

No. C3-02-857

**STATE OF MINNESOTA
IN SUPREME COURT**

Ronald Peterson, Barry Thune, Owen Larson, Owen Larson Farms, Inc.,
Duane Evenson, Jeffrey Nesvig, Richard Moen, Christopher Grove,
Christopher Grove Farms, Inc., David Abentroth, Glenn Asbeck, Asbeck, Inc.,
Donald Steinbeisser, Joe G. Steinbeisser & Sons, Inc., Stephen Pust, and
Stephen Pust Farms, Inc., individually and on behalf of all other similarly situated
Plaintiffs/Respondents,

vs.

BASF Corporation, a foreign corporation,

Defendant/Appellant.

**APPELLANT BASF CORPORATION'S SUPPLEMENTAL BRIEF
FOLLOWING REMAND**

Douglas J. Nill (#194876)
DOUGLAS J. NILL, P.A.
1000 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402-1801
(612) 573-3669

Hugh V. Plunkett III (#87282)
The Phoenician East
4723 N. 65th Street
Scottsdale, AZ 85251
(480) 429-8488

J. Michael Schwartz (#161408)
LOCKRIDGE, GRINDAL & NAUEN,
P.L.L.P.
100 Washington Avenue South, Ste. 2200
Minneapolis, MN 55401-2179
(612) 339-6900

Attorneys for Respondents

Winthrop A. Rockwell (#92526)
John P. Borger (#9878)
Bruce Jones (#179553)
John P. Mandler (#194438)
FAEGRE & BENSON, L.L.P.
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

Attorneys for Appellant
BASF Corporation

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STATEMENT OF ISSUES

In Bates v. Dow Agrosciences LLC, 125 S.Ct. 1788 (2005), the United States Supreme Court ruled that the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) expressly preempts state-law claims imposing standards for pesticide labeling that diverge from FIFRA’s requirements. The Supreme Court subsequently vacated this Court’s decision in this case and remanded for further consideration in light of Bates. The following issues are presented for this Court’s review:

1. FIFRA requires BASF to label, market, and sell Poast® and Poast Plus® as different products bearing different names. Under Bates, does FIFRA preempt plaintiffs’ claim that Poast® and Poast Plus® are the same product and that BASF committed consumer fraud by labeling them as different products?

Bates v. Dow AgroSciences LLC, 125 S. Ct 1788 (2005)

Geier v. American Honda Motor Co., 529 U.S. 861 (2000)

40 C.F.R. §§152.15, 152.42-.43, 158.175

2. EPA regulations expressly authorize BASF to label Poast Plus® for fewer than all of its EPA-registered uses. Under Bates, does FIFRA preempt state law claims that impose civil liability based on BASF’s exercise of that federally granted option?

Bates v. Dow AgroSciences LLC, 125 S. Ct 1788 (2005)

Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141 (1982)

40 C.F.R. §152.130

3. In registering pesticides, EPA does not review results of testing for efficacy or crop safety. Bates held that a manufacturer may be held liable for negligent testing

notwithstanding EPA approval of a pesticide. Under Bates, does FIFRA preempt a claim that EPA registration imposes a duty to label and market a pesticide for a particular registered use regardless of whether the manufacturer has satisfied itself that the product is safe and effective for that use?

Bates v. Dow AgroSciences LLC, 125 S.Ct. 1788 (2005)

Goeb v. Tharaldson, 615 N.W.2d 800 (Minn. 2000)

4. Bates recognized the states' power to prohibit the use of EPA-registered pesticides within their borders. No state has registered Poast Plus® for use on minor crops, and one state has refused to register it for use on *any* crop. Under Bates, does FIFRA preempt a jury determination that BASF committed consumer fraud by failing to sell Poast Plus® for use on minor crops in all 50 states?

Bates v. Dow AgroSciences LLC, 125 S.Ct. 1788 (2005)

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991)

7 U.S.C. §136v(a)

5. Over BASF's objections, plaintiffs introduced a large body of evidence at trial attacking the EPA-approved Poast Plus® label as "deceptive" and argued that such deception constituted consumer fraud. Under Bates, does the trial court's admission of this prejudicial evidence and argument entitle BASF to entry of judgment in its favor or, at a minimum, to a new trial?

Bates v. Dow AgroSciences LLC, 125 S.Ct. 1788 (2005)

W.G.O. v. Crandall, 640 N.W.2d 344 (Minn. 2002)

7 U.S.C. §136v

6. The Bates Court held that, if a defendant so requests, the trial court should instruct the jury on FIFRA provisions and EPA regulations that bear on the defendant's conduct. The trial court refused BASF's request for jury instructions about BASF's rights and duties under FIFRA concerning the labeling of Poast Plus®. Under Bates, does the trial court's refusal to instruct on FIFRA's provisions entitle BASF to a new trial?

Bates v. Dow AgroSciences LLC, 125 S.Ct. 1788 (2005)

Lindstrom v. Yellow Taxi Co. of Minneapolis, 214 N.W.2d 672 (Minn. 1974)

7 U.S.C. §136v

STATEMENT OF THE CASE

Plaintiffs brought a nationwide class action against BASF under the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-2 & -19 (“NJCFA”), alleging damages from their purchase of a BASF-manufactured herbicide called Poast®. Plaintiffs claimed that BASF committed consumer fraud by marketing two herbicides that contain the same active ingredient as two different products bearing two different names—Poast® and Poast Plus®. Plaintiffs also claimed that BASF violated state law in failing to label the lower-priced herbicide so that it could be used on plaintiffs’ crops, and in failing to publicize that it had obtained EPA’s permission to label that herbicide for use on minor crops but had chosen not to do so.

The trial court granted summary judgment to BASF after concluding that BASF’s conduct, which complied fully with FIFRA and its regulations, was neither deceptive nor unconscionable as a matter of state law. ADD-50.¹ The Court of Appeals reversed the summary judgment and remanded the case for trial. Peterson v. BASF Corp., 618 N.W.2d 821 (Minn. App. 2000), rev. denied (“Peterson I”).

On remand, the case was tried before the Norman County District Court, the Honorable Michael J. Kraker presiding. The jury found BASF liable and awarded damages totaling \$15,000,000. AA-373-374.² The trial court denied BASF’s post-trial

¹ “ADD-” citations are to Appellant’s Addendum, bound with this brief.

² “AA-” citations are to Appellant’s Appendix, separately bound.

motions, AA-389-390, and, after statutory trebling and the addition of attorneys' fees and costs, entered judgment totaling \$52,058,931. AA-391-393.

The Minnesota Court of Appeals affirmed the trial court's judgment. Peterson v. BASF Corp., 657 N.W.2d 853 (Minn. App. 2003) ("Peterson II") (ADD-32). This Court granted review in part, and affirmed. See Peterson v. BASF Corp., 675 N.W.2d 57 (Minn. 2004) ("Peterson III") (ADD-18).

BASF petitioned the United States Supreme Court for a writ of *certiorari*, contending that this Court's decision conflicted with principles of federal preemption and the First Amendment. On May 2, 2005, the United States Supreme Court issued an Order:

1. Granting BASF Corporation's petition for a writ of *certiorari*,
2. Vacating this Court's judgment, and
3. Remanding the case for this Court's further consideration in light of the United States Supreme Court's decision in Bates v. Dow AgroSciences LLC, 544 U.S. ___, 125 S. Ct 1788 (2005).

BASF Corp. v. Peterson, 544 U.S. ___, 161 L. Ed. 2d 845, 125 S.Ct. 1968 (2005) (the "GVR Order") (ADD-17).

After the Supreme Court issued its mandate, this Court directed the parties to brief the impact of the Bates decision on the preemption issues here.

STATEMENT OF FACTS

I. THE HISTORY OF POAST® AND POAST PLUS®

A. The National Regulatory System for Herbicide Registration and Use

Pursuant to FIFRA, Congress and the states comprehensively regulate the sale and use of pesticides, including herbicides. Under FIFRA, a farmer may legally use a herbicide on a particular crop *only if*:

1. EPA has registered (approved) the herbicide for use on that crop, 7 U.S.C. §136a(a)(ADD-64); *and*
2. The state where the herbicide will be used has registered (approved) it for use on that crop, e.g., Minn. Stat. §18B.26(1)(a) (ADD-72), AA-28-32; *and*
3. The herbicide's manufacturer has labeled the herbicide for use on that crop. 7 U.S.C. §136j(a)(2)(G)(ADD-64); 40 C.F.R. §152.130(b)(ADD-66).

A state may refuse to register a herbicide for a particular crop, or for any crop, notwithstanding EPA's registration of the pesticide for that crop. AA-490-498, 509-513; Bates, 125 S.Ct. at 1799 (ADD-10). A manufacturer also may elect not to register a pesticide in all states, or may decide to register a pesticide for different crops in different states. 40 C.F.R. §152.130(b)(ADD 66).

EPA's "subset labeling" rule expressly provides that a manufacturer may label a herbicide for *fewer* than all the crops for which EPA has registered it. Tr.2105:19-2106:6; 40 C.F.R. §152.130(ADD-66). Plaintiffs' expert agreed that EPA regulations permit companies to "market the product in a variety of ways" and with "different subsets

of approved uses.” Tr.2104:24-2105:8.³ If a manufacturer chooses not to put a registered use on the product label, FIFRA prohibits that use. 7 U.S.C.

§136j(a)(2)(G)(ADD-64).

B. BASF’s Introduction of Poast® to the Minor Crop Market

BASF introduced Poast® in 1983. BASF initially registered and labeled Poast® only for use on *major* crops such as soybeans and cotton. As word spread that Poast® was safe and effective, BASF and state agriculture departments received requests from farmers asking to use Poast®, *as priced*, on *minor* crops such as sugar beets, vegetables, grapes, citrus fruit and berries, AA-446-456, 505, 514-515, 540-541, for which few safe and effective herbicides were then available. Tr.1788:22-1789:10; 2582:24-2583:12; 3245:16-3247:17; AA-623-630. After conducting extensive additional crop safety testing of Poast® on minor crops, Tr.895:13-896:7; 903:1-17, BASF applied for and received the necessary EPA and state registrations, and added minor crops to the Poast® label. By 1992, Poast® was registered by EPA and every state for use on more than 60 crops. AA-560-600. Plaintiffs testified that Poast® was “a great product” (Tr.586:2-6; 2178:18-24) that helped them increase their yields and their profits (Tr.2201:10-15).

