

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL

Gerald Mitchell and Peter Pflaum,	:	Civil Case No. _____
	:	
	:	
	:	COMPLAINT
Plaintiffs,	:	
v.	:	JURY TRIAL DEMANDED
	:	
E. I. DU PONT DE NEMOURS AND	:	
COMPANY, a Delaware corporation,	:	
	:	
Defendant.	:	

Plaintiffs Gerald Mitchell and Peter Pflaum, for their Complaint and Jury Demand against Defendant, allege as follows:

INTRODUCTION

1. Plaintiffs file this action for damages incurred by Defendant’s Imprelis™ herbicide (“Imprelis”). Professional lawn care companies and consumers of lawn care products throughout the country applied Imprelis to property to the detriment of mature landscape trees, including Norway Spruce and white pine.

2. The U.S. Environmental Protection Agency (EPA) conditionally registered Imprelis on August 31, 2010. Since that time, Imprelis has been advertised, marketed, and sold to lawn-product consumers as being both highly effective and environmentally friendly. Defendant advertises Imprelis as “the most scientifically advanced turf herbicide in over 40 years,” and states that it “is effective against the most common broadleaf weeds of turfgrass, plus many hard-to-control broadleaf weeds—making it an excellent choice for any weed management

program.” In addition, Defendant notes that it “exhibits favorable environmental and toxicological characteristics,” it has “[l]ow toxicity to mammals and low environmental impact,” and it has “one of the lowered application rates in lawn care, making it easy on the environment.” But immediately following widespread use of Imprelis, reports of damage to trees emerged.

3. In initial reports of tree damage from northeastern states in May and June 2011, the most common injuries were to two coniferous species, Norway spruce and white pine. In Minnesota, reports to the University of Minnesota Extension and the Minnesota Department of Agriculture showed most injuries to white spruce, including its geographical variety Black Hills spruce and white pine, as well as injury to other conifer and broadleaf plants. Photographs from the University of Minnesota Extension web site provide graphic depictions of the scope and severity of the damage:¹



¹ Photos credited to Kathy Zuzek. *New Turfgrass Herbicide Linked to Injury on Some Spruces, Pines, and Other Landscape Plants*, available at <http://blog.lib.umn.edu/efans/ygnews/2011/07/new-turfgrass-herbicide-linked.html>

4. Defendant issued a letter to turf management professionals on June 17, 2011, stating that it was investigating the reports. In the interim, Defendant recommended that Imprelis not be applied “where Norway Spruce or White Pine are present on, or in close proximity to, the property being treated.”

5. A New York Times article from July 14, 2011 quotes a landscape service manager who reports that the herbicide seems most prone to affect trees with shallow root systems, including willows, poplars, and conifers.²

6. The EPA launched an investigation in July 2011.³

7. On August 11, 2011, the EPA issued a Stop Sale, Use, or Removal Order to Defendant regarding Imprelis.⁴

8. Plaintiffs bring claims pursuant to Minnesota’s Consumer Fraud, Product Liability, Trespass, Nuisance, and Commercial Sales statutes, and also allege violations of Minnesota common law. Plaintiffs seek restitution, disgorgement, and reasonable damages in amounts in excess of \$50,000, including but not necessarily limited to compensatory and consequential damages, treble damages, pre and post judgment interest, costs, and reasonable attorneys’ fees.

PARTIES

9. Plaintiff Gerald Mitchell is a resident of Florida and owns property in Wayzata, Minnesota.

10. Plaintiff Peter Pflaum is a resident of Wayzata, Minnesota.

² Jim Robbins, *New Herbicide Suspected in Tree Deaths*, N.Y. Times, July 14, 2011, available at http://www.nytimes.com/2011/07/15/science/earth/15herbicide.html?_r=1&pagewanted=all

³ *Imprelis and Investigation of Damage to Trees*, Pesticides, US EPA (July 2011), <http://www.epa.gov/pesticides/regulating/imprelis.html>.

