



Sun Valley Packing v. Consep

94 Cal.App.4th 315 (2001) | Cited 1 times | California Court of Appeal | December 10, 2001

CERTIFIED FOR PARTIAL PUBLICATION ¹

OPINION

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) is a comprehensive statutory scheme that regulates the use, sales and labeling of all pesticides sold in the United States. (7 U.S.C. § 136 et seq.) FIFRA expressly prohibits states from imposing "any requirements for labeling or packaging in addition to or different from those required" under the act. (7 U.S.C. § 136v(b).) Consequently, any state law claim that effectively requires a manufacturer to include different or additional information on a pesticide's federally approved label is preempted. (Taylor Ag Industries v. Pure-Gro (9th Cir. 1995) 54 F.3d 555, 561.)

The primary focus of this appeal is whether FIFRA preempts respondents' state law claims against the manufacturer of a pest control product for breach of an express warranty and negligence. The trial court concluded the statements at issue constituted a guarantee that was outside of the label. Consequently, the court ruled that the FIFRA preemption clause did not apply.

Appellant, Consep, Inc., disagrees with the trial court's analysis. According to Consep, its agent's representations were limited to the efficacy of the product and thus were consistent with the approved label. Therefore, Consep argues, the state law claims arising from the breach of this warranty are preempted. Consep further contends the trial court misapplied certain aspects of California law.

However, Consep's logic is unpersuasive. Since the express oral warranty was based on a recommended use that was contrary to the label instructions, FIFRA does not preempt the resulting state claims. Further, as discussed in the unpublished part of this opinion, the court's construction of the applicable California law was correct. Thus, the judgment will be affirmed.

STATEMENT OF THE CASE AND FACTS

Plaintiffs and respondents, Walt Jones, Brian Jones and Brad Jones grow tree fruit. They also pack, sell and ship the fruit through their family owned and operated packinghouse, Sun Valley Packing. With respect to pest control, respondents depend on recommendations from licensed pest control advisors (PCAs).



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In 1996, based on the advice of PCA Geoff McInnes, respondents used a mating disruption product called Isomate(TM) to control oriental fruit moths. This product does not kill the pests. Rather, it releases the same pheromone that is emitted by female moths to attract males. The males become confused by the overlapping areas of pheromone and are unable to find the females. Since it is the larva that damages the fruit, this disruption in adult mating can provide very effective protection. Respondents suffered no oriental fruit moth damage the year they used Isomate(TM).

In the fall of 1996, Consep introduced CheckMate SF(TM). This is a mating disruption product aimed at two pests, oriental fruit moths and peach twig borers. The label directs the consumer to "Apply the first application early in the season, after detection of the first oriental fruit moth and prior to detection of the first peach twig borer moth" CheckMate SF(TM) provides protection for 90 to 115 days, and thus needs to be applied only twice during the season. In contrast, Isomate(TM) is effective for 45 to 60 days.

In December 1996, Buck Bonilla, a Consep representative, conducted a seminar for PCAs. As part of this product presentation, Bonilla explained that growers had two timing options for the use of CheckMate SF(TM). The product dispensers could be hung either early in the season as directed on the label, i.e., at biofix, or at mid-season.

Respondents began pest control for the 1997 season with the program that had been successful in 1996. McInnes suggested to respondents in mid-February that they use CheckMate SF(TM) for that year. However, by this time the Isomate(TM) had already been ordered. Isomate(TM) was used for the first application.

As the season progressed, McInnes continued to recommend CheckMate SF(TM). In mid-May, respondents met with McInnes and Bonilla to discuss using CheckMate SF(TM) instead of Isomate(TM) for the second application. In comparing the two products, Bonilla extolled the virtues of CheckMate SF(TM). According to Bonilla, spraying with the soft chemistry pesticide *Bacillus thuringiensis* (Bt) would clean up any oriental fruit moth or peach twig borer larvae then existing in the orchards. Thereafter, the CheckMate SF(TM) would control these pests.

Before agreeing to purchase CheckMate SF(TM), Brad Jones wanted a guarantee that this product would protect the orchards against oriental fruit moth and peach twig borer damage. McInnes recalled Jones asking Bonilla "if he guaranteed that the crop would stay clean, that we wouldn't have worms. And [Bonilla] said, 'Oh, yeah, I guarantee it. I guarantee it.'" At that point, Jones ordered the CheckMate SF(TM).