C. The Development of Poast Plus®

In the early 1990s, BASF developed a second product, Poast Plus®, to avoid problems that arose when Poast® reacted antagonistically with another agricultural

³ Trial and hearing transcript excerpts cited in this brief are included in the Appendix at AA-787-1170.

chemical commonly used on soybeans (but not on minor crops). Tr.2888:21-2889:3; 2889:19-21; AA-469. Although Poast Plus® has the same active ingredient as Poast® (sethoxydym), it also contains a newly-discovered and newly-patented adjuvant that solves the chemical antagonism problem but simultaneously raises the level of biological activity of the sethoxydym. Tr.2739:24-2740:4; 2743:10-18; AA-439-445.

Because of their chemical differences, EPA regulations *required* BASF to register Poast® and Poast Plus® as *separate* products; to label and market them under *different* names (40 C.F.R. §§152.15(ADD-66), 152.42-.43(ADD-67), 158.175(ADD-69); EPA Label Review Manual Ch. 12: Labeling Claims); and to submit *separate* toxicology data for each product (see 40 C.F.R. §158.340).

D. BASF's Decision Not to Sell Poast Plus® for Minor Crops

Effective October 1992, EPA registered Poast Plus® for use on 60 minor crops. However, BASF was not ready to label Poast Plus® for use on minor crops. Although Poast Plus® satisfied EPA's requirements concerning residue and animal/human toxicity testing, BASF had conducted only limited testing of Poast Plus® to evaluate the risks to the minor crops themselves. AA-748. For example, BASF had conducted more than 400 crop-safety tests on sugar beets before marketing *Poast*® for that crop, but had completed only eight such tests using Poast Plus®. AA-748. Contemporaneous records demonstrate that BASF scientists were not comfortable selling Poast Plus® for use on high-value minor crops based on such limited testing. Tr.3391:16-3392:4, AA-457-487, 491-495, 500-504, 506-508, 611-614 ("Phyto[toxicity] data required before use"). BASF scientist Dale Carlson testified that before selling a herbicide, BASF would test the

product under all different soil and terrain types, under all different climate conditions, and under different tank mix combinations to ensure the product would be safe in the actual use where it was marketed:

[D]epending on the market you're looking at, for example, say soybeans, it goes into the Midwest. So we do multiple location field trials. ... [We will] look at the behavior of the active ingredient on different weeds in each of their different environments.

...
You have to test each crop individually. ... Because of the area where that crop is grown, we have to go to the area where that crop is grown, into the market region and test it under those conditions.

Tr.2863:6-25, 2866:21-2867:1; see generally Tr.2863:3-2867:5. Plaintiff farmers testified that they would expect such testing to be done as well. Tr.1219:20-1220:9; 1305:8-1307:9.

The limited minor-crop testing that BASF *had* conducted on Poast Plus® showed that, because of the newly added adjuvant, Poast Plus® was “hotter” than Poast® and could burn crops more readily. Specific tests showed that Poast Plus® posed a greater hazard of injury to crops such as Lima beans, cucumbers, flax, lettuce, and sugar beets. AA-690-699, 734, 740-744; Tr.2921:2-2923:5; 2923:6-2924:8; 3006:2-13. The testing also showed an elevated risk of “burning” crops if Poast Plus® was tank-mixed with other chemicals (a cost-cutting practice commonly employed by farmers). Tr.2456:22-2457:4; 2922:5-2923:5. Some test results specifically recommended the use of the safer Poast® to avoid crop injury. AA-496-497, 602-605.

Accordingly, BASF never sought state registration for Poast Plus® for minor crop use in any state and never labeled Poast Plus® for minor crops. Tr.2921:12-21; 3382:20-

3383:14; 3391:23-3392:17. Instead, as permitted by EPA's subset labeling provision, BASF labeled and marketed Poast Plus® only for four major crops. See 40 C.F.R. §152.130(ADD-66).

For a period of four years, between 1992 and 1996, Poast Plus® was priced lower than Poast®, reflecting greater competition in the major-crop pesticide market. AA-745; Tr.3387:19-25, 3388:1-19. In 1994, North Dakota's Commissioner of Agriculture, Sarah Vogel, asked EPA to allow BASF to sell Poast Plus® for minor crops. AA-783. After Vogel was told that EPA had already registered Poast Plus® for minor crops but that BASF had exercised its option to exclude minor crops from the labeling, Vogel sought an enforcement waiver from EPA that would have allowed North Dakota farmers to use Poast Plus® off-label without punishment. Tr.2657:11-2660:9. EPA refused to grant the request, stating that such a waiver would undermine EPA's policy that "the label is the law." AA-554-559.

After EPA denied its requested waiver, North Dakota issued a one-year "Special Local Needs" registration ("24(c) Registration"), which allowed farmers in that state to use Poast Plus® on six minor crops. In issuing this permit, North Dakota relied on the fact that Poast Plus® was less expensive than Poast®. BASF objected that such a purely economic motive for a 24(c) registration was not "in accord with the purposes" of FIFRA, 7 U.S.C. §136v(c)(1). Shortly thereafter, EPA issued a guidance document stating that price differentials "generally may not" be cited as grounds for 24(c) registration. EPA, Office of Pesticide Programs, *Guidance on FIFRA 24(c) Registrations*,

at Part IV.1 (Feb. 9, 1996)(AA-517-533). EPA officials told Commissioner Vogel that “future 24(c)’s based on economics will be denied.” AA-534.

II. THE LITIGATION

A. The Claimed NJCFA Violations

Plaintiffs represent a nationwide class of minor-crop farmers who purchased Poast® when it was more expensive than Poast Plus®. They contended that BASF violated the NJCFA in marketing Poast® and Poast Plus® as two different products and in failing to obtain state registrations and affix labels that would have permitted farmers to use the less-expensive Poast Plus® on their minor crops. Plaintiffs’ claims placed BASF’s labeling practices at the heart of the alleged unlawful conduct. Plaintiffs contended that BASF’s labeling of Poast Plus® obscured the fact that Poast Plus® was “identical” to Poast®, Tr.1170:21-1171:19; concealed EPA’s registration of Poast Plus® for minor crops, Tr.2174:19-25; and prevented farmers from using the less-expensive Poast Plus® lawfully on their minor crops, Tr.3768:4-3769:14.

This focus on the labeling began in plaintiffs’ complaint, which alleges:

12. In 1992, the EPA approved a specimen label for Poast Plus authorizing its use not only on the major crops, but also the minor crops. In order to protect its price discrimination scheme, and force growers of minor crops to buy the more expensive Poast herbicide, ***BASF did not affix this new label to its Poast Plus containers and did not disclose the new label to consumers or to the Departments of Agriculture.***

13. ***Instead, BASF falsely represented through its labeling, marketing, employees and agents that EPA had not approved Poast Plus for use on minor crops.***

AA-13 (emphasis added).

In arguing plaintiffs' motion to amend, plaintiffs' attorney characterized their claims as follows:

Now, *labels are important in this case*. Poast was labeled for all of these different types of crops I've described for you, minor and major. They submitted a label to the EPA to have this new product, Poast Plus, approved.

...
The EPA approved Poast Plus - I don't think this is even contested by the defendants - for virtually all the same crops it had labeled Poast for. But BASF then went out in the field, *put on a label limited to just the major crops* and reduced the price by about half.

...
... We're not asking the Court to enter into pricing only that the defendant not distinguish equivalent products on the base of *a label that is false and misleading*.

October 6, 1998 Tr. at 11:2; 25 (emphasis added) (AA-790-790.1).

Similarly, in interrogatory responses, plaintiffs stated that "BASF knowingly concealed, suppressed, or *omitted from the various labels that accompanied Poast Plus herbicide* the fact that the EPA registered Poast Plus for use on minor use crops." AA-44. According to the plaintiffs, "[t]his knowing concealment, suppression or omission of material facts forms the basis of this action." *Id.*

B. The Summary Judgment Decision

After certifying a nationwide class action, the trial court granted summary judgment to BASF, holding that the evidence would not support a claim of fraudulent and unconscionable commercial conduct violating the NJCFA.

The court first rejected claims that BASF had acted unconscionably in marketing Poast® and Poast Plus® as different products, explaining, EPA "allows manufacturers to register pesticide products with the same active ingredients, as different products."

ADD-58. Noting that EPA had “issued separate registration numbers to Poast® and Poast Plus® considering them distinct compositions,” the court stated that it would “not second-guess” that decision by holding BASF’s conduct deceptive under state law. Id.

Second, the court explained that BASF had “the right” under FIFRA “to [choose] whether or not to label Poast Plus® for use on minor crops.” ADD-57. Consistent with that federally-granted right, BASF was not required to seek state registration for minor-crop use and had no duty to disclose the EPA registration to state regulators and consumers. Id. The court also noted that, “[h]ad the Defendant disclosed that Poast Plus® was registered for minor crops with the EPA, Plaintiffs would still not have been able to use the product” lawfully on their crops. Id.

The court of appeals reversed the summary judgment and remanded the case for trial. Peterson I, 618 N.W.2d 821. According to the court, evidence that BASF planned “to conceal the fact that Poast Plus was EPA-registered for use on minor crops and to discourage any off-label use of Poast Plus” raised an issue of fact. Id. at 824. The court rejected BASF’s arguments that “the federal labeling law” precluded plaintiffs from establishing damages. Id. Notwithstanding FIFRA’s ban on the off-label use of pesticides—which made it illegal for plaintiffs to use Poast Plus® on their crops—the court ruled that plaintiffs could seek compensation for “their lost opportunity to choose whether to buy Poast or the identical, but four dollars per acre cheaper, Poast Plus.” Id.

C. The Trial

1. BASF's Motions *In Limine*

Because plaintiffs purported to eschew any claim of improper labeling, BASF on remand moved *in limine* to exclude evidence suggesting that BASF's labeling of its products gave rise to state-law liability. AA-210-212. BASF also sought an order excluding evidence suggesting that Poast® and Poast Plus® are the same product. AA-213-214. Plaintiffs opposed both motions, AA-221-318, and the trial court denied them. AA-319-322.