⁴ *E.I. du Pont de Nemours and Company Imprelis Order* <http://www.epa.gov/compliance/resources/cases/civil/fifra/dupontimprelis.html>

11. Defendant E. I. du Pont de Nemours and Company (“Defendant,” “DuPont,” or the “Company”) is a Delaware corporation with a principal place of business at 1007 Market Street, Wilmington, Delaware 19898. Defendant is a global company offering a wide range of products and services in agriculture, nutrition, electronics, communications, safety and protection, home and construction, transportation and apparel.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this matter pursuant to Minnesota Statutes sections 484.01, Subdivision 1(1) and 543.19.

13. Venue is proper in this judicial district pursuant to Minnesota Statutes section 542.02 as an action relating to injuries to land within Hennepin County, and within this District.

FACTUAL ALLEGATIONS

14. Defendant is a science-based products and services company founded in 1802, which offers a wide variety of products and services related to agriculture, nutrition, electronics, communications, safety and protection, home and construction, transportation, and apparel.

15. On October 4, 2010, Defendant issued a press release announcing that Imprelis was registered with the EPA and that it had begun the registration process in individual states in order to enable it to market and sell in those states.⁵

16. The active ingredient in Imprelis is aminocyclopyrachlor. Aminocyclopyrachlor is classified as a synthetic auxin or growth regulator. In susceptible plants, the herbicide produces characteristic twisting and curling of foliage, ultimately leading to plant death.

⁵ Press Release, DuPont, New DuPont™ Imprelis™ Herbicide Provides Post-Emergent Control of Dandelion and Clover Plus Tough to Control Broadleaf Weeds: New Technology Means More Application Freedom—No Waether or Reseeding Restrictions (Oct. 4, 2010), http://www2.dupont.com/Professional_Products/en_US/News_and_Events/Release_10_04_2010.html.

17. The EPA's initial registration, dated August 31, 2010, states the term of issuance is conditional, and requests additional information and medications to the Imprelis label. In addition, the EPA's registration specifically states that, "[r]egistration is in no way to be construed as an endorsement or recommendation of this product by the Agency." Defendant's press release did not acknowledge that its EPA registration was conditional, nor did it acknowledge that the EPA did not endorse or recommend registered products.

18. Defendant's October 2010 press release stated that independent university researchers and contractors conducted over 400 field trial protocols.⁶ Defendant trumpeted these studies as evidence that Imprelis is effective against weeds that are typically difficult to control, and that rain, hot temperatures, and cool temperatures do not affect the product's effectiveness. The press release claimed that plant leaves and roots "readily absorb[]" Imprelis and that Imprelis stops "the growth of target weeds by interfering with the hormonal balance necessary for normal shoot and root development." Additionally, the press release touted Imprelis's ability to quickly take effect, claiming that "[h]erbicide symptoms typically first occur within a few hours to a few days after application." *Id.*

19. The October 2010 press release also described the environmental benefits of using Imprelis. The press release said, "[i]ts single active ingredient has one of the lowest application rates, combined with low toxicity to mammals and low environmental impact." A DuPont global product development employee was quoted in the press release stating, "Finally, turf professionals have access to a new herbicide chemistry that helps them do their jobs better and

⁶ See Press Release, Oct. 4, 2010, *supra* note 4.

faster, and also be good stewards of the environment.” These claims were repeated as recently as April 12, 2011, when Defendant issued a press release announcing a new 4.5-oz. package size.⁷

20. These claims are repeated on the Imprelis product page on Defendant’s Web site.⁸ The Web site describes Imprelis as “effective against the most common broadleaf weeds of turfgrass, plus many hard-to-control broadleaf weeds—making it an excellent choice for any weed management program.” Additionally, the Web site claims Imprelis is “the most scientifically advanced turf herbicide in over 40 years,” and “has one of the lowest application rates in lawn care, making it easy on the environment.” *Id.*

21. Defendant’s press releases and Web site show that Defendant marketed, advertised, and sold herbicide to consumers of lawn-care products.

22. Lawn care companies and other consumers of lawn care products have applied Imprelis to private and commercial properties throughout the United States.