Respondents followed Bonilla's specific instructions for the use of CheckMate SF(TM). They sprayed their orchards with Bt and then hung the dispensers as directed. However, in mid-June, approximately two to two and a half weeks later, there were signs of a growing peach twig borer population. Within three to four weeks the peach twig borer problem was serious. Despite using



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harsh pesticides at this stage, respondents could not bring the problem under control. Rather, high numbers of worms remained in the fruit.

In early July respondents abandoned the CheckMate SF(TM) program. They removed the dispensers from most of the orchards and sprayed with a harsh pesticide. Within 10 days respondents were able to get the worms under control in the orchards where the CheckMate SF(TM) had been removed. However, by this time respondents had suffered a substantial crop loss attributable to peach twig borers.

Respondents filed a complaint against Consep and the retailer of Consep's product, Helena Chemical. The jury found Consep and Helena Chemical were liable for the crop loss and awarded respondents \$714,090.94 in damages. The jury found that Consep made an express warranty, breached that warranty, and was negligent.

DISCUSSION

1. Respondents' Warranty and Negligence Claims are not Preempted.

Through labeling and registration requirements, FIFRA governs the use and sale of pesticides in the United States. (*Louisiana-Pacific Corp. v. Koppers Co.* (1995) 32 Cal.App.4th 599, 603.) Under this scheme, a pesticide must be registered with the United States Environmental Protection Agency (EPA) before it is sold. (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 321.) The EPA will not register a pesticide unless it determines that the pesticide's labeling complies with FIFRA's requirements. (*Ibid.*)

To obtain registration for its product, a manufacturer must first petition the EPA. (7 U.S.C. § 136a.) As part of this process, the manufacturer must submit draft label language that complies with detailed requirements. These labeling requisites include a list of ingredients, directions for use, and any information known to the manufacturer regarding "unreasonable adverse effects of the pesticide on man or the environment." (*Etcheverry v. Tri-Ag Service, Inc.*, *supra*, 22 Cal.4th at p. 321.)

If the EPA concludes the label is inaccurate or inadequate, the pesticide will be considered "misbranded" and registration will be denied. (7 U.S.C. § 136(q).) Further, the pesticide must perform its intended function without "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." (*Etcheverry v. Tri-Ag Service, Inc.*, *supra*, 22 Cal.4th at p. 331.)

FIFRA permits a state to "regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by" FIFRA. (7 U.S.C. § 136v(a).) To maintain uniformity, FIFRA expressly prohibits states from imposing "any requirements for labeling or packaging in addition to or different from those required under"



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the act. (7 U.S.C. § 136v(b).) Under the Supremacy Clause of the United States Constitution, any state law or claim that requires a pesticide manufacturer to conform to a state law standard of care in its labeling and packaging practices is preempted. (Taylor Ag Industries v. Pure-Gro, supra, 54 F.3d at p. 559.)

In establishing the gross parameters of FIFRA preemption, the courts have looked to Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504 for guidance. There, in the context of a preemption provision in the Public Health Cigarette Smoking Act of 1969 (1969 Cigarette Act), the Supreme Court concluded that state failure to warn claims are preempted to the extent they require a showing that the defendants' advertising or promotions should have included additional or clearer warnings. (Id. at p. 524.) However, the court found that preemption did not apply to claims that rely solely on the defendants' testing or research practices or other actions unrelated to advertising or promotion. (Ibid.) Further, breach of express warranty claims based on representations voluntarily made are not preempted by the 1969 Cigarette Act. (505 U.S. at pp. 525-526.)

There is no notable difference between the preemption provision language in the 1969 Cigarette Act and the corresponding language in FIFRA. (Taylor Ag Industries v. Pure-Gro, supra, 54 F.3d at p. 559.) Consequently, the courts considering FIFRA have adapted the United Supreme Court's approach in Cipollone. "[T]he central inquiry in each case is whether the legal duty that is the predicate of the common law damages action constitutes a State 'requirement[] for labeling or packaging in addition to or different from' the FIFRA requirements" (Etcheverry v. Tri-Ag Service, Inc., supra, 22 Cal.4th at p. 335.) Thus, when a state law claim, however couched, would effectively require a manufacturer to include additional or different information in a pesticide's federally approved label or promotional material, it is preempted by FIFRA. (Worm v. American Cyanamid Co. (4th Cir. 1993) 5 F.3d 744, 749.)