2. Plaintiffs' Evidence Attacking BASF's Labels

Notwithstanding their prior disavowal of any "claim of improper labeling," plaintiffs' evidence at trial focused intensively on BASF's labeling of Poast® and Poast Plus®. See, e.g., Tr.1206:11-12 ("I'd like to send a message to the industry out there that—that you shouldn't lie on the label."); Tr.1239:3-4 ("[W]hat were some of the things that you thought were deceptive about the Poast Plus label?"); Tr.1399:3-5; 1406:18-19.

Although plaintiffs attacked the labels in many respects, their case centered on two theories. First, plaintiffs contended that BASF deceived them by labeling Poast® and Poast Plus® as different products when the two pesticides were, in plaintiffs' view, "identical." Tr.1170:21-1171:4, 1187:8-11, 1204:7-12, 1224:8-10 (asserting that Poast® and Poast Plus® were "identical product[s]"); Tr.563:7-8, 583:5-8 (stating that Poast® and Poast Plus® are "the same" and "are identical products"). Plaintiffs' counsel later argued to the jury that BASF unlawfully "marketed and sold one product as two different products in order to exploit a segment of the market." Tr.2529:1-2.

Second, plaintiffs testified that BASF acted dishonestly and unconscionably in labeling Poast Plus® for major crops only. According to the plaintiffs:

A. They weren't honest in fact to the consumer. *They lied to us.* It was the same—it was the same product. *They just labeled it so it was not to be used on some of the minor crops.*

Tr.2174:19-25 (plaintiff Abentroth) (emphasis added). Plaintiff after plaintiff echoed that view. E.g., Tr.588:23-589:5 (Peterson); 1397:19-1398:14 (Evenson); 1449:13-21 (Larson); 2174:7-13 (Abentroth). Plaintiffs' attorney underscored this point in closing argument, accusing BASF of engaging in a scheme "to scare the farmer into not experimenting with Poast Plus and finding out that it's the same as Poast." Tr.3773:2-5.

Plaintiffs also attacked a number of other statements by BASF, including accurate reports of possible off-label use of Poast Plus®, circulation of a magazine article noting the illegality of off-label use, and statements to state and federal regulatory officials. The allegedly "unconscionable" nature of these statements, however, ties directly to plaintiffs' two core arguments: that BASF wrongfully marketed the "same product" as different products, and that BASF acted improperly in choosing to label Poast Plus® only for major crops.

3. BASF's Request for Jury Instructions on the Federal Labeling Standards

At the close of the evidence, BASF asked the court to instruct the jury regarding the federal requirements governing the labeling of Poast® and Poast Plus®, including EPA's requirement that BASF label and market Poast® and Poast Plus® as different products and its regulation permitting subset labeling. AA-323-372. Acceding to

plaintiffs' objections, the trial court refused to give *any* instructions explaining FIFRA's requirements or EPA's regulations. Tr.3831:13-3850:17. Plaintiffs' counsel seized on this exclusion in his summation, arguing to the jury that the omission of any discussion of federal requirements from the jury instructions established that the federal law of pesticide labeling was entirely irrelevant to the jury's decision. Tr.3748:9-22.

D. The Appeal

After the jury returned a verdict for plaintiffs and the trial court entered judgment, BASF appealed. The court of appeals affirmed the trial court's judgment. Peterson v. BASF Corp., 657 N.W.2d 853 (Minn. App. 2003). It refused to hold that FIFRA "preempts private causes of action based on alleged abuse of pesticide regulations." Id. at 864. According to the court, "*even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could be used only on major crops when, in fact, it was EPA-registered for both major and minor crops." Id. at 865 (emphasis in original). The court also held that the issue of whether Poast® and Poast Plus® were the "same product" was a question of fact for the jury, omitting any mention of EPA's requirement that BASF label and market the two as *different* products. Id. at 864. The court added that "the jury could conclude that BASF's marketing scheme *and exploitation of federal regulations* ... concealed that Poast and Poast Plus were registered for the same uses and constituted fraud under the NJCFA." Id. at 866 (emphasis added).

This Court granted review in part, and affirmed. See Peterson v. BASF Corp., 675 N.W.2d 57 (Minn. 2004). With respect to FIFRA's preemption of plaintiffs' assertion

that Poast® and Poast Plus® are the same pesticide, the Court held that “[t]he farmers’ consumer fraud claim was not based on Poast and Poast Plus being the same product, but rather on BASF violating the NJCFA by making misrepresentations about the products, which included ... the fact that they contained the same active ingredient and were EPA approved for use on the same crops.” Id. at 69.

With respect to labeling, although acknowledging that “evidence was presented at trial based on statements derived from the Poast and Poast Plus labels,” the Court held FIFRA did not preempt plaintiffs’ claims because some of those claims relied on evidence of conduct “that went beyond the labels.” 675 N.W.2d at 70. The Court also stated that “BASF’s failure to seek state registration for Poast Plus on all crops,” and its “misrepresentations about Poast Plus’ EPA registration” “amounted to consumer fraud.” Id. at 71.

E. BASF’s Petition for *Certiorari*

BASF petitioned the United States Supreme Court for a writ of *certiorari*, presenting the two issues: (1) whether FIFRA preempts plaintiffs’ claims and (2) whether the First Amendment bars plaintiffs’ claims predicated on BASF’s protected speech. Plaintiffs submitted a brief and two supplemental briefs opposing the petition, arguing that FIFRA did not preempt their claims because the claims arose from fraudulent marketing as opposed to improper labeling. While BASF’s petition for *certiorari* was pending, the Supreme Court granted *certiorari* in Bates. The Court deferred resolution of BASF’s petition until it had decided Bates.

The Supreme Court issued its opinion in Bates on April 25, 2005. A few days later, both BASF and plaintiffs filed additional supplemental briefs in the Supreme Court addressing the impact of Bates on this case. BASF argued that this Court's prior decision regarding preemption could not be squared with Bates. AA-416-422. Plaintiffs argued that the petition should be denied because, under Bates, "fraudulent marketing representations are not preempted." AA434.⁴

On May 2, 2005, the United States Supreme Court issued the GVR Order, which granted BASF's petition, vacated this Court's judgment, and remanded the case for this Court's further consideration in light of the decision in Bates. BASF Corp. v. Peterson, 544 U.S. ___, 161 L. Ed. 2d 845, 125 S.Ct. 1968 (2005).⁵

⁴ At the time the Supreme Court issued its GVR order, it had received 59 pages of argument from BASF, 73 pages of argument from plaintiffs, and 59 pages of *amicus* submissions. (The submissions to the Supreme Court were submitted to this Court as attachments to BASF's motion to set a briefing schedule). The U.S. Supreme Court was fully informed about the nature of plaintiffs' claims when it issued the GVR Order.

⁵ BASF has contended throughout this case, including in its petition for *certiorari*, that plaintiffs' use of BASF's protected speech to establish unconscionable conduct violates the First Amendment. Although this Court's scheduling order limits the parties' briefs here to the preemption issue, BASF expressly preserves the First Amendment issue for further review.

SUMMARY OF ARGUMENT

In Bates v. Dow Agrosciences LCC (ADD-1), the United States Supreme Court held that FIFRA expressly preempts any state-law damages action that attaches liability to pesticide labeling, *unless* the labeling requirement underlying the action is genuinely equivalent to a requirement of FIFRA. Plaintiffs' action does exactly what Bates forbids: it posits that BASF complied with FIFRA but nonetheless, *through its labeling*, violated state-law duties of honesty and fairness to consumers.

First, plaintiffs claimed that BASF committed fraud by labeling and selling Poast® and Poast Plus® as two different products when, in plaintiffs' view, the two pesticides were "the same." FIFRA, however, *required* BASF to register, label and sell Poast® and Poast Plus® as *different* products having *different* names. Under Bates, state-law liability cannot be premised on a labeling decision that FIFRA mandates.

Second, plaintiffs contended that BASF's omission of EPA-registered minor crops from the Poast Plus® labeling was deceptive and wrongful. EPA's regulations, however, expressly permit manufacturers to label and market pesticides for fewer than all of their EPA-approved uses. Because plaintiffs' claims attach liability to labeling decisions that FIFRA specifically authorizes, they are preempted under Bates.

In addition, the Supreme Court recognized in Bates that manufacturers have a duty to ensure the safety of their products that continues even after EPA registration. Plaintiffs' claims turned Bates on its head by contending that BASF violated state-law duties in failing to label Poast Plus® for all of its EPA-registered uses, despite BASF's concern that the pesticide had been insufficiently tested and posed unacceptable risks to

minor crops. Because EPA does not review crop-safety testing before registration and permits manufacturers *not* to label pesticides for all registered uses, plaintiffs' contention that EPA registration created a duty to label Poast Plus® for use on minor crops conflicts with the federal regulatory regime and is preempted.

The Court also emphasized that FIFRA recognizes states' authority to regulate the sale and use of pesticides within their borders. *No state* has registered Poast Plus® for use on minor crops, and one important agricultural state (California) refused to register the Poast Plus® formulation for *any* use. Nevertheless, the \$50 million nationwide class action judgment in this case rests on a jury determination that BASF should label Poast Plus® for minor crops *in all 50 states*. Because plaintiffs' claims simply ignore the states' unquestioned power to limit pesticide sales within their borders, it is inconsistent with Bates and should be reversed.

Because plaintiffs' core theories of liability are preempted, BASF is entitled to judgment as a matter of law. At a minimum, BASF is entitled to a new trial without the improperly admitted testimony and argument suggesting that the Poast® and Poast Plus® labels were deceptive or otherwise wrongful that plainly infected the jury's verdict at the original trial.

Even if the Court rejects BASF's preemption arguments altogether, BASF is entitled to a new trial at which the jury receives instruction regarding FIFRA's requirements. As the Supreme Court held pointedly in Bates, such instructions are necessary to ensure that the jury does not, through its verdict, impose labeling requirements that go beyond FIFRA's requirements.

ARGUMENT

I. THIS COURT’S PRIOR DECISION ON FEDERAL PREEMPTION CANNOT STAND FOLLOWING BATES

A. The Supreme Court Ruled In Bates That FIFRA Preempts Claims Seeking To Impose Liability For Pesticide Labeling That Complies With FIFRA

FIFRA expressly provides that a state “shall not impose or continue in effect any requirements for labeling ... in addition to or different from those required under this subchapter.” 7 U.S.C. §136v(b). In Bates, the Supreme Court ruled that FIFRA’s express preemption provision extends to private damages actions that impose requirements for pesticide labeling. 125 S.Ct. at 1803. As the Court explained, such state-law labeling standards survive preemption only if they are equivalent to FIFRA’s standards. Id.

