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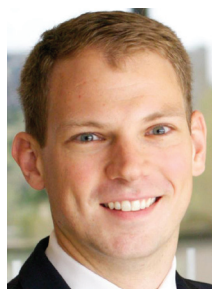
Pandemic Highlights Increased Pesticide Regulation Enforcement From Agencies

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Special to the Legal

In 2020, the COVID-19 pandemic raised many questions we thought we would never have to consider: How many times should I be washing my hands every day? Is it safe to touch a door handle? Should I be disinfecting my packages and groceries? While we all worried about our personal safety, federal and state environmental agencies grappled with reacting to increasing demand for products that aimed to help consumers resolve these questions and claimed an ability to kill viruses, including COVID-19. As a result of state and federal enforcement measures, many unproven products were pulled from the market, and some retailers and suppliers faced penalties. For many, the crackdown on products claiming to eradicate COVID-19 highlighted issues surrounding a lightly publicized environmental issue: regulation of antimicrobial pesticides. In fact, even before the pandemic, federal and state agencies have been increasing enforcement efforts on antimicrobial pesticides, and in some cases, the penalties associated with these enforcement efforts are surprisingly high.

At the federal level, the Federal Insecticide, Fungicide, & Rodenticide Act (FIFRA) bars distribution of an unregistered pesticide and broadly defines pesticide to include “any substance or mixture of substances intended for preventing, destroying, repelling or



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mitigating any pest.” See 7 U.S.C. Section 136(u). “Pest,” in turn, is broadly defined to include “any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism” but to exclude products, like hand sanitizers or wipes, that are intended for use on humans or animals. A pesticide, therefore, includes any product that intends to “mitigate” any microbial organism on an inanimate surface. The intent for a product’s end use is marked by any “pesticidal claims” made in promotional materials. No other environmental statute so squarely turns on a producer’s intention.

In the last two years, as many of us for the first time reluctantly reached for a disinfectant spray or wipe to clean off previously unthreatening surfaces—groceries, playground bars, or door handles, perhaps—suppliers came under pressure to

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bring to market products that were able to address the viral threat at hand. Some rushed to market with products that claimed an ability to fight COVID-19 or an ability to fight viruses or microbial organisms generally (making a “pesticidal claim” about the product), without registering the products with the EPA or state agencies. In turn, the U.S. Environmental Protection Agency (EPA) ramped up its enforcement, including use of enforcement tools like detaining imports, issuing Stop Sale, Use or Removal Orders, seizing products, and issuing civil penalties, all powers described in the EPA’s December 2009 FIFRA Enforcement Policy.

FIFRA also encourages state pesticide enforcement. A state “may 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. As a result, certain nuances of pesticide regulation may differ from state-to-state, including in Pennsylvania where the Pennsylvania Department of Agriculture exercises parallel pesticide enforcement authority under the Pennsylvania Pesticide Control Act.

A key difference between federal enforcement authority and most states’ enforcement authority is the magnitude of the potential penalties. FIFRA established the statutory civil penalty amount per violation at \$5,000. The possible base penalty has increased each year with inflation to the point that the maximum per-violation penalty for penalties assessed after Jan. 12, 2022, is \$21,805. The EPA’s December 2009 FIFRA Enforcement Policy makes clear that the EPA views each shipment or each sale of an unregistered pesticide as an independent violation. With this basic equation (number of violations *times* base penalty), total potential penalties rise quickly.

Early in 2020 the EPA acknowledged the need for more disinfectant products to reach the marketplace. In April 2020, then-EPA Secretary Andrew Wheeler said the EPA “will work diligently to ensure that consumers have access to EPA-approved and verified surface disinfectant products; products that we know to be effective against the novel coronavirus.” See press release: EPA Administrator Wheeler Talks with Retailers and Third-Party Marketplace Platforms to Discuss Steps to Protect American Consumers from Fraudulent Coronavirus Disinfectant Claims (April 3, 2020).

The EPA’s actions nevertheless made clear that it would wield its enforcement authority aggressively against businesses that sold or marketed products claiming to be effective against COVID-19 without proper registration. On June 10, 2020, for example, the EPA issued a stop sale order to eBay for 40 unregistered products, several of which were related to COVID-19. A year later, the EPA amended that order to include 170 additional products. Among the products flagged was “Virus Shut Out,” a plastic card

worn like a necklace, which was advertised as a “spatial disinfectant” that purportedly protected the wearer from COVID-19. See press release: EPA Issues Order to eBay to Stop Selling 170 Unregistered, Misbranded Pesticides (June 17, 2021).

Enforcement related to similar “anti-viral” products continues today. In April 2022, the EPA announced a nearly \$200,000 FIFRA settlement with Best Buy in connection with its “Pure Mobile Sanitizing Tech Wipes,” a product advertised to clean electronic devices. The EPA inspected a Best Buy facility in December 2020 and found that the product was not registered as a pesticide, even though its packaging claims that it “Kills Viruses and Bacteria.” See press release: EPA fines Best Buy for selling unregistered and misbranded disinfectant wipes from its Union City, Calif. Store (April 21, 2022).

Though antiviral and anti-COVID-19 products are a focus, they are not the EPA’s only focus, and the EPA’s increased enforcement efforts in this arena date back beyond the pandemic. The EPA’s investigation of eBay began in 2018 with insecticides as its initial target. The investigation continued through late March 2020, when the EPA also flagged products on eBay’s platform that implicated included “covid” and the “human coronavirus.”

In February 2018, the EPA and Amazon reached a \$1.2 million settlement agreement stemming from nearly 4,000 alleged violations of FIFRA from 2013 to 2018 related to importation of unregistered pesticide products. The EPA began investigating online pesticide sales in 2014, and as part of that investigation inspected various Amazon facilities, finding various allegedly unregistered pesticides, including insecticide chalk powder and bait products. In addition to paying a fine, Amazon also agreed to require sellers of pesticide to complete an online training program in pesticide regulations before being able to sell their products on Amazon’s website. See press release: Amazon Services LLC FIFRA Settlement (Feb. 15, 2018)

In the highest value recent settlement, the EPA reached an agreement with Electrolux related to the January and May 2020 importation of air filters claiming antimicrobial protection associated with the incorporation of nanosilver technology into the filters. The EPA’s allegations related to the import of more than 420,000 products. The final settlement valued nearly \$7 million. See press release: EPA and Electrolux Reach Settlement for Illegal Imports of Air Filter Products Incorporating Nanosilver (Oct. 15, 2020).

As the nation’s attention strays from the pandemic and most of us move away from overly aggressive disinfecting habits, the EPA’s actions indicate that it will continue aggressive FIFRA enforcement, often targeting antimicrobial products that many would not immediately identify as traditional “pesticides.” In addition to disinfecting spray and wipe products, the EPA’s enforcement attention has extended to ultraviolet light products, hypersonic pest repellent devices, and products that target or resist mold, mildew, algae or fungi.

Enforcement efforts are likely to expand in the future as regulators will increasingly expect market participants to be aware of this relatively new enforcement priority. Thus, manufacturers, importers, distributors and retailers alike should ask legal and operational staff to regularly consider whether seemingly innocuous products may fall into the broad, intent-based definition of “pesticide.” Frequent reminders of this surprising regulatory framework may lead to valuable avoidance of compliance and enforcement risks. •

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