

Liability of Exposure

Wrongful death law is an area of law that seeks to provide financial compensation to the heirs of a person whose death was caused by the negligent, willful, or wrongful act, neglect, omission, or default of another. Each state has drafted its own set of civil "wrongful death statutes," and some form of wrongful death claim action exists in all state jurisdictions today. While they all follow similar principles, each state jurisdiction is unique, so laws will vary from state to state. There are no federal statutes for wrongful death.

Successful wrongful death (and, fear of/developing chronic diseases) verdicts can be obtained when there are occupational (and, non-occupational) exposures to hazardous conditions or substances.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), governs pesticide manufacturing, sale, use and labeling in the United States. FIFRA is regulated by the Environmental Protection Agency (EPA). In order to register a pesticide the applicant must submit data to the EPA to establish that the pesticide will not cause unreasonable adverse effects on the environment. The unreasonable adverse effects standard, which appears throughout FIFRA, includes "man or the environment." This definition incorporates a risk-benefit standard since it recognizes that pesticides are toxic, and therefore present a risk to man and the environment, but are also designed to render a benefit control of a pest. EPA registration of a pesticide pursuant to FIFRA does not mean that the pesticide is "safe," even for its intended use. It merely means that, in EPA's opinion, the benefits of the pesticide outweigh its costs.

Tort preemption allows defendants some immunity to civil liability because they have done what is required by statute. The leading case supporting tort preemption is Cipolloance v. Liggett Group, Inc., 505 U.S. (1992). Cipolloance held that the preemptive clause in the Public Health Cigarette Smoking Act preempted civil liability. The leading case against tort preemption is Medtronic, Inc. v. Lohr, 518 U.S. (1996). Medtronic held that the preemptive clause in the Medical Device Amendments of 1976 did not preempt the plaintiff's tort claims. So far, courts have followed Cipolloance more than Medtronic; however, in 2008 the U.S. Supreme Court will be reexamining this issue in Riegel v. Medtronic.

FIFRA contains an express preemption clause regarding labeling requirements. Therefore, the majority of cases regarding pesticides, which have been FIFRA and EPA approved, hold that this approval preempts any state common law cause of action arising out of any alleged product liability; however, there is enough precedent to bolster a court's decision either for or against preemption.

As the EPA noted in an amicus brief filed in Etcheverry v. Tri-Ag Services, Inc., 22 Cal. 4th 316 (Ca. 2000) : - " Given that FIFRA establishes no private damages remedy for those injured by pesticides, it would be astonishing that, without any discussion, Congress could have intended to deprive injured persons of all means of relief."

In Bates v. Dow Agrosciences LLC, 81 U.S (2005), the U.S. Supreme Court held that FIFRA did not preempt the farmers claims alleging defective design, defective manufacture, negligent testing, and breach of express warranty. In Wuebker v. Wilbur-Ellis Co. (8th Cir. 2005),

relying on Bates the Court held that EPA regulation did not impliedly preempt common law claims.

Plaintiffs can recover “compensatory damages” such as the loss of support, services, lost prospect of inheritance, and medical and funeral expenses. Damages also typically include interest from the date of the decedent's death. Punitive damages may also be awarded in cases of serious or malicious wrong-doing to punish the wrong-doer, and/or deter others from behaving similarly.

The law is constantly changing in terms of how it is applied. However, as more health professionals are becoming aware of the potential link between exposure to toxic substances and disease; and accordingly, more plaintiff's lawyers are looking for more “experts” to bolster lawsuits, it is likely that lawyers seeking money will push against case law and utilize publicity to generate pressure upon manufactures and applicators to settle cases rather than expending millions of dollars defending and hundreds of millions of dollars paying verdicts which may, or may not be reversed on appeal.

The best practice to avoid civil liability is to use “best (applicator) practices” when dealing with potentially hazardous substances—without regard to whether or not a particular risk is recognized at a particular point in time by a majority of scientific evidence. While no one can be expected to “know” all of the literature and research within a field, it is a safe bet that the plaintiff's lawyer will find it—and an expert to tell the fact finder that a particular defendant knew, or could have known, about the risk. Documenting the steps being taken gathering information and establishing safety routines is essential to later establishing why a particular defendant, be it an individual or a multi-national corporation, should not be held liable

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