I. History of Bug Foggers

Residential bug foggers have been on the market for decades. All too often, though, consumers discharged foggers around lit cigarettes, candles or other open flame or heat sources without due regard to their flammability. To curb the number of fires and injuries resulting from foggers, the Environmental Protection Agency (EPA) approved new requirements on February 4, 1998 requiring that warnings and instructions be placed on insect foggers to ensure that they are used safely.\(^1\) Despite continued recognition by the EPA and others regarding the danger of these products as being easily misused, there remain an abundance of fogger products in the market place.\(^2\)

As Summer approaches, so do bugs - which means increased use of bug foggers. This article is intended to better your understanding of how the use of bug foggers can lead to explosions and fires and what avenues of recovery may or may not be available for such claims.

II. Theories of Liability and the Applicable Law

Losses involving bug foggers could potentially involve a host of theories of liability including, but not limited to, failure to warn, defective manufacture and/or design and breach of warranty claims. The ability to bring such claims is governed in part by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") 7 U.S.C. §§136-136y. FIFRA contains an express preemption provision prohibiting any state from imposing additional or different labeling requirements for any federally registered pesticide.\(^3\) The required language on a fogger's label may vary depending on the product's chemical components and the test results. The EPA

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categorizes each pesticide according to its toxicity and specifies the language to be used on the pesticides labels.\textsuperscript{4} The Courts have consistently held that the EPA requirements for labeling pesticides are sufficient to mandate preemption of failure to warn claims based on state statutes and common law. See Lewis v. America Cyanamid Company, 715 A. 2d 967, 972 (Sup. Ct. NJ 1998) (citations omitted). Therefore, under FIFRA, so long as the warnings are in compliance with EPA requirements, any failure to warn claim will be barred.

Note that while a warning that does not comply with EPA guidelines might afford you a state law based cause of action for failure to warn, there is no private cause of action under FIFRA. Congress has specifically considered and rejected amendments to FIFRA that would have allowed citizens to file civil suits for violation of FIFRA. See Rodriguez v. American Cyanamid Company, 858 F. Supp. 127, 131 (U.S.D.C. Arizona, 1994) (citations omitted). Rather, the Federal government issues its own civil or criminal penalties against manufacturers for failure to comply with FIFRA mandated warnings.\textsuperscript{5}

In short, if the warnings on the particular fogger are in compliance with EPA guidelines, you will be barred from making a "failure to warn" claim. The better potential avenue of recovery in these cases then is if the fogger shows signs of having been negligently manufactured or negligently designed.

\textbf{III. Case In Point}

Peter Lewis suffered second degree burns over 25\% of his body due to a bug fogger explosion and fire. \textit{See Lewis, supra}. Mr. Lewis had purchased a 3-pack of foggers. Mr. Lewis read the instructions on the label and activated the foggers. Approximately one minute later, he checked on the foggers (in violation of warnings) and noted that one of the foggers appeared to be malfunctioning because liquid was leaking down the side of the can and producing a weak spray. As he turned his head, he saw a fireball racing towards him.

Mr. Lewis pleaded several theories of liability: 1) The manufacturer should have included specific information on flammability and clearer warnings against misuse; 2) The product had a design defect in that there was a practical and feasible alternative design that would have reduced the flammability of the fogger’s propellant.

The Court held that Mr. Lewis' failure to warn claims were governed by FIFRA. Since the warning on the can met EPA requirements, his claim for failure to warn was barred. However, the Court held that the design defect claim was not preempted by FIFRA, and the issue of whether an alternate propellant was practical and feasible was a question of fact for the jury. \textit{Lewis}, 715 A.2d at 980.

\textbf{IV. Your Investigation}

In investigating bug fogger claims, you should obtain an exemplar product (as the actual product used was most likely consumed in the event). Then with the assistance of a qualified human factors or warnings expert, determine whether the language on the label is in compliance with EPA requirements. If the warnings are not in compliance with EPA mandates, you should be able to pursue a
failure to warn claim under state law. If, however, the warnings are in compliance with EPA guidelines, the manufacturer’s duty to warn is satisfied and the adequate warning issue may not be pursued.

While exploring whether the product warnings were in compliance with FIFRA, examine whether or not a particular fogger was defective in the way it was manufactured or designed that led to the loss. These latter types of claims are not preempted by FIFRA.

V. The Reality

Some experts believe bug foggers are seldom effective against indoor pest problems. Nevertheless, their use is prevalent.

Most consumers run into problems by using more than one fogger per room or too much insecticide for the size of the room. Failure to recognize all potential ignition sources that must be extinguished is most problematic (pilot light or spark from an electrical appliance that cycles on/off such as a refrigerator or air conditioner).

Unfortunately for you and your insured, so long as the warnings on the fogger are in compliance with EPA regulations, a state claim for failure to warn will be preempted and barred under FIFRA. While these cases remain difficult, with this information you should be in a better position to focus your recovery efforts by quickly evaluating any failure to warn claim, and focusing on manufacturing or design defects that may exist in the product.

ENDNOTES

1. See http://www.epa.gov/pesticides/factsheets
2. See www.bugsout.com; www.bugspage.com
4. See 40 C.F.R. §156.10; 7 U.S.C.A. §136(p) G 136a(c)(5)
5. 7 U.S.C.A. § §136j(a)(2)(M) & (Q); 1361
6. See University of Kentucky Entomology; http://www.uky.edu/agriculture/entomology/entfacts/struct/ef643.htm
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