IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

TOMMY LEE ANDRUS, Plaintiff

v. No. 4:97CV22-EMB

AGREVO USA COMPANY, Defendant

O P I N I O N

Plaintiff alleges that he applied a herbicide (Whip 360) manufactured by the defendant to 280 acres of rice, and although the product was applied as specified in the product label and under the advice of defendant's representative, he suffered a drastic reduction in crop yields for the year 1995 which he attributes to the allegedly defective herbicide.

Defendant moves for summary judgement on the grounds that plaintiff's claims are based on misleading, inadequate or deficient labeling, and federal law precludes recovery for such claims under §136v(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, because the labeling was approved by the Environment Protection Agency, and is therefore adequate as a matter of law. Defendant further argues that plaintiff's breach of warranty of fitness for a "particular purpose" claim is also preempted by FIFRA, and/or should be dismissed under Mississippi law.

In response, plaintiff contends that FIFRA is inapplicable here, i.e. that he is not claiming that the label on Whip 360 was misleading or inadequate, but that the product failed to perform as advertised on the label and/or as represented by defendant's corporate representative.

The parties in the above entitled action have consented to trial and entry of final judgment by the United States Magistrate Judge under the provisions of 28 U.S.C. §636(c), with any appeal to the Court of Appeals for the Fifth Circuit.

FIFRA PREEMPTION

The defendant is clearly correct that FIFRA preempts state common law claims based upon the failure of a manufacturer to properly or adequately label a herbicide. MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994); Cuevas v. E.I. DuPont de Nemours and Company, 956 F.Supp. 1306 (SD Miss. 1997). Despite plaintiff's protestations that he is not complaining about the label, his complaint states otherwise:

> The Whip 360 failed to perform as specified **pursuant to the product label** thereby causing a drastic reduction in yields for the 1995 crop year. (Complaint ¶5, emphasis added)
>
> Plaintiff, Tommy Lee Andrus, relied to his detriment on the specifications **pursuant to the Whip 360 product label**. AgrEvo's product failed to perform **as specified in its product label**. (Complaint ¶7, emphasis added)

The two page complaint which instituted this action is obviously not a model of clarity or legal craftsmanship, and under the notice pleading practice followed in our courts it is not necessary that it be legally definitive. However, the court cannot assume claims that are not made, and nowhere in the complaint is it plainly asserted that the product is defective, or that the defendant is strictly liable for manufacturing a defective product. In every instance the defects alleged are linked to the specifications set forth in the label.

Consequently, the court finds that defendant's motion should be sustained as to claims regarding the labeling of the Whip 360 herbicide, and those claims should be dismissed.

BREACH OF WARRANTY FOR A PARTICULAR PURPOSE

Defendant argues that plaintiff's breach of warranty claim (¶6 of the complaint) should be dismissed because Mississippi law does not recognize an implied warranty of fitness for a particular purpose when the product is purchased for its ordinary use, citing Curry v. Sile Distributors, 727 F.Supp 1052 (ND Miss. 1990) and Ford Motor Co. v. Fairley, 398 So.2d 216 (Miss. 1981).

In response plaintiff points to statutory language in Miss. Code Ann §75-2-315 to support his theory that his reliance upon the expertise of defendant's representative, Jeff Champion, who knew the particular purpose for which the product was to be used, supports this cause of action.

Miss. Code Ann §75-2-315 states:

> When a seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose.

The court has studied the cases cited by the parties, as well as cases from other states and the UCC itself, and finds that Mississippi law and the prevailing view in other states is that a particular purpose means a purpose other than its ordinary use.

The Official Comment to UCC §2-315 states:

> "A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business whereas the ordinary purposes for which goods are used are those envisaged in the concept of merchantability and go to uses which are customarily made of the goods in question."

As the defendant points out, the most recent case interpreting this comment in the context of Mississippi law held that no claim will lie under this section if the purposed use of the product was

ordinary. Curry, supra at 1054. This court is bound by that precedent, and convinced by cases in other jurisdictions that this is the correct interpretation of the code section. See Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292 (3rd Cir. 1961)(warranty of fitness warrants that goods are suitable for a special purpose, whereas warranty of merchantability warrants that goods are fit for the purpose for which they were sold); Jameson Chemical Co., Ltd. v. Love, 401 N.E.2d 41 (Ind.App. 1980) (same); Rogers v. W.T. Grant Co., 321 A.2d 54 (VT 1974) (same); Pearson v. Franklin Laboratories, Inc., 254 N.W. 2d 133 (S.D. 1977) (same); Bosway Tube & Steel Corp. v. McKay Machine Co., 237 N.W. 2d 488 (Mich. App. 1975) (same). But see Tennessee Carolina Transport, Inc. v. Strick Corp., 196 S.E.2d 711 (N.C. 1973) (warranty of fitness covers not only exceptional uses for a product, but general or ordinary uses also).

Both parties contend that Whip 360 was a herbicide used to kill weeds in rice fields, and plaintiff used the product as specified on the label to kill weeds in his rice fields. A copy of the label attached to defendant's motion, as well as the affidavit of Jeff Champion attached to plaintiff's response to the motion, indicate that Whip 360 was intended for this use. Consequently, plaintiff's claim of breach of an implied warranty of fitness for a particular purpose should be dismissed.

In the court's opinion the defendant has met its burden, and is therefore entitled to judgment as a matter of law.

A separate order in accordance with this opinion shall issue this same date.

THIS, the 17th day of September, 1998.

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UNITED STATES MAGISTRATE JUDGE

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FINAL JUDGMENT

In accordance with an Opinion entered this day, the parties in the above entitled action having consented to trial and entry of final judgment by the United States Magistrate Judge under the provi-sions of 28 U.S.C. §636(c), with any appeal to the Court of Appeals for the Fifth Circuit, it is hereby ORDERED:

1. That Defendant's Motion for Summary Judgment be, and it is hereby, sustained.

2. That all of plaintiff's claims against defendant be, and are hereby, dismissed with prejudice, and that summary judgment be granted in favor of defendant.

3. That this action be, and is hereby, dismissed with prejudice, with all costs to be taxed to the plaintiff.

All memoranda, depositions, affidavits and other matters considered by the court in ruling on the motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED, this, the 17th day of September, 1998.

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UNITED STATES MAGISTRATE JUDGE