23. Reports of injuries to landscape trees began in May 2011. Initially, the most common injuries from the northeastern states affected the Norway spruce and white pine species.

24. Property owners and lawn care professionals began to notice damage to trees shortly after the application of Imprelis. Symptoms include yellowing, browning, curling, and/or dieback of current-season growth.⁹ In severe cases, the entire tree turns brown and begins to lose its needles. The injury may appear in a spiral pattern because of the tree’s spiral vascular system.

⁷ Press Release, DuPont, DuPont Announces New 4.5 oz Package Size for DuPont™ Imprelis™ Herbicide: Turf Professionals Now Have Three Convenient Package Sizes for Controlling the Toughest Broadleaf Weeds (April 12, 2011), http://www2.dupont.com/Professional_Products/en_US/News_and_Events/Release_04_12_2011.html.

⁸ DuPont™ Imprelis® herbicide, http://www2.dupont.com/Professional_Products/en_US/Products_and_Services/Imprelis/index.html (last visited July 28, 2011).

⁹ Dieback is a situation where a tree begins to die from the tip of its leaves or roots backwards, and is usually caused by a disease or unfavorable environment.

25. On June 17, 2011, Defendant issued a letter to turf management professionals regarding the tree damage reports. The letter advised that Defendant was investigating the reports, and in the meantime, instructed turf management professionals not to apply Imprelis:

where Norway Spruce or White Pine are present on, or in close proximity to, the property to be treated.

Additionally, when applying Imprelis, be careful that no spray treatment, drift or runoff occurs that could make contact with trees, shrubs and other desirable plants, and stay well away from exposed roots and the root zone of trees and shrubs.¹⁰

26. On or around June 17, 2011 Defendant's Web site included a link to the above letter.

27. In July 2011, the EPA announced an investigation into Imprelis's damage to trees. The announcement states EPA's concern, and states that it has been in contact with Defendant regarding this issue.

28. On August 11, 2011, the EPA issued a Stop Sale, Use, or Removal Order to Defendant regarding Imprelis, pursuant to its authority under Section 13(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. §136k(a) ("FIFRA") to prohibit the sale or use of pesticides when there is reason to believe that the pesticide is in violation of the FIFRA or intended to be distributed or sold in violation of FIFRA. On the webpage summarizing its Order, the EPA states that it, "has reason to believe Imprelis herbicide is in violation of FIFRA based on DuPont's own test data and information gathered during EPA and state investigations," and that, "The directions for use and/or warning or caution statements on DuPont's Imprelis labeling are inadequate to protect non-target species such as conifer trees."

¹⁰ Letter from Michael McDermott, Global Business Leader, DuPont Professional Products, to Turf Management Professionals (June 17, 2011), available at http://www2.dupont.com/Professional_Products/en_US/assets/downloads/pdfs/Letter_to_Imprelis_Customers_061711.pdf.

29. During the spring of 2011, a professional landscape company applied Imprelis herbicide to Plaintiff Pflaum's property, which shares a border with Plaintiff Mitchell's property.

30. Within several weeks trees on both Plaintiffs' properties began showing signs of damage including browning at the top of trees and on several branches.

31. A focal point of Plaintiff Mitchell's property is an 80 year-old spruce tree that stands over 120 feet tall. The tree was once considered as a candidate for the "National Register of Trees." Plaintiff Mitchell's spruce tree has now been so severely damaged that it must be cut down and removed.

32. The damage and death of Plaintiffs' trees adversely affected the beauty of Plaintiffs' properties, and their enjoyment of them. Additionally, the unsightly nature of the injuries caused the properties' values to diminish.

33. Plaintiffs seek to recover amounts paid for the loss of and injury to trees, and for injuries to the aesthetics of Plaintiffs' properties as a result of Defendant's actions and the damage caused by its product Imprelis.