In Bates, Dow sought a declaratory judgment against Texas peanut farmers who threatened to sue for crop damage they attributed to Dow’s EPA-registered pesticide “Strongarm.” The farmers counterclaimed for damages, asserting breach of express warranty, fraud, strict liability, negligent testing, negligent failure to warn, and violation of the Texas Deceptive Trade Practices Act (“DTPA”). The district court, and then the Fifth Circuit, held that Dow was entitled to summary judgment because FIFRA preempted plaintiffs’ claims. 125 S.Ct. at 1793. The Supreme Court reversed, holding that several of the claims at issue were not preempted, and remanded for a determination of whether the remaining claims were preempted.

The Supreme Court began by explaining that FIFRA’s express preemption provision extends to all state laws—whether established by statute, regulation, or private

damages action—that “set a standard” for labeling or packaging. 125 S.Ct. at 1798-99.

In ruling that damages actions can impose “requirements” subject to preemption under Section 136v(b), the Court cited Cippollone v. Liggett Group, Inc., in which it stated:

[S]tate regulation can be as effectively exerted through an award of damages as through some sort of preventative relief. The obligation to pay compensation can be, indeed is intended to be, a potent method of governing conduct and controlling policy.

505 U.S. 504, 521 (1992) (cited in Bates, 125 S.Ct. at 1798); see also Medtronic v. Lohr, 518 U.S. 470, 504 (1996) (Breyer, J. concurring) (“[t]he effects of ... the state court suit are identical” to those of a “state agency regulation”).

The Supreme Court ruled that FIFRA did not preempt the plaintiffs’ claims for defective design and manufacture, negligent testing, and breach of express warranty because such claims do not require “that manufacturers label or package their products in any particular way.” Bates, 125 S.Ct. at 1798. In contrast, the Court held, “plaintiff’s fraud and negligent-failure-to-warn claims are premised on common-law rules that qualify as ‘requirements for labeling or packaging’” because they “set a standard for a product’s labeling that the [pesticide] label is alleged to have violated by containing false statements and inadequate warnings.” Id. at 1799-1800. In remanding those claims to the court of appeals for further analysis, the Court directed that such claims are preempted if they impose duties “in addition to or different from” those imposed by FIFRA. Id. at 1803-04.

Explaining that limitation, the Court noted that a pesticide is “misbranded” under FIFRA “if its label contains a statement that is ‘false or misleading in any particular.’”

Id. at 1795 (citing 7 U.S.C. §§ 136(q)(1)(A); 40 C.F.R. §156(10)(a)(5)(ii)). According to the Court, states may impose pesticide labeling requirements that are “equivalent to, and fully consistent with, FIFRA’s misbranding provisions.” Id. at 1800. However, the Court warned, FIFRA expressly “preempts *competing* state labeling standards.” Id. at 1803 (emphasis added). Put another way, Section 136v(b) “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.” Id.

The Court also stressed the need for courts to examine whether state-imposed labeling requirements are truly equivalent to FIFRA requirements:

We emphasize that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption. For example, were the Court of Appeals to determine that the element of falsity in Texas’ common-law definition of fraud imposed a broader obligation than FIFRA’s requirement that labels not contain “false or misleading statements,” that state-law cause of action would be pre-empted by §136v(b) to the extent of that difference.

125 S.Ct. at 1803. The Court reiterated that, in determining whether state and federal law are equivalent, “[s]tate-law requirements must also be measured against any relevant EPA regulations that give content to FIFRA’s misbranding standards.” Id. at 1803-04.

The Supreme Court also cautioned that “the court’s jury instructions must ensure that nominally equivalent labeling requirements are *genuinely* equivalent to federal requirements.” 125 S.Ct. at 1804 (emphasis in original). Thus, it directed that “[i]f a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards.” Id. Such instructions are necessary, the Court stated, because “a manufacturer should not be held

liable under a state labeling requirement subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA.” Id.

Justices Breyer and Thomas wrote separate opinions. Justice Breyer’s concurring opinion emphasized “the importance of [EPA’s] role in overseeing FIFRA’s future implementation,” noting that “the federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements.” 125 S.Ct. at 1804-05 (Breyer, J. concurring). Justice Thomas, concurring and dissenting, underscored the majority’s ruling that state-law causes of action are preempted to the extent that they impose liability where FIFRA would not:

A state-law cause of action, even if not specific to labeling, nevertheless imposes a labeling requirement “in addition to or different from” FIFRA’s when it attaches liability to statements on the label that do not produce liability under FIFRA. The state-law cause of action then adds some supplemental requirement of truthfulness to FIFRA’s requirement that labeling statements not be “false or misleading.”

Id. at 1805 (Thomas, J., concurring in part and dissenting in part).

B. As The GVR Order Indicates, This Court’s Prior Decision Is Inconsistent With Bates

- 1. The mere fact that the Supreme Court issued the GVR Order strongly suggests that this Court’s decision cannot be squared with Bates.**

The Supreme Court has stated that its power to issue GVR orders is “exercised sparingly.” Lawrence v. Chater, 516 U.S. 163, 173 (1996). The Court will enter a GVR order only “[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, *reveal a reasonable probability*

that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation.” Id. at 167 (emphasis added). See also Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964) (the Supreme Court issues a GVR order only when it finds new authority “sufficiently analogous and, perhaps, decisive to compel reexamination of the case”) (reversing South Carolina Supreme Court’s reaffirmance of original decision following prior GVR). The Court will not issue a GVR order unless it also determines that the “equities of the case” favor reconsideration. Lawrence, 516 U.S. at 167-68.

In granting a GVR, the Court is “acting on the merits” of the case. Trustees of Keene College v. Sweeney, 439 U.S. 24, 25-26 (1978) (Stevens, J. (joined by Brennan, Stewart, and Marshall), dissenting on other grounds). As one knowledgeable commentator has explained, a GVR order indicates that the Court finds “enough similarity between the case before it and the intervening decision to indicate, as a *prima facie* matter, that the judgment below is in error.” A. Hellman, “Granted, Vacated, and Remanded”—Shedding Light on a Dark Corner of Supreme Court Practice, 67 *Judicature* 389, 393 (1984) (citing Henry). “[A] reconsideration order, if not tantamount to reversal, does indicate a strong leaning in that direction.” Id. at 394.

2. The reasoning in this Court’s prior decision on federal preemption is inconsistent with Bates

As the GVR Order indicates, this Court’s prior decision regarding preemption is inconsistent with the Supreme Court’s ruling in Bates. As set forth in the succeeding

sections of this brief, the trial record reveals indisputably that plaintiffs' claims are preempted under Bates. In addition, this Court's rationale for rejecting BASF's preemption argument is contrary to the Supreme Court's reasoning in Bates.

First, this Court adopted the reasoning of the court of appeals that "*even if* BASF's labels were technically accurate, BASF could and did commit consumer fraud by leading farmers to believe that the cheaper Poast Plus could only be used on major crops." 675 N.W.2d at 70 (quoting Peterson II, 657 N.W.2d at 865). Under Bates, however, a manufacturer cannot be held liable for consumer fraud arising from its labeling "unless the manufacturer is also liable for misbranding as defined by FIFRA." 125 S.Ct. at 1804. BASF's compliance with FIFRA's requirements, which both plaintiffs and this Court acknowledge, is therefore not a mere "technicality"; under Bates, it is a fact that should have precluded plaintiffs' claims that the labels transgressed state-law duties. Instead, this Court appeared to accept plaintiffs' argument that the labeling could *both* comply with FIFRA *and* contribute to consumer fraud by misleading farmers about the registration status of Poast Plus®.

Second, although recognizing that "evidence was presented at trial based on statements derived from the Poast and Poast Plus labels," this Court ruled that plaintiffs' claims were not preempted because they also "derived from statements and actions that went beyond the label." 675 N.W.2d at 70. Under Bates, however, a claim is preempted if, to any degree, "it attaches liability to statements on the label that do not produce liability under FIFRA." 125 S.Ct. at 1805 (Thomas, J., concurring in part and dissenting in part). The fact that plaintiffs also relied on evidence of conduct "beyond the label"

does not allow plaintiffs to avoid preemption of their claims to the extent those claims relied on “statements derived from the Poast and Poast Plus labels.” 675 N.W.2d at 70.

Third, in assessing BASF’s argument for preemption, this Court failed to examine the “relevant EPA regulations that give content to FIFRA’s misbranding standards.” Bates, 125 S.Ct. at 1803-04. For example, this Court accepted plaintiffs’ argument that their claims were not preempted because they arose from “a company marketing decision in which the EPA had no input.” 675 N.W.2d at 70-71. As discussed below, however, the “marketing decision” about which plaintiffs complained—i.e., the omission of minor crops from the Poast Plus® labeling—was expressly authorized by EPA’s subset labeling regulation. Under Bates, states cannot impose liability for labeling decisions authorized by FIFRA.

Finally, this Court reasoned that plaintiffs’ claims were not preempted because BASF could not have avoided liability merely by changing its label; in addition, BASF would have had “to seek state registration for Poast Plus on all the crops.” 675 N.W.2d at 71. In Bates, however, the Supreme Court squarely rejected the principle that a claim is preempted if, and only if, the manufacturer can avoid liability simply by changing its label. 125 S.Ct. at 1799. Instead, to determine whether FIFRA preempts an action under state law, the Court must identify the rule on which a plaintiff’s claim is premised and determine whether it establishes “a standard for a product’s labeling;” if so, the claim is preempted unless the standard it imposes is equivalent to a federal requirement. Id. at 1800. FIFRA permits no state law labeling requirements “in addition to or different from” its own requirements. 7 U.S.C. §136v(b).

As discussed below, plaintiffs' claims relied in large part on contentions that BASF breached *labeling* standards not imposed by FIFRA. Accordingly, under Bates, plaintiffs' claims are preempted.

II. DEFENDANTS ARE ENTITLED TO JUDGMENT BECAUSE PLAINTIFFS RELIED HEAVILY ON THEORIES OF LIABILITY THAT ARE INCONSISTENT WITH BATES

A. Under Bates, FIFRA Preempts Plaintiffs' Claim That BASF Committed Consumer Fraud In Labeling And Marketing Poast® And Poast Plus® As Different Products

Plaintiffs do not dispute that EPA's regulations *required* BASF to label and market Poast® and Poast Plus® as *different* products, under *different* names.

