts refuse to apply preemption under *Schaffner*, litigants will have the ability to obtain relief in state court that they could not obtain in federal court.

Conclusion

It remains to be seen whether *Schaffner* will spell the end for the Roundup Products Liability litigation in Pennsylvania state courts. If not, courts across the Commonwealth will need to grapple with the strong policy concerns raised by permitting state-law failure-to-warn claims in the face of FIFRA.

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