When this approach is applied, certain categories of claims are consistently dismissed. Claims that are founded on a failure to warn of the risks of using the pesticide, or on breach of an express warranty required and approved by the EPA are preempted by FIFRA. (Etcheverry v. Tri-Ag Service, Inc., supra, 22 Cal.4th at p. 334; Welchert v. American Cyanamid, Inc. (8th Cir. 1995) 59 F.3d 69, 72-73.) These claims challenge the product label itself, either directly or indirectly. Further, preemption cannot be avoided simply because the challenged misrepresentations or warranties were made separately from the label. Off-label statements are preempted if they merely repeat information in the label itself. (Kuiper v. American Cyanamid Co. (7th Cir. 1997) 131 F.3d 656, 662-663.)

However, FIFRA does not preempt the entire field of pesticide regulation. Claims that are not label-based are not preempted. Accordingly, courts have permitted injured plaintiffs to assert state law claims against pesticide manufacturers for negligent testing, formulation, or manufacture of their products. (Worm v. American Cyanamid Co., supra, 5 F.3d at p. 749.) More importantly here, where a pesticide manufacturer or retailer has voluntarily warranted a product's fitness for a particular purpose, courts have permitted plaintiffs to assert state law claims for breach of that



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warranty. (Prather v. Ciba-Geigy Corp. (W.D.La.1994) 852 F.Supp. 530, 532.) Such a voluntary contractual commitment is not preempted. It is a warranty "'imposed by the warrantor,'" rather than a requirement imposed by a state. (Papas v. Upjohn Co. (11th Cir. 1993) 985 F.2d 516, 520.) The critical question is whether such a warranty actually addresses matters outside the scope of the required label. If so, an action may lie. (Etcheverry v. Tri-Ag Service, Inc., supra, 22 Cal.4th at p. 337.)

Here, Consep, through its agent Bonilla, recommended a use of CheckMate SF(TM) that was contrary to the label directions and then guaranteed this procedure would control the target pests. When respondents suffered crop damage due to the ineffectiveness of this pest control program, they asserted claims for breach of express warranty and negligence against Consep.

Consep characterizes respondents' claims as being label-based. According to Consep, the warranty was simply that the product would work as it was labeled to do. Consep notes that, in approving the CheckMate SF(TM) label, the EPA determined it would control the listed pests. Thus, Consep argues, permitting state claims founded on the ineffectiveness of this product would be tantamount to allowing California to regulate pesticide labeling indirectly in violation of FIFRA.

However, Consep misconstrues respondents' theory. Respondents are not basing their breach of express warranty and negligence claims on a general warranty of fitness. Rather, respondents are relying on Consep's express oral guarantee that CheckMate SF(TM) would control peach twig borers when applied for the first time mid-season. As explained below, FIFRA does not preempt the claims based on this guarantee.

First, the statements at issue did not merely repeat information in the label itself. Rather, Consep's recommended application schedule contradicted the EPA approved label directions. The label directed a first application early in the season and a second midseason application. Thus, Consep's statements were clearly "off-label." Second, Consep voluntarily made this guarantee in order to induce respondents to purchase its product. Consequently, Consep's duty to honor that promise was self-imposed. FIFRA preemption is limited to requirements imposed by a state.

In sum, Consep's express warranty falls outside the scope of the CheckMate SF(TM) label. Thus, respondents are not challenging the adequacy of that label, either directly or indirectly. Since this lawsuit does not seek to impose "any requirements for labeling or packaging in addition to or different from those required under" FIFRA (7 U.S.C. § 136v(b), respondents' claims are not preempted.²

2. FIFRA Has no Impact on the Label's Damage Limitation.

The relevant CheckMate SF(TM) label contains the following paragraph entitled "WARRANTY AND LIMITATION OF DAMAGES":



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"Consep, Inc. warrants that this material conforms to the chemical description on the label. Consep, Inc. neither makes, nor authorizes any agent or representative to make, any other warranty of fitness or of merchantability, guarantee or representation, express or implied, concerning this material. Consep, Inc.'s maximum liability for breach of this warranty shall not exceed the purchase price of this product. Buyer and user acknowledge and assume all risks and liabilities resulting from the handling, storage and use of this material, whether in accordance with directions or not."