COUNT I
CONSUMER FRAUD, MINN. STAT. §§ 325F.68–.70

36. Plaintiffs incorporate by reference all preceding paragraphs.

37. Defendant's conduct, as alleged above, is in violation of Minn. Stat. § 325F.69. Specifically, as described in more detail above, Defendant made false and misleading statements regarding the safety of Imprelis, and concealed or omitted the fact that Imprelis caused serious environmental damage to trees including, but not limited to, Norway spruce, white pine, white spruce, Colorado blue spruce, and other conifer and broadleaf plants.

38. For example, Defendant advertised that "Imprelis™ allows turf professionals to control dandelion, clover and plantains plus the toughest broadleaf weeds—like ground ivy and

wild violets—even during reseeding or rainy days. Its single active ingredient has one of the lowest application rates, combined with low toxicity to mammals and low environmental impact.” Defendant further advertised that “Professionals treating residential and commercial lawns, golf courses, sod farms, and sensitive areas such as schools, parks and athletic fields will benefit from this new level of performance and environmental features.” Additionally, Defendant advertised that “turf professionals have access to a new herbicide chemistry that helps them do their jobs better and faster, and also be good stewards of the environment.”

39. As described in more detail above, Defendant intended for consumers to rely on its representations to purchase and use Imprelis.

40. The approved end-use label for Imprelis does not include Norway spruce and white pine as target species. The directions for use and/or warning or caution statements on DuPont’s Imprelis labeling are inadequate to protect non-target species such as conifer trees, thus resulting in a pesticide product that is misbranded.

41. Plaintiff Pflaum’s lawn service relied upon Defendant’s representations and purchased and used Imprelis, resulting in damage to Plaintiffs.

42. As a direct and proximate cause of Defendant’s violation of Minn. Stat. § 325F.69, Plaintiffs suffered, and will continue to suffer, property damage and associated costs as described above and based on the reasonable and foreseeable use of Imprelis.

COUNT II NEGLIGENCE

43. Plaintiffs incorporate by reference all preceding paragraphs.

44. Defendant, as the developer and supplier of Imprelis, has a duty to insure the safety of Imprelis and a duty to insure that the intended use of its product will not cause harm to the property on which it is applied as intended. Defendant is liable for the losses and damages

sustained by Plaintiffs that resulted directly and proximately from the negligent conduct of Defendant.

45. Defendant clearly intended that its product would be applied to private properties and therefore owes this duty to Plaintiffs as property owners.

46. Defendant unequivocally breached this duty by providing a product which both injured and killed a valuable trees owned by Plaintiffs.

47. Defendant failed to ensure the safety of its product and also failed to provide any warning or instructions with regard to the safety of pine and spruce trees.

48. Upon application of Imprelis, valuable trees on Plaintiffs' properties were injured and killed.

49. As a direct and proximate result of Defendant's actions, Plaintiffs incurred damages.

COUNT III
PRODUCT LIABILITY, MINN. STAT. § 544.41

50. Plaintiffs incorporate by reference all preceding paragraphs.

51. Defendant produced a product, Imprelis, which directly injured properties owned by Plaintiffs.

52. Defendant intended that its product would be used on properties of the type owned by Plaintiffs.

53. Defendant's product, when used as intended, caused injury and death to trees owned by Plaintiffs.

54. As a direct and proximate result of Defendant's product, Plaintiffs have incurred damages.

**COUNT IV
TRESPASS, MINN. STAT. § 561.04**

55. Plaintiffs incorporate by reference all preceding paragraphs.

56. Plaintiffs have rightful possession in their property.

57. Defendant, by acting through a professional law care company, unlawfully interfered with the properties of Plaintiffs.

58. Defendant's interference with Plaintiffs' properties caused damage to the properties of Plaintiffs, including trees, in accordance with Minn. Stat. § 561.04.

**COUNT V
COMMON LAW NUISANCE**

59. Plaintiffs incorporate by reference all preceding paragraphs.

60. Plaintiffs have the right to the use and enjoyment of their property, free from interference.

61. The damage Defendant's product caused to Plaintiffs' properties substantially interfered with their free enjoyment of their property, constituting a nuisance.

