

Cleaning Product Enforcement Challenge Highlights Reach of EPA's Antimicrobial Regulatory Authority

Joseph J. Green

December 11, 2020

For years, EPA has asserted broad authority to regulate products that are labeled or marketed with express or implied pesticidal (including antimicrobial) claims. During the current pandemic, that authority has been exercised aggressively, particularly against products, many of which are imported, that claim or suggest effectiveness in fighting coronavirus and other microbes. A novel litigation challenge to one such EPA enforcement action provides a timely reminder of the extensive scope of the authority claimed by the agency under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

Zuru, LLC, filed suit in September alleging that EPA incorrectly declared their product, Bactive Heavy Duty Cleaning Wipes, to be an unregistered "pesticide" and blocked its import into the United States. The crux of the case is that Zuru asserts that it does not make any "disinfectant or other pesticidal claims" for the product, which it says is labeled only "as intended for use in heavy duty cleaning of nonporous surfaces to fight the presence of dirt, grease, and common messes."

For several reasons, however, EPA contends that the cleaning wipes are pesticide products regulated under FIFRA. In particular, the agency argues that the wipes fall under EPA's FIFRA authority because they contain an active ingredient (chlorhexidine digluconate) found in a number of other EPA-registered disinfectants. Moreover, while no express pesticidal claims are made on the product packaging, EPA alludes to statements made on-line by third party resellers that the wipes are "disinfectants" and "kill germs." The agency also contends that the very name "'Bactive' implies bacterial fighting properties."

The case, for which EPA earlier this week was granted a 10-week extension to respond, provides compelling lessons for companies that sell cleaning products to keep in mind, including:

- (1) The scope of FIFRA is not limited to express pesticidal claims made on the product label or in marketing materials. In determining whether a product is "intended for a pesticidal purpose," EPA will look beyond express claims to examine whether labeling, ingredients, marketing materials, and even the product name imply pesticidal intent.
- (2) EPA can regulate a product for which no pesticidal claims are made if it contains a substance that "has no significant commercially valuable use other than as a pesticide." This is the core issue in the *Zuru* case, in which the company argues that the ingredient at issue also has separate value as a cleaning agent.

(3) Sometimes, an ingredient or product becomes commonly associated with "pesticidal" purposes, such that EPA asserts regulatory authority over it even absent other express or implied pesticidal claims. The classic example, from decades ago, is Avon's Skin So Soft lotion that was not overtly marketed as a pesticide, but became commonly associated in the public mind with mosquito repellency. Third party website testimonials and the statements of product resellers, such as in the *Zuru* case, may be cited as evidence of pesticidal intent based on public perception.

(4) Product names and logos can be considered to be "pesticidal" claims. This seems to be a major hurdle for *Zuru* in its case, as the agency asserts regarding the term "Bactive."

While the parties may reach a settlement, the case is worth keeping a close eye on for its potential to shape the scope of EPA's FIFRA authority as applied to cleaning products and other disinfectants/antimicrobials.

The case is *Zuru, LLC v. EPA, et al.*, in the United States District Court for the District of Columbia.