

Suit Challenges EPA FIFRA Enforcement Action Against Products Sold as “Cleaning Agents”

November 11, 2020

This article was originally published in Wiley’s The WELL blog.

The U.S. Environmental Protection Agency (EPA) has made clear that, during the COVID-19 pandemic, it will aggressively pursue businesses that it believes are selling unregistered pesticide products. A recent press release from EPA Region 2 touting its enforcement activities is one example of this. But is EPA, in some instances, pushing the boundaries of its jurisdiction in pursuing its objectives? A recent suit filed by Zuru, LLC, claims that it has crossed the line. Zuru distributes a cleaning wipe product called “Bactive” that contains chlorhexidine digluconate, which is an active ingredient in some registered disinfectants. Bactive’s packaging, however, makes no express pesticidal claims. The suit (*Zuru, LLC v. U.S. EPA et al.*, 20-cv-2433 (D. D.C. filed October 5, 2020)) may help delineate the boundary between “pesticides” and “cleaning products” under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Under EPA’s implementing regulations for FIFRA, the Agency has broad authority to regulate “pesticides,” that is, products that are “intended for … preventing, destroying, repelling, or mitigating any pest... .” 40 C.F.R. § 152.15. That section also lays out several ways that the requisite intent can be found. The seller could “claim[], state [], or impl[y]” that the product can be used as a pesticide. The product could contain an active ingredient that has no other commercially valuable purpose. Or, the seller could have “actual or constructive knowledge” that the product “will be used, or is intended to be used, for a pesticidal purpose.”

FIFRA’s implementing regulations also specify a group of products that are subject to a different test, set forth in 40 C.F.R. § 152.10: “[d]

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odorizers, bleaches, and cleaning agents." These three types of products "are not considered to be pesticides unless a pesticidal claim is made on their labeling or in connection with their sale and distribution." Thus, on one hand, the inquiry is simplified – there is no need to inquire into the "actual or constructive knowledge" of the seller," or whether the "active ingredient ... has no other commercially valuable purpose."

Complexity creeps back in, however, as it now must be determined whether a product is a deodorizer, bleach, or cleaning agent within the meaning of 40 C.F.R. § 152.10. We know that, even if a product might also be a disinfectant, it can still be a cleaning agent or deodorizer, because bleaches are disinfectants, and this does not take them outside 40 C.F.R. § 152.10. EPA has published a "Fact Sheet" entitled "Determining If a Cleaning Product Is a Pesticide Under FIFRA" which states that "for the purposes of the fact sheet" "cleaning products" (which the fact sheet appears to be using as a catch-all for "cleaning agents" and "deodorizers") are products which are "intended to clean away or remove inanimate material from a surface, water or air."

The fact sheet states that, for cleaning products, the relevant inquiry is whether any "claim or implication" of pest mitigation is made "in connection with the sale or distribution." This includes elements of the "claim[], state[], or impl[y]" language in 40 C.F.R. § 152.15 and the "unless a ... claim is made" language in 40 C.F.R. § 152.10. A statement made by a third party could be probative of whether the seller has constructive knowledge that its product will be used to disinfect (relevant under 40 C.F.R. § 152.15). But when might third party statements be part of the "sale or distribution" of a product as described in 40 C.F.R. § 152.10?

This question, as well as the necessary level of "implication" of pesticidal activity needed to constitute a pesticidal claim, may soon be litigated if Zuru's suit proceeds.

Zuru's "Bactive" cleaning wipes contain chlorhexidine digluconate, a registered pesticide active ingredient. Bactive's packaging does not make any explicit pesticidal claims. But EPA has observed that third party resellers have described the wipes as "disinfecting," stated that they "kill germs," and displayed them alongside disinfectant products. Comments-section sleuths on Target.com have also informed fellow shoppers that "[t]hese ARE disinfecting wipes, unlike the other comments state! READ THE INGREDIENTS and do a SEARCH online!"

EPA also takes issue with the implications of the Bactive wipe packaging, specifically noting that "the name and logo imply that the product is intended for antimicrobial use and public health protection, and that the word 'Bactive' implies bacterial fighting properties." EPA also argues that the cross logo is considered a universal first aid sign. Images of the packaging are included as Exhibit 1 to Zuru's complaint.

EPA has not yet seen fit – the litigation being in its early stages – to further observe that Bactive also evokes bacta, the fictional, presumably antiseptic, liquid in which indispensable characters in the Star Wars films are immersed after finding themselves on the business end of a lightsaber or wampa ice creature.

EPA and Zuru have jointly requested a 30-day extension to EPA's deadline to answer so that they may possibly "resolve the claims ... without further litigation." Absent such resolution, or a further extension, EPA's answer will be due December 8, 2020. If the case proceeds, it could help determine the contours of the "cleaning agent" provisions of 40 C.F.R. § 152.10.