62. Defendant knew or should have known that its product would cause damage and interfere with Plaintiffs' free enjoyment of their properties.

63. Defendant is liable for damages to compensate Plaintiffs for the injury, destruction, and loss of the use of property caused by the nuisance Defendant's product created.

**COUNT VI
STATUTORY NUISANCE, MINN. STAT. § 561.01**

64. Plaintiffs incorporate by reference all preceding paragraphs.

65. Minn. Stat. § 561.01 provides: "Anything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any

person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.”

66. Plaintiffs have the right to the use and enjoyment of their property, free from interference.

67. The damage Defendant’s product caused to Plaintiffs’ properties substantially interfered with their free enjoyment of their property, constituting a nuisance.

68. Defendant knew or should have known that its product would cause damage and interfere with Plaintiffs’ free enjoyment of their properties.

69. Defendant is liable for damages to compensate Plaintiffs for the injury, destruction, and loss of the use of property caused by the nuisance Defendant’s product created.

**COUNT VII
BREACH OF EXPRESS WARRANTY**

70. Plaintiffs incorporate by reference all preceding paragraphs.

71. Defendant expressly “warrants” that Imprelis is “reasonably fit” for use as an herbicide.

72. This express warranty is part of the basis of the bargain for any direct or indirect purchaser of Imprelis.

73. Imprelis is not reasonably fit for use as an herbicide because it harms non-target vegetation even when used as directed.

74. As a direct and proximate result of Defendant’s breach of warranty, Plaintiffs have been damaged.

75. Defendant’s repeated statements that Imprelis is safe for the environment operate to create an express warranty.

76. Imprelis is not safe for the environment inasmuch as it harms non-target vegetation even when used as directed.

77. Defendant's attempted disclaimer that it created an express warranty (and other purported limitations in the warranty) by repeatedly emphasizing that Imprelis is safe for the environment is substantively and procedurally unconscionable and therefore ineffective.

78. Plaintiffs were in privity with Defendant because they are persons who could reasonably be expected to be affected by the goods in question and because they were injured by Defendant's breach of warranty.

COUNT VIII
BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY

79. Plaintiffs incorporate by reference all preceding paragraphs.

80. Defendant's attempted disclaimer of the implied warranty of merchantability is ineffective, because no reasonable person would contemplate that the proper use of an herbicide would harm substantial quantities of non-target vegetation.

81. Imprelis was sold by a merchant, as that term is defined when construing warranties pursuant to the Minnesota Uniform Commercial Code.

82. Imprelis was not merchantable because it would not and will not pass in trade without objection, nor would it be considered fit for the ordinary purposes for which herbicides are used.

83. As a direct and proximate result of Defendant's breach of warranty, Plaintiffs have been damaged.

84. Plaintiffs were in privity with Defendant because they are persons who could reasonably be expected to be affected by the goods in question and because they were injured by Defendant's breach of warranty.

COUNT IX
BREACH OF THE IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR
PURPOSE

85. Plaintiffs incorporate by reference all preceding paragraphs.

86. At the time of contracting, Defendant had reason to know that Plaintiff Pflaum's lawn care company's particular purpose for purchasing Imprelis was to kill weeds, but not trees.

87. Plaintiffs and the professional lawn care companies employed to spray Imprelis relied upon Defendant's judgment to select or furnish a product that would be suitable for their purposes, thereby creating an implied warranty that the goods furnished would be fit for these purposes.

88. Imprelis was not fit for Plaintiffs' and professional lawn care companies' intended purpose because it does in fact kill trees and other non-target vegetation, causing injury to Plaintiffs.

89. Any attempted limitation of the implied warranty of fitness for a particular purpose is substantively and procedurally unconscionable under the circumstances.

COUNT X
UNJUST ENRICHMENT

90. Plaintiffs incorporate by reference all preceding paragraphs.

91. Defendant has been unjustly enriched by their unlawful and wrongful acts as set forth above, to the detriment of Plaintiffs.

