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Pesticides

Farmers' Spray Drift Lawsuit Against EPA Turns on Trigger for Statute of Limitations

The statute of limitations for suing the Environmental Protection Agency in a pesticide case should start running when the violation by the agency is discovered, not when the pesticide is registered, two Arkansas tomato farmers told a federal appeals court Sept. 21 (*Hardin v. EPA*, D.C. Cir., No. 09-5365, 9/21/10).

If the U.S. Court of Appeals for the District of Columbia Circuit accepts the farmers' arguments on applying the "discovery rule" to the six-year statute of limitations, it would make it easier to sue EPA over faulty pesticide and herbicide registrations.

Gabrielle H. Kickham, of Looper Reed & McGraw P.C. of Dallas, argued for farmers Randy Hardin and Vernon Blasingame that EPA violated the Federal Insecticide, Fungicide and Rodenticide Act in approving the registration for Facet® herbicides manufactured by BASF.

Kickham said the six-year statute of limitations should not run from the date of registration of the Facet products but from the date in 2000 when the farmers discovered that EPA had registered the products without following steps set out in FIFRA.

The discovery rule holds that a claim does not accrue until the plaintiff discovers the injury that is the basis of the action. Under the farmers' version of the facts, the statute of limitations started to run on June 26, 2000, the date the farmers filed their federal lawsuit in Arkansas. In the course of that lawsuit, plaintiffs said they discovered errors in the FIFRA registration of the Facet products.

The farmers seek reversal of a Aug. 27, 2009, decision of the U.S. District Court for the District of Columbia that dismissed the lawsuit (*Hardin v. Jackson*, 648 F.Supp.2d 42, 70 ERC 1786 (D.D.C. 2009)).

The district court granted motions for dismissal by EPA and BASF, which argued that the court did not have jurisdiction over the complaint filed by the farmers because it was not filed in a timely manner.

Under 28 USC §2401(a), challenges to administrative agency actions must be brought within six years of the "accrual" of the cause of action. This is viewed by courts as the date of the final agency action.

EPA argued in its brief that, because the last of three Facet herbicides at issue was registered on April 27, 1998, and because the farmers' federal lawsuit was filed Aug. 3, 2004, the lawsuit was not filed within the six-year statute of limitations.

The members of the three-judge appeals court panel were Karen LeCraft Henderson, Janice Rogers Brown and Brett M. Kavanaugh.

'Outside Six-Year Period?'

Kavanaugh questioned Kickham, asking, "Why isn't this case well outside the six-year period?"

Kickham replied, "It wasn't until suit was progressing for property damages, until it was discovered that EPA had not met its obligations."

She explained that there were two different injuries in the case. There was the property damage to the farmers' crops, and there was the procedural injury that EPA "concealed" by failing to make "substantive findings" before the Facet product was first registered.

"The injury was hidden and concealed here," she said, so the "discovery rule" must be applied.

Brown asked Kickham how the statute of limitations should work, if FIFRA product registration and publication in the *Federal Register* are insufficient to start the statute of limitations running.

Kickham replied that "diligence" by plaintiff farmers was not the answer in this case since EPA registered the product without making factual findings mandated by Congress.

EPA's Compliance Burden

"The burden for doing it right begins with EPA," Kickham argued.

Robert H. Oakley, U.S. Department of Justice, Washington, D.C., argued for EPA, making "lack of diligence" by the two farmers a key theme.

"These parties were not diligent," he said, "They were aware of their injury in the 1990s and should have looked at the product registration much earlier."

The farmers argue in their written brief that since they were produce farmers and the Facet products drifted onto their fields from nearby rice fields targeted for aerial spraying, it would be unreasonable to expect them to know about Facet product registration errors in the 1990s.

The farmers argued that "it took Arkansas State Plant Board investigators, cooperative extension service personnel, and University of Arkansas professors 'a few years' to reach a consensus that Facet was damaging Plaintiffs' crops through off-target drift that did not result from applicator error."

James B. Slaughter, with Beveridge & Diamond P.C., Washington, D.C., argued for BASF. He used his time as an intervenor on behalf of EPA to represent to the appeals court that the Facet products were safe.

"The record does show that this is a safe pesticide," Slaughter said.

He argued that it was used safely by rice farmers across the country for almost 20 years.

"I appreciate your point, but it's really neither here nor there," Kavanaugh said, trying to steer the argument back to the statute of limitations.

"The statute is six years, so that is an open-and-shut case," Slaughter said.

Kavanaugh observed that the farmers had filed a 2003 petition for review of the herbicides' registrations, so the matter was now before EPA for consideration.

Kavanaugh noted that the petition had been pending for seven years and asked Oakley when EPA would act on the petition.

Oakley replied that the matter is still under review at EPA, but that it was "complicated" to work with pesticides since "their entire purpose was to kill something."

Oakley said an EPA decision could be "years in the future."

Henderson said it sounds like EPA has more problems with Facet than the farmers did, if that much testing of the products was planned.

Facet Applied in 1993

The case began in 1993 when Facet 50 was first applied to rice fields in Arkansas, which were near the tomato crops of the farmers.

Over time, three different Facet products were used, Facet 50, Facet 75 and Facet GR, all of which were manufactured by BASF.

Quinclorac is the active ingredient. Quinclorac is a phytotoxic substance—toxic to vegetation—that BASF developed and patented.

One key feature of the product, according to farmers, is that it can drift for miles in the air and damage non-target crops.

On June 26, 2000, the farmers filed a lawsuit against BASF for damages in the U.S. District Court for the Eastern District of Arkansas, alleging strict liability and other claims.

BASF defended itself by arguing that the Arkansas lawsuit was preempted by FIFRA.

On Sept. 26, 2003, the district court in Arkansas granted summary judgment in favor of BASF (*Hardin v. BASF Corp.*, 290 F. Supp. 2d 964 (E.D. Ark. 2003); 201 DEN A-11, 10/17/03).

However, while a motion for reconsideration was pending, the U.S. Supreme Court issued its decision in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 60 ERC 1129 (2005); 81 DEN A-12, 4/28/05).

That case held that FIFRA did not preempt certain common-law damage claims, such as those asserted in the lawsuit filed in 2000. For this reason, the U.S. Court of Appeals for the Eighth Circuit vacated its order affirming summary judgment on June 29, 2005, and remanded the case to the district court.

Meanwhile, during the litigation, the farmers said, they learned that EPA registered the Facet products without making factual determinations required by FIFRA before a pesticide can be registered. They also claimed that EPA failed to publish a notice on the registration.

On Sept. 13, 2003, the farmers filed a petition with EPA challenging the improper registration.

About one year later, when EPA had failed to act, the farmers filed a new lawsuit on Aug. 3, 2004, in the U.S. District Court for the District of Columbia, seeking a declaratory judgment that Facet products were not properly registered and were not entitled to be marketed and sold in the United States.

On EPA's motion, the district court stayed further proceedings until the farmers could exhaust their administrative remedies.

EPA advised the court that its decision on the administrative petition for review would be completed by Dec. 31, 2007, but then it failed to meet that deadline.

As a result, on Jan. 15, 2008, the court returned the case to its calendar.

At this point, summary judgment motions were filed and BASF moved to intervene.

BASF was allowed to intervene, then the District Judge, J. Frederick Motz, dismissed the lawsuit based on violation of the statute of limitations.

This appeal followed.

By Robert C. Cook

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