Consep contends that, because the CheckMate SF(TM) label was approved by the EPA, this paragraph must be enforced. Consequently, Consep argues its maximum liability for breach of warranty is limited to the purchase price of the product. According to Consep, the trial court's application of California law to the damage limitation and warranty disclaimer violates the FIFRA preemption rules.

Kawamata Farms v. United Agri Products (1997) 86 Hawaii 214 [948 P.2d 1055] presented a similar situation. There the trial court refused to enforce a pesticide label's limitation of liability and warranty disclaimer on unconscionability grounds. The trial court held that these clauses escaped preemption by FIFRA because neither one was required by FIFRA. (948 P.2d at p. 1081.)

The Hawaii Supreme Court agreed with this analysis. The trial court's ruling did not force the defendants to remove or alter the subject label. Rather, certain clauses were simply deemed unenforceable. (Kawamata Farms v. United Agri Products, *supra*, 948 P.2d at p. 1081.) Consequently, the trial court did not violate FIFRA. Moreover, the Hawaii Supreme Court refused to interpret FIFRA so as to allow a manufacturer of a pesticide to avoid tort liability merely by placing a disclaimer on a label and then claiming FIFRA preemption. (*Id.* at pp. 1081-1082.)

The Kawamata Farms analysis is reasonable and should be applied here. Since FIFRA does not require a pesticide label to include a damages limitation clause, applying state law to determine whether such a clause is valid does not constitute "a State "requirement[] for labeling or packaging in addition to or different from" the FIFRA requirements" (Etcheverry v. Tri-Ag Service, Inc., *supra*, 22 Cal.4th at p. 335.) Therefore, when the trial court refused to enforce the damage limitation provision contained in the EPA approved CheckMate SF(TM) label, it did not violate FIFRA.

3. Consep Has not Demonstrated Instructional Error Regarding Disclaimers.³

Consep contends the trial court gave incorrect and conflicting instructions on the subject of disclaimers. According to Consep, the jury should not have been instructed on California law where the label had received federal approval. Consep makes this claim by referring to certain instructions, stating that they were given out of context, and then asserting that these instructions were "prejudicial, confusing, and wrong." However, Consep does not support this position with further argument or citation of authority.



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This claim fails for two reasons. First, the underlying assumption of Consep's argument is that FIFRA preempts respondents' causes of action for breach of express warranty and negligence. As discussed above, FIFRA does not preempt these claims. Thus, instructions on California disclaimer law were neither incorrect nor inconsistent.

Second, this contention is unsupported. Consequently, it is deemed to be without foundation and abandoned. (*People v. Crittenden* (1994) 9 Cal.4th 83, 153.) It is not up to the reviewing court to develop the appellant's arguments. (*Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.) In sum, Consep has not demonstrated instructional error.

4. The Trial Court Correctly Instructed the Jury Regarding the Product Label.

The crux of respondents' claim against Consep is Bonilla's express guarantee that CheckMate SF(TM) would control the target pests when applied in a manner that was contrary to the label directions. The CheckMate SF(TM) label includes a disclaimer aimed at such guarantees. This label states "Consep, Inc. neither makes, nor authorizes any agent or representative to make, any other warranty of fitness or of merchantability, guarantee or representation, express or implied, concerning this material."

At trial, respondents established that they did not see or read the CheckMate SF(TM) label until after the purchase and delivery of this product. Consep argues that since the label was not read, the court erred in instructing the jury on the requirement that disclaimers be conspicuous. Consep asserts that these instructions were unnecessary. However, as with the instructional errors alleged above, Consep has not provided support for this contention. Consequently, this argument will be deemed to be without foundation and abandoned. (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 153.)

Consep also contends that, whether or not respondents read the label, they are bound by its terms and the jury should have been instructed accordingly. In other words, the label disclaimer should exclude Bonilla's express warranty.

Under California Uniform Commercial Code section 2316, a disclaimer must give way to an express warranty unless some clear agreement between the parties dictates otherwise. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 119.) At the very least, a warranty can be limited only by means of words that clearly communicate that a particular risk falls on the buyer. (*Ibid.*) Thus, where a buyer relies on the seller's express warranty in purchasing a product, a unilateral disclaimer does not exclude that warranty. (*Fundin v. Chicago Pneumatic Tool Co.* (1984) 152 Cal.App.3d 951, 958.) As explained by the court in *India Paint Co. v. United Steel Prod. Corp.* (1954) 123 Cal.App.2d 597, where "sales transactions are entered into on the basis of anterior warranties, it is universally held that an attempt to disclaim the binding effect of such warranties upon or after delivery of the goods, by means of language on an invoice, receipt or similar notice, is ineffectual" The exception to this rule is where the buyer either assents or is charged with knowledge of nonwarranty as to the transaction. (*Id.* at p.



