4/28/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Monsanto Company, and	)	IF&R Docket No. IF&R-VII-1194C-93P
Newton Feed Center	)	
Elevator Incorporated,	)	
	)	
Respondents	)	

ORDER DENYING MOTION TO LIFT ORDER
HOLDING PROCEEDING IN ABEYANCE

Complainant moved November 23, 1993 to lift the Order of June 15, 1993 holding this proceeding in abeyance. The basis of the June 15 Order was that other cases were then pending that presented an issue similar to the issue in this case. Hence the Order ruled that waiting for a decision in one of these other cases might clarify the proper resolution of this case, and thus conserve judicial resources.

Complainant moved to lift this Order because a ruling in one of these other cases has now been announced. Respondent opposed Complainant's motion by arguing that the ground for this ruling was unique to the facts of that case, and that another currently pending case, already briefed (which the instant case is not), presents facts closer to those in the instant case.

The underlying issue in all of these cases, as stated in Complainant's motion (at 1), is "whether the original registrants/manufacturers of pesticides were liable under FIFRA for distribution or sale of adulterated and misbranded pesticide products that were repackaged from bulk shipments."[1] The case from which a ruling has emerged is In the Matter of ICI Americas, Inc. and Dodge City Cooperative Exchange, IF&R Docket No. VII-1191C-92P, Order on Cross Motions for Accelerated Decision (November 16, 1993). The ruling in ICI Americas held the original registrant/manufacturer liable, chiefly because it was found to have had a principal-agent relationship with the repackager, and thus was responsible for the actions of its agent.

Respondent in the instant case contended that the ruling in ICI Americas turned significantly on the particular relationship between the original registrant/manufacturer and the repackager in that case, so that the ruling has limited relevance for the instant

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[1] FIFRA is the acronym for the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y.

case. To support this point, Respondent claimed that its relationship with its repackager differs in important respects from the relationship in ICI Americas.

Respondent asserted further that it itself is also the respondent in another of the pending cases--In the Matter of Monsanto Company and Simpson Farm Enterprises, Inc., IF&R Docket No. VII-1193C-93P--in which its relationship with its repackager is the same as that in the instant case. Since this other case is already briefed, Respondent suggested that a ruling in this case may soon be available as an aid to resolving the instant case.

Finally, Respondent argued that in both this other case and in one more of these pending cases, also fully briefed--In the Matter of American Cyanamid Company and Sur-Gro Plant Foods, et al., IF&R Docket No. VII-1129C-92P--two theories besides the agency theory of ICI Americas have been advanced. These two theories (which include the possibility of strict liability for the original registrant/manufacturer) could, according to Respondent, become arguments as well in the instant case when it is briefed. Therefore Respondent concluded that awaiting a decision in these fully briefed cases could illuminate the proper resolution of the instant case by addressing these two theories.

Discussion

Complainant's motion is denied; the Order holding this proceeding in abeyance will remain in place. It is true that Complainant has a legitimate interest in prosecuting this case without undue delay. At this point, however, this interest is still outweighed by the advantage of possibly obtaining a clarification of the issue in this case by a decision from another similar case that is procedurally more advanced than this one.

The ruling in ICI Americas, offered by Complainant as the reason why the present Order should be lifted, was tied too closely to the facts of that case to be useful in determining whether an agency relationship existed in the instant case. Insofar as the agency question is significant, the other pending case in which Respondent appears as a respondent may be more relevant. If Respondent's claim is accurate that it has the same relationship with its repackager in both this other case and the instant case, a decision in this other case, which is already briefed, should be illuminating for the instant case.

Moreover, there is also the problem of whether the dispositive approach to the instant case is something other than the agency theory, such as one of the two theories raised in the other pending cases. A decision on this point from either of the already briefed cases could be helpful for the instant case.

In sum, the benefit of conserving judicial resources dictates

that the instant case continue to be held in abeyance to await a possibly useful decision from one or both of the similar pending cases. But this holding in abeyance is only a temporary measure. Both parties will be directed to report by July 31, 1994 on the status of this case and of the other relevant cases, and at that time the procedural situation of this case will be reviewed again.

Order

Complainant's motion to lift the Order of June 15, 1993 holding this proceeding in abeyance is denied. Both parties are directed to report by July 31, 1994 on the status of this case and the status of other relevant cases.

Thomas W. Hoya
Administrative Law Judge

Dated: April 28, 1994

In the Matter of Monsanto Company & Newton Feed Center Elevator, Inc., Respondent
Docket No. IF&R-VII-1194C-93P

Certificate of Service

I certify that the foregoing **Order Denying Motion to Lift Order Holding Proceeding In Abeyance**, dated April 28, 1994, was sent this day in the following manner to the addressees listed below.

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Dated: April 28, 1994