Nevertheless, plaintiffs premised their consumer fraud claims in large part on the theory that BASF fraudulently sold the same pesticide under two different names. Because plaintiffs sought to hold BASF liable for labeling practices that FIFRA mandated, their action seeks to create a standard for labeling that competes with the federal standard.

According to Bates, FIFRA preempts such actions.

1. Plaintiffs' claims rest on the assertion that BASF deceived them by labeling Poast® and Poast Plus® as different products

Throughout the trial, plaintiffs advanced the theory that BASF committed consumer fraud by deceptively registering and labeling Poast® and Poast Plus® as two different pesticides when, for all practical purposes, the two products were "the same."

The named plaintiffs testified that their claims were predicated on their belief that BASF lied in "passing off" Poast® and Poast Plus® as two different products. One plaintiff stated:

Q. In your own words, can you tell the jurors what your complaint is against BASF?

A. My complaint to BASF is that *they lied to us because Poast and Poast Plus is the same product.*

Tr.2174:7-13 (plaintiff Abentroth, emphasis added). Another plaintiff put it this way:

Q. In your own words, could you summarize for the jury what your complaint is against BASF?

A. *My complaint, I guess, against BASF would be fraud of the selling of one product as two* in order to capitalize on a captive crop, so to speak, or captive producers for excess profit.

Tr. at 1296:12-17 (plaintiff Pust, emphasis added).

Such contentions formed the drumbeat of plaintiffs' case at trial. Over BASF's objections,⁶ plaintiffs repeatedly attested to their belief that Poast® and Poast Plus® were the same product and that BASF acted improperly in labeling them with two different names. E.g., Tr.1237:17-1238:13, 1248:6-19; 1296:12-20; 2174:7-13, 2174:19-25; 1403:25-1404:8; 1450:6-11. Plaintiffs also elicited considerable testimony from their expert suggesting that Poast® and Poast Plus® were essentially identical products. Tr.1979:21-2007:10; 2046:2-5, 16-19 ("Q. In your opinion, as a regulatory expert, are Poast and Poast Plus essentially the same in terms of the way they control weeds and protect fields? A. Yes, sir.").

Plaintiffs also repeatedly contended that BASF acted wrongfully in registering Poast® and Poast Plus® as different products. E.g., Tr.572:12-25; 2176:3-15. Indeed,

⁶ See 10/11/01 Tr.183:14-189:19; Tr.171:21-172:8. (AA-808-814).

plaintiffs admitted that, if Poast® and Poast Plus® were *not* the same product, they would have no claims:

Q. If Poast and Poast Plus are in fact different products, would you have a complaint?

A. Well, if they actually were different, no, I wouldn't.

Tr.1225:14-17 (plaintiff Steinbeisser). See also Tr.1422:25-1423:9 (Evenson: "If they were different, yes. That would be okay."); Tr.1306:8-18 (Pust: If Poast and Poast Plus were different pesticides, "I wouldn't have a problem.").

On appeal, plaintiffs continue to acknowledge that their consumer fraud claims rest in large part on the alleged deceptiveness of marketing the same herbicide as different products. AA-407 ("Trial evidence established that BASF defrauded thousands of farmers by marketing the same herbicide as different products—Poast and Poast Plus—for different uses."); AA-409 ("BASF knew that if farmers realized that cheaper Poast Plus was the same herbicide as Poast and EPA registered for the same crops, farmers would question the use of expensive Poast"). Even plaintiffs' attorney's own website states (as of the date of this brief) that this lawsuit "alleg[es] that BASF Corp. defrauded thousands of American farmers by marketing the same herbicide as different products - Poast and Poast Plus – at radically different prices." <http://www.farmlaw.com>. (hard copy at AA-784).

2. Plaintiffs' claim that BASF committed fraud by labeling Poast® and Poast Plus® as distinct products imposes a "requirement for labeling or packaging" that diverges from FIFRA

As explained above, under Bates, FIFRA preempts any state-law claim that "sets a standard for a product's labeling," 125 S.Ct. at 1799, if that standard "diverges from

those set out in FIFRA and its implementing regulations.” *Id.* at 1803. Under this rule, plaintiffs’ claim that BASF committed consumer fraud by marketing Poast® and Poast Plus® under two different names is clearly preempted.

A herbicide’s name is an important part of its labeling. Both FIFRA and EPA’s regulations require that a pesticide label must “show clearly and prominently ... the name, brand, or trademark under which the product is sold.” 40 C.F.R. §156.10(a)(1)(i); 7 U.S.C. §136q(1)(E) (pesticide is “misbranded” if required information, including name, is not “prominently placed” on the label). In exercising its authority over pesticide labeling, EPA substantively regulates product naming, and state law may not “alter or augment the substantive rules governing liability for labeling.” 125 S.Ct. at 1805 (Thomas, J., concurring in part and dissenting in part). Because the judgment here was based on and adopted plaintiffs’ theory that BASF committed fraud by giving Poast® and Poast Plus® different names, it establishes “a requirement ‘for labeling or packaging’” within the meaning of Section 136v(b). *Id.* at 1798.

The labeling rule underlying the judgment clearly “diverges from” FIFRA’s requirements. 125 S.Ct. at 1803. As the jury here applied the NJCFA, a manufacturer may not label different herbicide formulations with different names if they contain the same active ingredient and the jury concludes that they are functionally similar. But FIFRA imposes a contrary rule: because of chemical differences between Poast® and Poast Plus®, EPA *requires* that they be registered as *separate* products and that they be labeled with *different* names. 40 C.F.R. §§152.15, 152.42-.43, 158.175; EPA Label Review Manual Ch. 12: Labeling Claims. In other words, federal law *obliged* BASF to

label Poast Plus® as a product distinct from Poast®. 7 U.S.C. §136q(1)(E); 40 C.F.R. §156.10(a)(1)(i).

Indeed, had BASF tried to sell or market Poast Plus® as Poast®, it could have been held civilly and criminally liable for selling a misbranded pesticide. “A pesticide is misbranded if ... it ... is offered for sale under the name of another pesticide,” 7 U.S.C. §136q(1)(C). Federal law makes it “unlawful for any person in any State to distribute or sell to any person ... any pesticide which is ... misbranded.” 7 U.S.C. §136j(1)(E). Likewise, any attempt by BASF to sell or market Poast Plus® as Poast® would have violated most states’ laws governing pesticides. See, e.g., Minn. Stat. §18B.07, subd. 2(a)(1) (“A person may not ... distribute ... a pesticide ... in a manner (1) that is inconsistent with a label or labeling defined by FIFRA...”).

In addition, under well-settled Supreme Court jurisprudence of implied conflict preemption, when a “state law is in actual conflict with federal law” or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the state law is preempted. Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995) (internal quotation marks omitted); see also Geier v. American Honda Motor Co., 529 U.S. 861, 869 (2000) (noting that an express preemption provision “does *not* bar the ordinary working of conflict pre-emption principles” (emphasis in original)). Plaintiffs’ claims that Poast® and Poast Plus® are “identical” products directly conflicts with EPA’s determination that under FIFRA the products must be registered, named and labeled as separate products. Plaintiffs’ claims are therefore impliedly preempted.

In sum, because EPA has determined that the chemical differences between Poast® and Poast Plus® *require* BASF to label and market them as different herbicides, any state-law claim that would “attach liability” to those actions is preempted. See Bates, 125 S.Ct. at 1805 (Thomas, J., concurring in part and dissenting in part) (section 136v(b) preempts any claim that “attaches liability to statements on the label that do not produce liability under FIFRA”). Because plaintiffs’ claims clearly do this, they cannot be sustained under Bates.

B. Under Bates, FIFRA Preempts Plaintiffs’ Claim That BASF Committed Consumer Fraud By Using Subset Labeling

In tandem with their assertion Poast® and Poast Plus® were the same product, plaintiffs also based their consumer fraud claims on BASF’s decision not to label Poast Plus® for use on minor crops when EPA (at BASF’s request) had registered the pesticide for those uses. It is undisputed, however, that EPA regulations affirmatively permit BASF to exclude registered uses from the labeling. Because plaintiffs’ action establishes a labeling standard that competes with the standard embodied in EPA’s regulations, it is preempted under Bates.

1. Plaintiffs’ claims rest on attacking BASF’s employment of subset labeling

Although plaintiffs acknowledged that EPA regulations allowed BASF’s subset labeling, they nevertheless contended that BASF’s employment of the practice here constituted consumer fraud. Plaintiffs repeatedly asserted that BASF deceived them and acted unconscionably by excluding minor crops from the Poast Plus® labeling. According to plaintiffs, BASF’s decision to subset label Poast Plus® kept them from

learning that Poast Plus® was registered for the same crops as Poast® and from using the product on their crops (even though the lack of state registration would still have prevented them from doing so legally).

Plaintiffs expressly acknowledged that their claims were focused on BASF's subset labeling of Poast Plus®. In response to BASF's interrogatories, they stated:

BASF knowingly concealed, suppressed, or omitted from the various labels that accompanied Poast Plus herbicide the fact that the EPA registered Poast Plus for use on minor use crops. This knowing concealment, suppression or omission of material facts forms the basis of this action.

(emphasis added)(AA-44). Outlining plaintiffs' claims at a pretrial hearing, plaintiffs' counsel stated that subset labeling was at the heart of the alleged scheme to defraud farmers:

Poast Plus was never labeled on anything but alfalfa, peanuts, cotton and soybeans. And Poast and Poast Plus were registered with the EPA by the time the EPA said, "Yes, we accept that registration on all these other crops, both by aerial application and ground application." And, at that point, BASF had no doubt that they could have moved all those crops over to the Poast Plus label, but they didn't. They designed this scheme and plan to improperly exploit minor crop farmers.

Motion in Limine Tr.150:16-22 (emphasis added)(AA-805).

At trial, plaintiffs repeatedly testified that, ***in their view***, BASF's use of subset labeling was unconscionable. For example:

Q. In your own words, can you tell the jurors what your complaint is against BASF?

A. My complaint to BASF is that they lied to us because Poast and Poast Plus is the same product. And ***we had to use the higher priced product on our sugar beets because it was not labeled.*** So, therefore, we had to use it.

