UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Rug Doctor, Inc.,	)	Docket No. FIFRA-09-0375-C-84-8
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act. Announcements to dealers relating to a product, with or without pesticidal claims as a part thereof, are not labeling under the Federal Insecticide, Fungicide and Rodenticide Act if the announcement was not intended for and was not received by consumers.

Federal Insecticide, Fungicide and Rodenticide Act. Deodorizers for which no pesticidal claims are made are not considered pesticides within the definition thereof in the Federal Insecticide, Fungicide and Rodenticide Act. (40 C.F.R. 162.4(c)).

Appearances:

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INITIAL DECISION

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, Section 14(a)(1), 7 U.S.C. 136 l(a)(1) for assessment of a civil penalty for alleged violations of the Act.[1/]

A Complaint was issued against Respondent, Rug Doctor, Inc., on October 25, 1983, charging Respondent with selling a nonregistered pesticide in violation of FIFRA, Section 12(a)(1)(A), 7 U.S.C. 136 j(a)(1)(A), and with not registering the establishment at which the pesticide was produced, in violation of FIFRA, Section 12(a)(a)(L), 7 U.S.C. 136 j(a)(2)(L). A penalty of $4,000 was proposed. Respondent answered alleging the Complaint was defective in that it did not contain a concise statement of the factual basis for alleging the violation. A Motion To Dismiss was filed by Respondent based upon the same premise. A Motion To Amend Complaint was filed to correct the alleged deficiency. The Motion To Amend Complaint was granted and the Motion To Dismiss was denied. An Amended Complaint was filed. Motion To Dismiss The Amended Complaint was denied.

Thereafter, a hearing was held in Los Angeles, California on Thursday, February 14, 1985. Following the hearing, both parties submitted briefs on the legal issues. On consideration of the entire record and the briefs, it is concluded that the Complaint should be dismissed.

1/ FIFRA, Section 14(a)(1) provides, as follows:

> Any registrant, commercial applicator, wholesaler, dealer retailer or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

Findings Of Fact

1. Respondent, Rug Doctor, Inc., is a California corporation whose place of business is located in Fresno, California.

2. The facts with respect to the violations alleged in the Complaint are not disputed and with respect thereto the following stipulation was read into the record by counsel for Complainant and was agreed to by Counsel for Respondent, Tr., p. 8.

Pursuant to instructions set forth in the Notice of Hearing dated January 14, 1985, counsel for Complainant and Respondent hereby stipulate to the following facts:

1. As of July 29, 1982, the products that are the subject of this Complaint, Rug Doctor Odor Killer, Vibra Vac Original Cleaner, and Steam Detergent, were not registered with the EPA pursuant to 7 U.S.C. 136a.

2. As of July 29, 1982, Respondent was not registered as a producer establishment of the EPA pursuant to 7 U.S.C. 136e.

3. Exhibits A, B and C are true and accurate copies of the labels for the three products identified in paragraph 1, which were collected by Inspector Richard Rolfe during an official inspection of Respondent's Fresno, California facilities on July 29, 1982.

4. Exhibit D is a true and accurate copy of the Rug Doctor "Product Announcements" dated February 1, 1982.

5. Respondent does not dispute the method of calculation of the civil penalty which results in placing Respondent in category Roman numeral V, Gross Receipts in Excess of $1,000,000. And the payment of the proposed penalty will not have an effect on Respondent's ability to continue in business.

6. There is no history of noncompliance with FIFRA, or the implementing regulations with respect to this Respondent on file in the office of Region 9.

7. The products which are the subject matter of this proceeding are not pesticides requiring that the products or the producer establishment be registered with EPA.

The Exhibits A through D are, for the record, identified as EPA Exhibits 1-4, inclusive, and were admitted into evidence.

This stipulation referred to all the violations alleged in the Complaint. The hearing was then reduced to the legal argument as to whether or not the labels or Product Announcements contained "pesticidal claims" as defined in FIFRA, Section 2(u). EPA Exhibits 1-4.

Thereafter, counsel for Complainant was permitted to summarize his contentions as related to EPA Exhibits 1-4.

Exhibit 1 - Rug Doctor Odor Killer

The very words "Odor Killer" are pesticidal within the definition of a pesticide set out in FIFRA since it implies the destruction of creature odors, namely, bacteria, which are pests. Exh. 1 also makes the claim that it eliminates odors in carpets such as urine, vomit, smoke, foods, animal odors, and water damage odor. The root cause of these odors is bacteria and bacteria being pests, the claim is pesticidal.

Exhibit 2 - Vibra-Vac Cleaner

The label states "Pet Stain Remover. To remove pet stains, coffee, fruit, berry stains and other oxydized stains." Also, Rug Doctor Odor Killer removes odors such as urine, vomit, smoke, foods and many others.

Exhibit 3-1 and 2 - Steam Detergent

Label 3-2 states "Odor Killer" kills smoke, animal odors, vomit and other foul odors. Complainant contends that foul odors are created by bacteria which are pests and Odor Killer is intended to kill bacteria.

Exhibit 4 - Rug Doctor, Inc. Product Announcements

Complainant alleges this exhibit falls under the statutory definition of labeling. And under the product Odor Killer, the announcement indicates, "Lab testing and field use of a new formulation of Odor Killer without formaldehyde has been successfully completed."

This is in the first sentence. And we emphasize the words, "field use," which we understand to mean that it has been taken out and tested against carpets.