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608.)

Here, respondents relied on Bonilla's express warranty in purchasing the CheckMate SF(TM) from Consep. Under these circumstances, it does not matter whether respondents read the general warranty disclaimer when the product was thereafter delivered. Pursuant to California Uniform Commercial Code section 2316, the disclaimer must give way to the express warranty. There was no evidence of any agreement between the parties to the contrary. Consequently, the trial court correctly refused Consep's proposed jury instruction on respondents' failure to read the product label.

5. Bonilla's Statements Created an Express Warranty.

Consep takes the position that Bonilla did not make an express warranty as a matter of law. Rather, Consep interprets Bonilla's guarantee that the "crop would stay clean" with a mid-season application of CheckMate SF(TM) as mere "sales puffing." According to Consep, these statements were nothing but general assertions of superiority, made by a salesman to sell a product.

California Uniform Commercial Code section 2313 sets forth the statutory parameters of express warranties. Subdivision (1)(a) provides that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." Formal words such as "warranty" or "guarantee" are not required. (Cal. U. Com. Code, § 2313, subd. (2).) Further, the representation need only be a factor or consideration inducing the buyer to enter into the bargain. (Keith v. Buchanan (1985) 173 Cal.App.3d 13, 23.) However, the seller's affirmation of value or an expression of opinion or commendation of the goods does not create an express warranty. (Id. at p. 19.)

Determining whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult. The decision is frequently dependent on the facts and circumstances existing at the time the statement is made. (Keith v. Buchanan, supra, 173 Cal.App.3d at p. 21.) Factors that tend to indicate an opinion include (1) a lack of specificity in the statement made; (2) a statement that is made in an equivocal manner; or (3) a statement that reveals that the goods are experimental in nature. (Ibid.)

Currently, the trend is toward narrowing the scope of representations that are considered opinion, sometimes referred to as "'puffing'" or "'sales talk.'" (Keith v. Buchanan, supra, 173 Cal.App.3d at p. 21.) Thus, the liability that flows from broad statements made by manufacturers or retailers as to the quality of their products has expanded. (Ibid.) In fact, statements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless the buyer could only have reasonably considered those statements to be opinion. (Ibid.)

Here, before deciding whether to purchase the CheckMate SF(TM), Brad Jones asked Bonilla directly



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if he would guarantee that the product would work. Bonilla then stated " "Oh, yeah, I guarantee it. I guarantee it." " Thereafter, respondents made the purchase.

The only reasonable interpretation of this exchange is that an express warranty was created. Bonilla promised that a mid-season application of the product would work. His statements were specific and unequivocal. Further, Brad Jones relied on Bonilla's statement in making the purchase. The jury's finding that Bonilla made an express warranty is clearly supported by the record.

6. Respondents Suffered Property Damage.

Respondents sought compensation for the damage to their crop based on breach of express warranty and negligence. Consep asserts respondents cannot recover for negligence because the alleged tort did not result in either personal injury or property damage. According to Consep, respondents merely suffered economic damages, i.e., lost profits due to a drop in production.

However, contrary to Consep's position, respondents did suffer physical injury to property. The peach twig borers did not cause production per se to fall. Rather, the pests damaged what would otherwise have been marketable fruit. Although the CheckMate SF(TM) did not itself injure the fruit, its failure to perform permitted this damage.

Additionally, the fruit at issue was tangible property. For example, theft of this fruit would have supported a criminal prosecution. (Pen. Code, § 487, subd. (b).) Also, the fruit could have been levied upon to satisfy a debt. (Civ. Code, § 3061.5; Code Civ. Proc., §§ 488,335 and 700.020.) Thus, damage to the fruit constituted property damage.

7. Consep is not Entitled to Immunity Under Food and Agricultural Code Section 12855.

CheckMate SF(TM) was registered in California with the Department of Pest Control Registration. With respect to the manufacturer of a registered pesticide, Food and Agricultural Code section 12855 provides follows:

"Except as otherwise provided in this article, the registrant is not liable for any injury or damage that is suffered solely by reason of any of the following:

"(a) The use of the pesticide for a purpose that is not indicated by the label.