Tr.2174:7-13 (plaintiff Abentroth, emphasis added). Likewise, plaintiff Larson testified:

Q. What was your motivation for bringing this lawsuit?

A. I felt that we were being deceived by what we found out at that time, what was registered. *The crops that were registered for Poast Plus and what was actually put on the label are two different things.* And also the pricing. I mean, Poast Plus was half the price of Poast, but *because of that label, I wasn't allowed to use Poast Plus.*

1449:13-21 (emphasis added). And again:

I've understood through the research involving [sic] in this case that in actuality, the Poast Plus had been registered, or the ingredients, the same time as the Poast was, for all the crops that Poast was. Just that *BASF made the decision to only put the four crops on the Poast Plus label, and I guess I feel that they had been deceptive in saying that only those four crops could be—that Poast Plus could be used only on those four crops.*

Tr.1398:19-1399:2 (plaintiff Evenson, emphasis added). And yet again:

Poast is labeled for minor crops. *Poast Plus is not labeled for minor crops.* Minor crops being sugar beets again and edible beans and I think flax is on there too. But *it does not allow me and a whole bunch of other farmers to use the more reasonable priced chemical. Rather, the label says you can't use it, but in actuality the registration said it's okay.*

Tr.588:23-589:5 (plaintiff Peterson, emphasis added).

Plaintiffs asserted that it was “unfair” and “morally” wrong for BASF to list fewer than all of the registered uses on the label. Tr.1414:9-15; 1405:23-1406:8. In closing argument, plaintiffs' attorney condemned BASF for employing the practice: “the only problem was, the minor crop grower couldn't get access to [Poast Plus] because BASF denied them access to it”). Tr.3769:12-14.

2. Plaintiffs' claim that BASF unlawfully exploited farmers through its use of subset labeling imposes a "requirement for labeling or packaging" that is not equivalent to a FIFRA requirement

The claim that BASF wrongfully omitted minor crops from the Poast Plus® labeling—embodied in the trial court's judgment in this case—clearly establishes a "requirement for labeling or packaging" within the meaning of FIFRA's express preemption provision. According to plaintiffs, it is unlawful for a manufacturer to exclude EPA-registered uses from a herbicide's labeling while making another herbicide containing the same active ingredient available for those uses at a higher price. Under Bates, a claim premised on that labeling rule can survive preemption only if it is equivalent to a rule imposed by FIFRA.

To determine the federal requirement to which a state labeling standard must be compared, a court must examine "the relevant EPA regulations that give content to FIFRA's misbranding standards." Bates, 125 S.Ct. at 1803-04. In this case, the relevant provision is EPA's "subset labeling" rule, which sets forth manufacturers' rights and obligations with respect to the inclusion of EPA-registered uses on product labeling.

The regulation, entitled "Distribution under Approved Labeling," provides in pertinent part:

(b) A registrant may distribute or sell a product under labeling bearing any subset of the approved directions for use, provided that in limiting the uses listed on the label, no changes would be necessary in precautionary statements, use classification, or packaging of the product.

40 C.F.R. § 152.130(b) (emphasis added). The preamble to the regulations explains that this section is directed at pesticide marketing:

A company having a registered product is permitted ... to market the product in a variety of ways. The product may be marketed under different brand names ... or it may be marketed under the same brand name, but bearing different subsets of approved uses ...

53 Fed. Reg. 15952 at 15957 (May 4, 1988).

Under the rule imposed by the trial court judgment, a jury may find a pesticide label deceptive if it excludes federally-registered uses. That standard plainly “diverges from” the federal standard, Bates, 125 S.Ct. at 1803, under which manufacturers may label a product with “any subset of the approved directions for use” without running afoul of FIFRA. 40 C.F.R. § 152.130(b). Because plaintiffs’ claims seek to attach liability to a labeling decision that FIFRA allows, it is preempted under a straightforward application of Bates.

The fact that EPA’s regulation *permits* but does not *require* manufacturers to employ subset labeling does not alter its preemptive effect. According to Bates, a state-law fraud claim is preempted when it “impose[s] a broader obligation than FIFRA’s requirement that labels not contain ‘false or misleading statements.’” Bates, 125 S.Ct. at 1803. Under FIFRA, subset labeling is not unlawful unless limiting the uses listed on the label would necessitate “changes ... in precautionary statements, use classification, or packaging of the product.” 40 C.F.R. § 152.130(b). Under plaintiffs’ construction of the NJCFA, in contrast, subset labeling is unlawful if it is employed in a manner that a jury deems “unconscionable.” See Peterson, 675 N.W.2d at 71-72 (citing N.J.S.A §56:8-2). Because in this respect the NJCFA imposes a “broader obligation” than the federal

regulation, the state law is preempted “to the extent of that difference.” Bates, 125 S.Ct. at 1803.

Well-established principles of implied conflict preemption also confirm this result. The Supreme Court has long held that a state may not hold a defendant liable for exercising an option granted by federal regulation. E.g., Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 152-53 (1982). Under this doctrine, a federal regulation preempts contrary state law even where the federal “regulation simply permits, but does not compel” the act in question. Id. at 155. Thus, when the responsible agency has decided to give “flexibility” to the regulated community—as EPA has done in promulgating the subset labeling rule—a state may not take that flexibility away. Id. at 155.

In sum, EPA regulations provided BASF with a choice, and BASF exercised that choice. Any judgment that second-guesses BASF’s choice “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” Cuesta, 458 U.S. at 153, and hence is impliedly, as well as expressly, preempted.

C. In Conflict With Bates, The Decision Below Imposes A State-Law Duty To Market Federally-Registered Products That Overrides Manufacturers’ Legitimate Safety Concerns.

The trial court’s judgment here also conflicts with Bates by imposing a state-law duty on a manufacturer to market a pesticide in all 50 states for all EPA-registered crops, regardless of the manufacturer’s desire to perform additional state-specific safety testing or its concerns stemming from the results of previous tests. In Bates, Dow had conducted *general* crop safety testing of its pesticide “Strongarm” on peanuts, and EPA had

registered and approved Strongarm for use on peanuts wherever they are grown. The Supreme Court nevertheless sustained the farmers' claim that Dow had an independent state-law duty to conduct *additional* crop safety tests under the high-pH soil conditions present *in Texas* before labeling and selling Strongarm for use *in Texas* under those conditions. 125 S.Ct. at 1793.

In Bates, the Court found that the prospect of tort claims can induce pesticide manufacturers "to use due care in conducting appropriate testing of their products," even when EPA has already registered the product for a particular use. 125 S.Ct. at 1798. The Court noted that EPA has waived review of crop safety and efficacy data and has "stopped evaluating pesticide efficacy for routine label approvals." Id. at 1796 (citing 44 Fed. Reg. 2793 (1979), 40 C.F.R. § 158.640(b); PR Notice 96-4, available at www.epa.gov/oppmsd1/PR_Notices/pr96-4.html). The Court observed that, even after registration, "FIFRA contemplates that pesticide labels will evolve over time, as manufacturers gain more information about their products' performance in diverse settings." Id. at 1802.

Finding that the sale of inadequately tested pesticides "creates not only financial risks for consumers, but risks that affect their safety and the environment as well," the Court noted:

The long history of tort litigation against manufacturers of poisonous substances ... emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items.

125 S.Ct. at 1801-02. Based on its view that FIFRA's labeling requirements do not

supersede pesticide manufacturers' duty to ensure the safety of their products, the Court held that the farmers' state-law negligent testing claims were not preempted. *Id.* at 1798.

The judgment here turns both the sound public policy and the legal holding in Bates on their heads. Here, BASF did just what the Supreme Court contemplated in Bates: it “use[d] the utmost care” before labeling Poast Plus® for minor crop uses, even though EPA had already approved such use. BASF was never satisfied that Poast Plus® was sufficiently proven safe to be sold for minor crops. Although BASF had conducted *some* general minor-crop safety testing before seeking EPA registration for use of Poast Plus® on minor crops, documents demonstrate that BASF scientists and BASF’s internal standards required—in writing—*more* minor-crop safety testing of Poast Plus® before BASF could label and market the product for those particular crops *in any state*.

Tr.2923:2-2924:8; 2946:1-6. These standards required testing, not only as to each of the 60-odd minor crops, but also of various soil types (e.g., the soil pH as in Bates), terrain, weather conditions, and likely tank mixes that might be encountered in the various states where BASF might market Poast Plus®. Tr.2863:3-2867:5; AA-612 (“Phyto[toxicity] data required before use”). Moreover, company documents show that the limited testing that had been performed raised red flags about the product’s suitability for minor crops. Tr.2980:9-2981:20, AA-496-497, 690-699 (increased injury to soybeans); Tr.2983:9-2984:14, AA-682-685 (increased injury to carrots); Tr. 2986:19-2989:6, AA-638-681 (increased injury to sugar beets); Tr.3000:24-3001:4, 3002:9-3007:17, AA-700-744 (increased injury to lima beans, cucumber, flax and lettuce).

If BASF had marketed Poast Plus® for minor crops despite unsatisfied concerns for crop safety and if farmers had sued BASF for crop damage on a theory of negligent testing—exactly the claim asserted in Bates—the internal company documents urging more testing would no doubt have been farmers’ “Exhibit A” at trial. Yet in the present case, despite BASF’s scientists’ undisputed reservations, the trial court judgment held that, simply because EPA had registered Poast Plus® for minor crops, BASF’s decision *not* to market Poast Plus® for minor crops in every state in the country constituted “unconscionable commercial conduct” in violation of state law. Tr.3769:12-14 (plaintiff’s counsel argues that the “only problem” was that BASF “denied [the minor crop farmer] access to [Poast Plus].” Indeed, the trial court all but ensured that the jury would pay no heed to BASF’s duty to test the safety of its products: although BASF asked the court to instruct the jury about the state-law duties of testing and product safety, the court (at plaintiffs’ urging) refused. AA371-372.

As Bates demonstrates, both FIFRA and the courts encourage companies to err on the side of caution on matters of product safety. Minnesota itself recognizes the duties of pesticide manufacturers to design, test, and manufacture safe products. E.g., Goeb v. Tharaldson, 615 N.W.2d 800, 817-19 (Minn. 2000). The trial court judgment here, however, directly undercuts that policy—on a nationwide basis—by threatening companies with the prospect of massive consumer fraud class action damages for “failure to market” products, even when the company’s own scientists deem more safety testing necessary.

