Federal Court Curtails EPA's Ability to Use its Enforcement Authority Under FIFRA

In a landmark case litigated by Arnold & Porter LLP attorneys, which resolved an important issue of pesticide law that had remained unsettled for more than 30 years, the District Court of the District of Columbia (Court) sharply limited the ability of the Environmental Protection Agency (EPA or the Agency) to take enforcement actions against properly registered pesticide products. The Court ruled that EPA is barred from bringing an enforcement action in lieu of the administrative cancellation procedures set forth in Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. The decision is likely to have a profound and far-reaching effect on EPA's future regulation of pesticides.

Background

FIFRA requires all pesticides marketed within the United States to be registered with EPA in accordance with the FIFRA registration standard. The statute grants EPA authority to bring an enforcement action against registrants who distribute a product unlawfully, such as when the product does not bear required labeling or when the product has been misformulated. *See* Sections 12 and 14 of FIFRA. The statute also authorizes EPA to cancel or suspend a registration whenever EPA believes a product does not comply with FIFRA or when it fails to meet the FIFRA registration standard. *See* Section 6. The FIFRA cancellation process entitles registrants to request that certain administrative procedures be undertaken, including a hearing before an administrative law judge, and referral of matters of scientific fact to a panel of the National Academy of Sciences.

While the statute requires EPA to follow the Section 6 process if it wishes to remove a product from the market (or restrict its use), EPA has recently asserted the authority to take enforcement actions against registered products—that are in full compliance with their registrations—on the grounds that the registration no longer meets the Section 3 registration standard. *See, e.g.,* EPA's Risk Mitigation Decision for Ten Rodenticides (RMD), *available at* http://www.epa.gov/oppsrrd1/reregistration/rodenticides/finalriskdecision.htm. Reckitt Benckiser, the maker of the d-CON brand of rodenticides, challenged EPA's position in *Reckitt Benckiser Inc.* v. *Jackson*, contending that FIFRA requires EPA to follow the hearing and other administrative requirements of Section 6 before taking enforcement

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actions. In January, the District Court of the District of Columbia agreed.

The pertinent facts underlying this case began in 2008, when EPA decided, following a FIFRA Section 4 reregistration review, that the Agency would require all makers of rodenticide products that contain a specific class of active ingredients (specifically, "second-generation" anticoagulants) to voluntarily cancel their registrations for all residential consumer uses of those products. The Agency's RMD also required registrants to cease distribution of those consumer products by June 4, 2011,[1] and stated that any products that did not conform to the RMD and that were distributed by registrants following the June 4, 2011 "sell by" date would be considered "misbranded". Misbranded products can be subject to EPA enforcement actions which can include civil and criminal penalties, and stop sale, use, and removal orders (SSUROs).

Reckitt Benckiser's Refusal to Voluntarily Cancel its Registrations

Reckitt Benckiser, in meetings and in written comments filed with the Agency, had criticized the scientific and logical underpinnings of the RMD. After publication of the RMD, Reckitt Benckiser notified the Agency that it would not "voluntarily" cancel its registrations and requested that EPA commence the statutorily required cancellation proceedings. Following discussions with the Agency, it became apparent that EPA did not intend to commence cancellation proceedings before the June 2011 "sell by" date. Moreover, the Agency's threats to bring "misbranding" enforcement actions began to gain traction with retailers, causing them to "de-select" Reckitt Benckiser's products in favor of its competitors' products.

Litigation

Reckitt Benckiser filed suit in federal district court in early 2009, seeking to prevent EPA from initiating misbranding or other enforcement actions against the company's affected products until the cancellation procedures of FIFRA Section 6 had been completed. After the district court originally dismissed the case for lack of jurisdiction, the Court of Appeals for the District of Columbia Circuit reversed that decision. The court of appeals unanimously held that EPA's interpretation that it had the right under FIFRA in such circumstances to take an enforcement action was final agency action reviewable by the district court under FIFRA Section 16(a). The DC Circuit also found that EPA's determination of its right to take an enforcement action was a "final agency action" that was "ripe for review." The case was remanded to the District Court.

Victory on Remand

On remand, the district court definitively determined that EPA lacks the authority under FIFRA to bring a misbranding action in lieu of a cancellation proceeding based on noncompliance with the RMD, and enjoined the Agency from bringing an enforcement action on these grounds prior to completing the administrative cancellation procedures required by FIFRA.

The Court's opinion carefully reviews the text, structure, and legislative history of FIFRA to determine whether the language of the act and Congress' intent were clear with respect to how EPA should exercise its authority to remove a registered product from the market. The court agreed with the company that EPA must follow the detailed procedures of Section 6 when it wants to cancel or suspend a registration and may not bypass this process by bringing an enforcement action. The court concluded that EPA's interpretation of FIFRA in essence "renders Section 6 superfluous" and "allows EPA to avoid the rigorous cancellation process Congress provided for in the statute." Additionally, the Court rejected EPA's argument that provisions in FIFRA allowing it to take "appropriate regulatory action" encompassed the authority to take enforcement actions without first following Section 6. The Court relied in part on the legislative history of the 1964 amendments to FIFRA that created the predecessor to the current registration process, and held that those revisions were intended to prevent EPA from taking enforcement actions against licensed products, and to give registrants

1 The RMD permitted without explanation, however, the very same rodenticide active ingredient to be used in products sold in bulk for use in agricultural settings, and for use by application-for-hire services.

procedural protections against arbitrary EPA actions. The Court stated that "[t]o accept EPA's interpretation in the present case would recreate precisely the same problem Congress intended to eliminate in 1964—forcing plaintiff to accede to EPA's demand that it change its products to conform to reregistration standards of the RMD or face the severe sanctions of enforcement proceedings."

Implications of the Decision

The Court's opinion is likely to limit EPA's enforcement options in areas other than the reregistration of pesticides. The Agency historically has used a variety of informal means to regulate pesticides and to impose requirements on registrants short of rulemaking, cancellation, or re-classification proceedings—and often based on the explicit or implicit threat that a recalcitrant registrant could be subject to enforcement actions. For example, Reregistration Eligibility Determinations and Risk Mitigation Decisions are published routinely by EPA following reregistration and registration reviews, and they often have "voluntary" requirements embedded among threats of enforcement actions if the terms are not agreed to by registrants. *See* EPA website *available at* http://www.epa.gov/oppsrrd1/reregistration/rodenticides/rodenticides_background.htm#mitigation. Perhaps equally often, new requirements are issued in the form of Pesticide Registration Notices (or PR Notices) that, like the RMD, impose requirements and deadlines, combined with the threat that if a registrant fails to comply, its products will be subject to enforcement actions. Today, there are literally hundreds of (uncodified) PR Notices on the books. *See* EPA website *available at* http://www.epa.gov/PR_Notices/. The decision in *Reckitt Benckiser, Inc.* v. *Jackson* is likely to require the Agency to completely reassess its practices in the context of its reregistration and registration review proceedings and in the context of keeping registrations "up to date" through label advisories and other policy changes announced through PR Notices.

As of the date of this Advisory, EPA has not filed a notice of appeal in the Reckitt case.

We hope that you find this brief summary helpful. If you would like more information or assistance in addressing the issues raised in this advisory, please feel free to contact:

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