92. Defendant received compensation for Plaintiff Pflaum's purchase of Imprelis. In exchange for the purchase price, Plaintiff Pflaum expected to get "a new herbicide chemistry" that would offer effectiveness with minimal environmental damage. Plaintiffs suffered injury by use of Imprelis. Upon information and belief, Defendant is not going to pay for the injuries caused by its product and has been unjustly enriched.

93. Defendant should be divested of this unjustly gained enrichment with such damages awarded to Plaintiffs in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief as follows:

- A. For an order awarding Plaintiffs restitution and/or disgorgement and other equitable relief as the Court deems proper;
- B. For an order of Judgment against Defendant for Plaintiffs' consumer fraud claim (Count I) in whatever amount Plaintiffs are found to be entitled, plus interest, costs, reasonable attorneys' fees, and such other relief as the Court deems just and appropriate;
- C. For an order of Judgment against Defendant for Plaintiffs' negligence claim (Count II) in whatever amount Plaintiffs are found to be entitled, plus interest, costs, reasonable attorneys' fees, and such other relief as the Court deems just and appropriate;
- D. For an order of Judgment against Defendant for Plaintiffs' product liability claim (Count III) in whatever amount Plaintiffs are found to be entitled, plus interest, costs, reasonable attorneys' fees, and such other relief as the Court deems just and appropriate;
- E. For an order of Judgment against Defendant for Plaintiffs' trespass claim (Count IV) in whatever amount Plaintiffs are found to be entitled, plus treble the amount of damages incurred, interest, costs, and reasonable attorneys' fees;
- F. For an order of Judgment against Defendant for Plaintiffs' common law nuisance claim (Count V) in whatever amount Plaintiffs are found to be entitled, plus interest, costs, and reasonable attorneys' fees;

- G. For an order of Judgment against Defendant for Plaintiffs' statutory nuisance claim (Count VI) in whatever amount Plaintiffs are found to be entitled, plus interest, costs, and reasonable attorneys' fees;
- H. For an order of Judgment against Defendant for Plaintiffs' breach of express warranty claim (Count VII) in whatever amount Plaintiffs are found to be entitled, plus interest, costs, and reasonable attorneys' fees;
- I. For an order of Judgment against Defendant for Plaintiffs' breach of implied warranty of merchantability claim (Count VIII) in whatever amount Plaintiffs are found to be entitled, plus interest, costs, and reasonable attorneys' fees;
- J. For an order of Judgment against Defendant for Plaintiffs' breach of implied warranty of fitness for a particular purpose claim (Count IX) in whatever amount Plaintiffs are found to be entitled, plus interest, costs, and reasonable attorneys' fees;
- K. For an order of Judgment against Defendant for Plaintiffs' unjust enrichment claim (Count X) in whatever amount Plaintiffs are found to be entitled, plus interest, costs, and reasonable attorneys' fees;
- L. For an order awarding Plaintiffs reasonable attorneys' fees and costs of suit incurred herein; and
- M. For an order awarding such other and further relief as this Court may deem just and proper.

DATED: August 17, 2011

Respectfully submitted,

ZIMMERMAN REED, PLLP

By: _____

Charles S. Zimmerman (#0120054)

David M. Cialkowski (#0306526)

Kirsten D. Hedberg (#0344369)

Dori H. Handy (#0389325)

1100 IDS Center

80 South 8th Street

Minneapolis, MN 55402

Telephone: (612) 341-0400

Facsimile: (612) 341-0844

Email: charles.zimmerman@zimmreed.com

david.cialkowski@zimmreed.com

kirsten.hedberg@zimmreed.com

dori.handy@zimmreed.com

GUSTAFSON GLUEK PLLC

Daniel E. Gustafson (#202241)

Jason S. Kilene (#024773X)

Ellen M. Ahrens (#0391004)

650 Northstar East

608 Second Avenue South

Minneapolis, MN 55402

Telephone: (612) 333-8844

Facsimile: (612) 339-6622

Email: dgustafson@gustafsongluek.com

jkilene@gustafsongluek.com

eahrens@gustafsongluek.com

Counsel for Plaintiffs