Manufacturers then face an insoluble dilemma. If a company elects *not* to sell a pesticide that it does not believe it has adequately tested, it may be found liable for “unconscionable commercial conduct” (as occurred here). If, however, the company elects instead to sell the pesticide despite its belief that the product is not fully tested and ready, it would breach its duty under state product liability laws to adequately test the product before selling it, opening itself to liability should the product damage customers’ crops. E.g., Bates, 125 S.Ct. at 1798; see also Goeb, 615 N.W.2d at 819 (upholding claim for negligent testing against claim of FIFRA preemption). This threat of litigation would substantially interfere with the goal of ensuring crop safety—a goal shared by the Bates Court, by state courts, by EPA and the state agencies that administer FIFRA and its state complements,⁷ and by pesticide manufacturers and users.

As discussed above, EPA’s own rules sensibly permit a manufacturer to omit EPA-registered uses from pesticide labels. The judgment here overrides BASF’s decision, for crop safety reasons, to exercise the EPA-granted option not to include on the product label a particular use that EPA had approved. Because the judgment here thus imposes “state-law labeling and packaging requirements that are *‘in addition to or different from’* the labeling and packaging requirements under FIFRA,” 125 S Ct. at

⁷ Indeed, because this Court’s ruling will have a substantial impact on EPA’s regulatory program, BASF encourages the Court to invite the agency to offer its views before rendering a decision. See Bates, 125 S.Ct. at 1804-05 (Breyer, J. concurring) (noting agency expertise in determining effect of state requirement on federal requirements).

1800 (emphasis in original), and runs directly counter to sound public policy regarding the safety of pesticide products, the decision below should be reversed.⁸

D. Plaintiffs' Claims Flout The States' Important Role In Pesticide Regulation

In Bates, the Supreme Court recognized that FIFRA expressly “preserves a broad role for state regulation” of pesticides. 125 S.Ct. at 1802; see also Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 615 (1991) (discussing the cooperative federal/state “regulatory partnership” under FIFRA). Every state has legislatively exercised its prerogative under FIFRA and requires separate state approval and registration of pesticides before those pesticides may be sold within state borders. See Tr.2662:3-2663:2. Under these state regulations, states can and do deny state registration notwithstanding EPA registration. AA-490, 498, 509-513. Here, it was undisputed that no state had registered Poast Plus® for use on minor crops, and that BASF therefore could not lawfully have labeled or marketed Poast Plus® for minor crops in any state.

⁸ Plaintiffs' argument that the issue of sufficiency of the crop safety testing is a jury question, see Peterson v. BASF, 657 N.W.2d at 867, misses the point. Putting aside the advisability of allowing juries to second-guess a company decision not to sell a pesticide product for reasons of crop safety, the judgment creates a *duty* to market any product approved for use by EPA immediately in all 50 states, regardless of any determination by the expert company scientists *or* the jury of whether the product is safe for a particular crop in a particular state under particular soil and weather conditions or whether a safer product is available. The question of whether a duty exists is of course a question of law for the court, not a question of fact for the jury. See, e.g., H.B. & S.B. by and through Clark v. Whittemore, 552 N.W.2d 705, 707 (Minn. 1996).

The judgment here, however, rests on the holding that BASF committed consumer fraud by failing to market Poast Plus® for minor crops in *every* state. Under Bates and FIFRA, any state “may ban the sale of a pesticide” within its borders, 125 S.Ct. at 1799 (citing 7 U.S.C. §136v(a)), and any contrary requirement imposed by a different state is preempted.

In an apparent attempt to resolve this tension between plaintiffs’ claims and FIFRA’s federal-state registration scheme, this Court stated that “the ‘problem’ ... was BASF’s failure to seek state registration for Poast Plus on all the crops.” 675 N.W.2d at 71. But that statement rests on an *assumption* that the independent regulators in each of the 50 states would then have approved the use of Poast Plus® on minor crops in their states, if BASF only had asked. Yet *every* state had the right to *deny* BASF permission to market Poast Plus® for use on minor crops. In fact, this actually occurred: California (which had registered Poast®) did not allow BASF to market the Poast Plus® formulation⁹ for *any* crop, major or minor, despite federal registration, because the state did not believe that the product toxicity testing was sufficient or that the label’s warning was strong enough. Tr.2014:12-2018:14; Tr.2611:13-2612:8; AA-488, 490, 498, 509. Even so, the class that the district court certified included farmers in California. AA33-36.

⁹ Vantage®, the product for which BASF sought California registration, had exactly the same chemical formula as Poast Plus® and, unlike Poast®, was a permitted alternative name for Poast Plus® under EPA regulations. Tr.2611:13-2612:8.

California's action demonstrates exactly the state power that the Bates Court characterized as "most significant": the power to prohibit the use of a pesticide in the state *even if EPA has approved it*. Bates, 125 S.Ct. at 1802 ("Most significantly, States may ban or restrict the uses of pesticides that EPA has approved...", citing 7 U.S.C. §136v(a)). In treating such state approval and registration as a foregone conclusion, however, the judgment here ignored the power of regulators in each state—including Minnesota itself—to *independently* review, and to approve or disapprove, the pesticides permitted to be used in that state.

This is not an question of fact, for an expert or otherwise; indeed, it is not a *question* at all. It is simply each state's right, under FIFRA and its own laws, to control the use of pesticides within its borders and protect its own citizens based on whatever considerations it sees fit, whether EPA has registered the pesticide or not. For example, in addition to the California example discussed above, Minnesota itself recently exercised this regulatory power and refused to unconditionally register a pesticide despite the product's EPA registration. ADD-73. Given these states' rights and the states' willingness to exercise them, plaintiffs' underlying assumption that every state would have automatically registered Poast Plus® for every minor crop is not only inherently speculative but asks this Court to usurp and negate the very state powers that Bates reaffirmed. See 125 S.Ct. at 1796-97, 1799.

In sum, FIFRA grants the authority to determine whether a pesticide should be sold in a state to that state's authorities, not to a jury in a foreign jurisdiction. Because no state actually has registered Poast Plus® for use on minor crops within its borders, the

holding that BASF should have marketed Poast Plus® for minor crops in every state ignores every state's sovereign right to regulate pesticide use within its borders.

E. Plaintiffs' Reliance on Preempted Theories Entitles BASF To Judgment

Because Bates eviscerates plaintiffs' case by precluding their "same product" and subset labeling theories of liability, BASF is entitled to judgment as a matter of law. See, e.g., Geier v. American Honda Motor Co., Inc., 166 F.3d 1236, 1245 (D.C. Cir. 1999), aff'd, 529 U.S. 861 (2000); Lynnbrook Farms v. Smithkline Beechum Corp., 79 F.3d 620, 623 (7th Cir. 1996). The fact that plaintiffs also adduced some evidence of conduct outside the labeling does not preclude the entry of judgment in BASF's favor. When plaintiffs' objections to BASF's labeling of Poast Plus® are disregarded, as Bates requires, their contention that BASF engaged in wrongdoing apart from the labeling also dissolves.

For example, plaintiffs objected to BASF's advertisements because they stated that Poast Plus® was registered only for major crops and that Poast® was the only herbicide of its kind registered for minor crops. AA-749-751, 776-782. Plaintiffs contended that these statements were wrongful because they prevented plaintiffs from learning that Poast® and Poast Plus® were "the same pesticide" and could be used on the same crops. According to EPA's regulations, however, the products were *not* the same; moreover, minor-crop farmers could not lawfully use Poast Plus® because BASF had exercised its right to employ subset labeling. 7 U.S.C. §136j(a)(2)(G). Absent an attack on the Poast® and the Poast Plus® labeling—which Bates forecloses—there are no grounds for objection to BASF's advertisements, which were consistent with that

labeling. See Taylor AG Indus. v. Pure Gro, 54 F.3d 555, 561 (9th Cir. 1995) (FIFRA preempts claims based on off-label statements when the claims are “premised ultimately on the inadequacy of the product label”).

Plaintiffs also contended that BASF committed consumer fraud by circulating an article relating *truthful* information about the illegality of off-label pesticide use and by *truthfully* reporting possible off-label use of Poast Plus® to appropriate authorities.

According to plaintiffs, these actions were wrongful because they prevented minor-crop farmers from using Poast Plus®. Under FIFRA, however, “the label is the law.” AA-554-559. The notion that it was unlawful for BASF to enforce the limitations on the Poast Plus® labeling necessarily implies that it was wrongful for it to use subset labeling in the first place. Because Bates forecloses the latter claim, it also forecloses the former one. Put another way, plaintiffs may not circumvent FIFRA’s preemption of their labeling claims by contending that BASF’s actions supporting its labeling, but not the labeling itself, violated state law.¹⁰

¹⁰ Even if not preempted, these remaining claims are legally insubstantial and insufficient to sustain the massive class action judgment in this case. For example, BASF’s alleged misstatements to state regulators were not made “in connection with the sale or advertisement of any merchandise” as required under the NJCFA, N.J.S.A. §56:8-2, the resulting misunderstanding was cleared up in a few weeks, AA-752, 783, and the record contains no evidence that any class member ever knew of that misunderstanding. BASF’s reports of possible off-label use of Poast Plus® and the magazine article concerning off-label use likewise were not made “in connection with the sale or advertisement of any merchandise,” and such undisputedly truthful statements cannot be deemed “fraud,” and are protected by the Minnesota and U.S. Constitutions and by well-established public policy. Finally, the allegedly deceptive advertisements merely stated that Poast Plus® was registered only for major crops and that Poast® was the only herbicide of its kind registered for minor crops. AA-749, 776-782. Under Bates and

(continued on next page)

III. IN THE ALTERNATIVE, BATES REQUIRES A NEW TRIAL THAT EXCLUDES EVIDENCE OF PREEMPTED CLAIMS AND INCLUDES INSTRUCTIONS TO THE JURY CONCERNING BASF'S RIGHTS AND OBLIGATIONS UNDER FIFRA.