"(b) The use of the pesticide contrary to the printed directions of the registrant or seller.

"(c) The breach of any warranty by the registrant that is not expressly printed on the label."

Consep argues that since respondents' lawsuit is founded on Bonilla's express guarantee that



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CheckMate SF(TM) would control the target pests when applied in a manner that was contrary to the label directions, it is immune from liability. According to Consep, the public policy of keeping the label as the single controlling document entitles it to judgment under Food and Agricultural section 12855, subdivisions (b) and (c). However, the misapplication of the CheckMate SF(TM) was at Consep's direction. Under these circumstances, Consep cannot escape liability.

Food and Agricultural Code section 12855, subdivision (b) does not provide unconditional immunity for a pesticide manufacturer. Rather, the damage must be "suffered ... solely by reason of" the use of the pesticide contrary to the printed directions. The inclusion of the word "solely" is key. (John Norton Farms, Inc. v. Todagco (1981) 124 Cal.App.3d 149, 174.) One can reasonably interpret its placement as indicating an intent to limit immunity to situations where the manufacturer's involvement in the injury-producing situation does not extend beyond placing the product in the stream of commerce. In other words, the misuse of the pesticide must be solely the fault of the consumer. Otherwise, a pesticide manufacturer could urge the customer to use the product contrary to the printed label and then claim immunity for any resulting damages. Such an interpretation would be a travesty.

Similarly, Consep cannot rely on being exempt from liability for breaching a warranty that was not expressly printed on the label. The analysis of Food and Agricultural Code section 12855 with respect to Consep's misuse recommendation applies with equal force to Consep's concomitant warranty. Additionally, although a manufacturer can limit the warranties printed on the pesticide's label, it cannot exclude or waive the implied warranty that the pesticide is reasonably fit for use for any purpose for which it is intended. (Food & Agr. Code, §§ 12853 and 12854, subd. (b).) Thus, where, as here, the pesticide was applied as Consep directed, Consep cannot disavow liability on grounds of immunity for breaching its oral warranty that the product would be effective, i.e., would be reasonably fit to control the targeted pests.

Consep's attempt to escape liability on the ground that respondents' off label use of CheckMate SF(TM) was illegal is also without merit. It was Consep, not respondents, who instigated this illegal use.

8. The Trial Court Correctly Refused to Instruct on a Recommendation Presumption.

Consep argues that the Food and Agricultural Code section 12974 presumption applies to this case and the jury should have been so instructed. Section 12974 provides that "[f]ailure of a person using a pesticide to possess a written recommendation shall create a rebuttable presumption that he or she has assumed responsibility for the recommendation." Consep notes that Bonilla did not personally write a recommendation.

However, respondents did possess a written recommendation for the mid-season application of CheckMate SF(TM). McInnes issued this recommendation. Bonilla and McInnes were jointly



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advising respondents on pest control. Requiring each PCA to provide a written recommendation in such a situation is neither legally required nor logical. Thus, the trial court correctly refused Consep's proffered jury instruction.

9. The CheckMate PTB(TM) Flyer was Admissible.

The content of a flyer distributed by Consep to advertise CheckMate PTB(TM), a mating interruption product, was discussed during the testimony of several witnesses. This flyer promoted a mid-season use of CheckMate PTB(TM) to control peach twig borers in almond orchards. In doing so, the flyer referred to there recently having been high counts of trapped peach twig borer moths in the area.

Consep contends this testimony should not have been permitted on relevancy grounds in that it related to a different product and a different crop. According to Consep, the entire proceeding was contaminated by the improper references to this flyer.

However, the flyer was relevant to this proceeding. It demonstrated that Consep was aware of the high peach twig borer count in the area when recommending a mid-season application of CheckMate SF(TM) to control this pest in respondents' orchards. Consequently, the trial court did not err in permitting this testimony.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

WE CONCUR:

Buckley, Acting P.J.

Cornell, J.

1. Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of parts 3 through 9.
2. Consep has requested this court to take judicial notice of various EPA documents pertaining to CheckMate SF(TM) label modifications. However, these documents are not relevant to the disposition of this appeal. Therefore, Consep's request is denied.
3. See footnote on page 1, ante.