And then in the second sentence it reads, "The formaldehyde will be replaced by a 'quaternary ammonium' disinfectant." We believe that the words, "quaternary ammonium" and the word "disinfectant" are pesticidal in the sense that quaternary ammonium is a well-known biocide, which indicates that its ultimate use is intended to kill bacteria.

Under the heading Steam Detergent, we find the words in the last sentence, "A quaternary ammonium compound will be used in trace amounts to prevent micro-organism growth."

Here, again, the quaternary ammonium being a well-known biocide, it prevents micro-organism growth. Micro-organisms, we contend are pests; therefore, pesticidal.

Under Vibra Vac Cleaner, the announcement indicates in the first sentence, and it's not a complete sentence, it states, "Same as Steam Detergent." Then it goes on to discuss the product. And it says that after January 15, 1982, the products bottled will have formaldehyde replaced with a quaternary ammonium compound.

In support of its position that the Public Announcements exhibit is labeling, Complainant refers to language contained in N. Jones & Co., Inc. v. U. S. Environmental Protection Agency, 666 F. 2d 829 (3rd Cir.).

> "E.P.A. takes the statute and regulations to mean that a product is a pesticide, if a reasonable consumer - given the label accompanying circulars, advertising representations, and the collectivity of circumstances - would use it as a pesticide. The fact that the product may also have other uses does not affect the need to register."

And that the focus of the inquiry should be on the intended use, implied or expressed. We take this to mean the use which a reasonable consumer would undertake. And that the subjective intent is that a substance shall be considered a pesticide by the intent of the manufacturer, seller or distributor as expressed or implied in labeling and in the claims and recommendations according to advertising materials.

A manufacturer or distributor cannot avoid the breach of the Act by pointing to its own subjective intent that a product have a given use, even if it were possible to gauge their subjective intent. The public wheel requires even those who inadvertently produce goods which the product perceives as pesticides be subject to the jurisdictions and regulations of the EPA.

Complainant further contends that based on that reasoning the public going out to use Rug Doctor machines to clean their carpets to get rid of odors, perceives these machines and these products as pesticides being capable of destroying whatever pests that create the odors that are bothersome. And it is also for this reason that these products are so identified and the labels are so marked.

Discussion and Conclusions

Prior to the hearing, only the Product Announcement, Exhibit 4, appeared to be the subject of dispute as to its pesticidal claims. At the hearing it became apparent that Complainant had taken the position that the labels, Exhibits 1-3, also were in dispute. However, there is no evidence before the Court establishing that any pesticidal claim is made on any of the actual product labels. This fact is confirmed by the statement of Mr. Gerald Gavin, Jr., Environmental Scientist, EPA, Region 9, in deposition where, upon reviewing Exhibits 1-3, in response to the question, "In your opinion, are there any pesticidal claims made?" He responded, "No, there aren't. . . ." Resp. Exh. 1, Deposition, p. 25. It is clear that Complainant's argument with regard to the three labels is only applicable to the Odor Killer product label since the only alleged pesticidal claims

that counsel alleges are made on the other product labels are the statements that describe the Odor Killer product. There are no alleged pesticidal claims for the Vibra-Vac Cleaner or Steam Detergent. It is therefore concluded that Exhibits 1-3 do not make pesticidal claims within the meaning of FIFRA and the regulations promulgated thereunder.

The remaining issue to be resolved concerns the Public Announcement, EPA Exhibit 4. See Complainant's contention, supra, pp. 4 and 5. Complainant, in addition, argued that the crux of the definition of a pesticide is the word "intended," citing the Jones case, supra. The record of this proceeding and the Court are in agreement with this rule of law. The question presented here, though, is whether the use of this product with its trace amounts of quaternary ammonium is intended to act as a pesticide in the sense that the average consumer interprets the ultimate purpose of the use of a pesticide.

The Public Announcement was a one-time circular directed to approximately 300 dealers and no proof was presented to indicate the circular reached the hands of any consumers. This is one of the prime requisites for even alleging that circulars, advertising brochures, or Public Announcements are to be considered as labeling. Its primary purpose was to inform dealers that formaldehyde, a product which poses some danger if cautions are not followed, would no longer be used to deodorize the machines dispensing the Odor Killer, but that quaternary ammonium would be used instead. The uncontroverted evidence is that the reference to this compound preventing micro-organism growth relates solely to the prevention thereof in the dispensing machine. While counsel for Complainant made some insinuating remarks in an attempt

to indicate the pesticidal effect of quanternary ammonium was for other purposes, such as to kill bacteria in carpets, no evidence was forthcoming or presented.

Further, the Odor Killer label is the only exhibit which makes reference to deodorizing claims. 40 C.F.R. 162.4(c) reads, as follows:

> (c) Products not considered pesticides. The following are examples of the types of products which are not considered pesticides:
> (1) Deodorizers, bleaching agents, and cleaning agents for which no pesticidal claims are made in connection with manufacture, sale, or distribution;

It is not necessary in order to reach the conclusion in this proceeding that the Complaint should be dismissed to consider the issues as to what constitutes a "pest," what is "deleterious," are micro-organisms pests, etc.

FINAL ORDER */

For the foregoing reasons, the Complaint is hereby dismissed.

Edward B. Finch
Chief Administrative Law Judge

Dated: June 6, 1985
Washington, D. C.

*/ Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 C.F.R. 22.27(c).

CERTIFICATION

I hereby certify that the original of this Initial Decision, together with the file, was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and three copies were mailed to the Regional Hearing Clerk, U. S. EPA, Region IX, to be disseminated in accordance with 40 C.F.R. 22.27(a)

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: June 6, 1985