If this Court concludes that BASF is not entitled to judgment, then BASF should receive a new trial. First, despite plaintiffs' concession that BASF's labeling complied fully with FIFRA, they introduced a mountain of evidence inviting the jury to hold BASF liable for fraud on the basis of the labeling, contrary to the holding in Bates. Second, contrary to the Supreme Court's pointed directive in Bates, the trial court refused to give jury instructions regarding FIFRA's requirements, thus inviting the jury to impose state-law standards that do not comport with federal law. Bates makes it clear that, under these circumstances, the judgment below cannot stand.

A. Under Bates, the Trial Court Erred in Refusing to Exclude Evidence in Support of Preempted Labeling Claims.

Plaintiffs have repeatedly tried to defend the judgment in this case by asserting that they are not attacking BASF's labeling but instead BASF's "marketing"—although their fundamental objection to BASF's "marketing" is in reality an objection to the product name and the permitted uses BASF puts on the Poast Plus® label. Assuming

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FIFRA, these were accurate statements recognizing the need for state registration and reflecting the undisputed facts that Poast Plus® was not registered for minor crops in any state and that minor-crop farmers could not lawfully use it.

No Minnesota court has yet addressed these arguments in a context where Bates preempts the heart of plaintiffs' case—the "same product" and subset labeling claims.

arguendo that plaintiffs' "marketing" claims are legally viable, however, those are *not* the claims plaintiffs *actually* presented at trial.

As discussed at length above, plaintiffs presented a vast body of evidence at trial that directly attacked BASF's EPA-mandated labeling of Poast Plus® as a unique product and BASF's EPA-approved decision to subset label Poast Plus®. Even beyond that, however, plaintiffs and their attorneys also repeatedly and *directly* attacked BASF's pesticide labels themselves, attacks clearly barred by Bates. E.g., Tr.1206:11-12; 205:15-16; 588:15-589:5; 1303:14-16; 1412:17-25; 1421:8-13. Plaintiffs called the labels "misleading" and suggested that BASF had a "moral" duty to change the Poast Plus® label. Tr.1260:17-21; 1414:9-17. Plaintiffs assailed the Poast Plus® label as deceptive based on the names of the products, the percentages of active ingredient, the instructions for use, and the approved uses. See Tr.1206:9-15, 1239:3-24, 1260:17-21; 588:15-589:5; 1412:17-25, 1421:8-13; 381:1-14; 3770:3-11. These attacks were not isolated or incidental, but formed part of a deliberate and methodical attempt by plaintiffs' counsel to improperly induce the jury to find BASF liable based on the content of the product labels. See Tr.1239:3-4 ("[W]hat were some of the things that you thought were deceptive about the Poast Plus label?"); Tr.1399:3-5; 1406:18-19.

This evidence directly conflicts with Bates' holding that preempts state labeling requirements that try to "set a standard for a product's labeling." 125 S.Ct. at 1799. This evidence was irrelevant to any non-label-based claim, and thus should have been excluded. See Cart v. Missouri Pacific Railroad Co., 752 So. 2d 241, 243-44 (La. App. 1999) (affirming exclusion of evidence of claim preempted by the Federal Railroad

Safety Act); Estate of Montag v. Honda Motor Co., 856 F. Supp. 574, 576-77 (D. Colo. 1994) (excluding evidence of claim preempted by Motor Vehicle Safety Act); Boyle v. Chrysler Corp., 501 N.W.2d 865, 871 (Wisc. Ct. App. 1993) (reversing trial court order permitting evidence relating to federally preempted claim).

Furthermore, the evidence was highly prejudicial to BASF, because it invited the jury to find liability on preempted grounds. See State v. Chambers, 589 N.W.2d 466, 477 (Minn. 1999) (defining “prejudice” in erroneous admission of evidence as “the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means”). Therefore, if this Court does not direct entry of judgment for BASF, this Court should remand the case for a new trial at which plaintiffs are limited to presenting evidence that does not attack BASF’s pesticide labeling. See W.G.O. v. Crandall, 640 N.W.2d 344, 349-50 (Minn. 2002) (reversing and remanding for new trial where erroneous evidentiary ruling “might reasonably have influenced the jury and changed the result of the trial”).

B. The Trial Court Improperly Denied BASF’s Requested Jury Instructions Concerning BASF’s Rights and Duties under EPA Regulations

Finally, even assuming *arguendo* that the trial court properly admitted plaintiffs’ evidence attacking BASF’s labeling, BASF is nevertheless entitled to a new trial. Directly contrary to the requirements of Bates, the trial court here refused to instruct the jury concerning *any* of the laws or regulations governing the heavily regulated pesticide industry, instructions that would have permitted the jury to distinguish between claims that were preempted and claims that were not.

Bates establishes that when a state-law claim operates in the area of pesticide labeling, the trial court must guard against the imposition of state labeling requirements that are not “*genuinely* equivalent” to federal requirements. 125 S.Ct. at 1804 (emphasis in original). To that end, the Court held that “*if a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards.*” Id. (emphasis added). This is necessary to ensure that the manufacturer is not “held liable under a state labeling requirement subject to §136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA.” Id.; see also id. at 1803-04 (“State-law requirements must also be measured against any relevant EPA regulations that give content to FIFRA’s misbranding standards.”).

Here, BASF asked the court to instruct the jury about the regulations governing its conduct under FIFRA. See generally Tr.3647:10-3653:6. For example, BASF requested instructions:

- That EPA regulations “required BASF to register Poast® and Poast Plus® as separate products.” AA-340.
- That “EPA’s regulations prohibited BASF from using the exact same name for Poast® and Poast Plus®.” AA-341.
- That “EPA regulations allow manufacturers to distribute or sell pesticides under labeling bearing any subset of the directions for use approved by the EPA.” AA-333.

- That “EPA allows a company to label an herbicide for fewer crops than registered by the EPA.” AA-333.
- That “[a] manufacturer of pesticides has no duty under federal or state law to label pesticides for specific crop uses.” AA-334.
- That the jury could not find “[t]he omission of any information from, or the inclusion of any information on” the Poast Plus® label to be a violation of the NJCFA. AA-360.
- That every state requires separate registration of pesticides and may deny registration and bar use of the pesticide notwithstanding EPA registration. AA-327-330, 343, 346.

Plaintiffs did not dispute the accuracy of the law stated in these instructions, and conceded that BASF’s labeling of Poast® and Poast Plus® complied fully with EPA’s regulations. E.g., Tr.3544:5-7 (“We have never once asserted that they did not comply with the regulations.”). Plaintiffs nevertheless opposed the requested instructions on the ground that FIFRA’s requirements were *irrelevant* to their consumer fraud claims. See generally Tr.3656:2-3663:6; see also Tr.2527:16-23 (plaintiffs’ argument against directed verdict) (“we’re telling them about law that has nothing to do with their findings as they relate to consumer fraud”).

The trial court sustained plaintiffs’ objections and refused to give *any* instructions whatsoever explaining FIFRA’s requirements or the relevant EPA regulations. See Tr.3831:25-3851:8. To compound the error, plaintiffs’ counsel then argued in closing that

the court's failure to discuss EPA's regulations in the instructions meant that the jury was free to ignore them:

And the most striking thing that will occur to you when the Court sends you back for deliberations is you're going to take the instructions in your hand. ...

There is not one word in there about 90 percent of what BASF just argued to you this morning. Not one word. ... You won't see one word about whether or not if you register a product properly or subset label that somehow that's good. Because the Court recognizes that this is a case about consumer fraud. That's all it's about.

Tr.3748:9-22.

Under Bates, a cause of action by *any* name, "even if not specific to pesticide labeling," imposes a labeling requirement that is preempted by Section 136v(b) if it "adds some supplemental requirement of truthfulness to FIFRA's requirement that labeling statements not be 'false or misleading.'" 125 S.Ct at 1805 (Thomas, J. concurring in part and dissenting in part). Such instructions were particularly critical here because of the court's broad instruction that the jury could find BASF liable for any conduct it found "unconscionable" or "deceptive." See Tr.3840:9-3842:17.

Nevertheless, and contrary to Bates' holding, the jury here was allowed to evaluate plaintiffs' evidence regarding BASF's alleged misconduct—much of which focused on BASF's labeling practices—without receiving *any* guidance regarding the federal regulations that controlled that conduct.

The trial court's refusal to instruct the jury on FIFRA's requirements and their preemptive effect was particularly egregious given plaintiffs' extensive reliance on evidence inviting the jury to find fault with BASF's pesticide labeling. Proper

instructions might have ameliorated the prejudice from that evidence; instead, the court's refusal even to mention the federal regulations in its instructions magnified the problem and the prejudice.

The trial court's refusal flatly contradicts Bates' unequivocal directive that courts should "instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards," 125 S.Ct. at 1804, and the judgment here therefore cannot stand. The omission of such instructions both "destroy[ed] the substantial correctness of the charge as a whole," and "result[ed] in substantial prejudice" to BASF. Lindstrom v. Yellow Taxi Co. of Minneapolis, 214 N.W.2d 672, 676 (Minn. 1974) (discussing circumstances in which erroneous jury instructions justify new trial). Thus, even assuming that this Court were to hold that some of plaintiffs' claims are not preempted, it should at the very least reverse the judgment of the district court and remand for a new trial with the jury instructions required by Bates.

CONCLUSION

For the reasons set forth above, BASF urges this Court to reverse the judgment of the district court and direct entry of judgment in BASF's favor on all claims. In the alternative, BASF urges this Court to reverse the judgment of the district court and remand the case for a new trial, at which plaintiffs will not be permitted to pursue or introduce evidence concerning labeling claims and BASF will be entitled to instructions properly informing the jury of its rights and duties under the applicable federal laws.

Dated: July 14, 2005

FAEGRE & BENSON LLP



Winthrop A. Rockwell, #92526

John P. Borger, #9878

Bruce Jones, #179553

John P. Mandler, #194438

2200 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402-3901

(612) 766-7000

STATE OF MINNESOTA
IN SUPREME COURT

Ronald Peterson, Barry Thune, Owen,

Plaintiffs/Respondents,

vs.

BASF Corporation, a foreign corporation,

Defendant/Appellant.

CERTIFICATION OF
BRIEF LENGTH

Appellate Court
Case Number: No. C3-02-857

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,908 words. This brief was prepared using Microsoft Word 2003 software.

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FAEGRE & BENSON LLP


Winthrop A. Rockwell, #92526
John P. Borger, #9878
Bruce Jones, #179553
John P. Mandler, #194438

2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 336-3000