

D.C. CIRCUIT REJECTS CHALLENGE TO PESTICIDE REGISTRATION AS UNTIMELY

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In *Hardin v. Jackson*, 625 F.3d 739 (D.C. Cir. Oct. 29, 2010), the U.S. Court of Appeals for the District of Columbia Circuit held that a civil action challenging alleged defects in a pesticide registration was time barred under the federal civil statute of limitations and was not saved by the discovery rule. The challengers knew or should have known of the alleged flaws in the registration at the time they learned that the pesticide was registered, which occurred more than six years before filing the complaint. The *Hardin* decision underscores that any legal challenge to a pesticide registration issued under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) will be held to a strict reading of the statute of limitations and the discovery rule, and that parties claiming an injury from a pesticide have a duty to investigate promptly the legitimacy of the pesticide's registration. The case is also noteworthy in that the challengers were unsuccessful in their argument that the delays of the U.S. Environmental Protection Agency (EPA) in ruling on their administrative petition to cancel the same pesticide registration could somehow restart the statute of limitations period for a court challenge.

The FIFRA Pesticide Registration and Cancellation Process

FIFRA and its regulatory scheme govern the registration, sale, distribution, use, and cancellation of pesticides. 7 U.S.C. § 136–136y; 40 C.F.R. Parts 150–189. FIFRA section 3 grants EPA authority to register pesticides after EPA determines that the "use of the pesticide is in the public interest" and that "the

pesticide . . . will not cause any unreasonable adverse effect on the environment." FIFRA § 3(c)(7)(C), 40 C.F.R. § 152.114. During the registration process, EPA is required to publish certain notices in the *Federal Register* regarding the receipt of registration applications and the issuance of pesticide registrations. 40 C.F.R. § 152.102.

FIFRA and its regulations also establish detailed procedures that govern the prosecution and defense of efforts to cancel a pesticide registration. FIFRA section 6 provides an administrative process through which pesticide registrants, pesticide users, and the public can petition EPA to cancel pesticide registrations. Following the filing of a petition to cancel, EPA collects and evaluates information regarding the pesticide's use, human and environmental effects, and economic impacts. 7 U.S.C. § 136d. Section 6 also provides for a hearing process in which petitioners, registrants, and users participate prior to EPA canceling a pesticide registration. *Id.*; 40 C.F.R. Parts 164, 178, 179 (governing hearings under FIFRA for cancellation of registrations).

Litigation History of the Registration Challenges

The litigation that preceded the *Hardin* case is important because it proved that the challengers were on notice of the pesticide's registration shortly after it issued, a critical fact for the D.C. Circuit's decision. The prior litigation also illustrates how pesticide cancellation petitions can be used as an adjunct to tort litigation for damages.

In 1992, EPA registered Facet®, a herbicide containing the new active ingredient quinclorac, to BASF Corporation. In 1995, Randy Hardin and Vernon Blasingame, the plaintiffs/appellants in the *Hardin* case, and other tomato growers in northeastern Arkansas began bringing lawsuits in Arkansas state courts against rice farmers and pesticide application companies for alleged damage to their crops from off-target spray drift from aerial application of Facet onto

rice crops. In 2000, Hardin and others brought a federal civil action in the Eastern District of Arkansas challenging the validity under FIFRA of the Facet registration and subsequent quinclorac products (“the registrations”), along with tort claims for damages for alleged spray drift of Facet. *See Hardin v. BASF Corp.*, 290 F. Supp. 2d 964, 972 (E.D. Ark. 2003). The parties settled the suit in 2006 with no admission of liability by BASF and no changes to the Facet registrations.

In September 2003, while the Arkansas federal lawsuit was ongoing, the plaintiffs filed a petition to cancel, asking EPA to cancel for the same reasons the same Facet registrations being challenged in Arkansas federal court. While the petition to cancel was pending before EPA, in August 2004 plaintiffs filed a lawsuit against EPA in the U.S. District Court for the District of Columbia, again alleging that the Facet registrations are invalid and seeking their cancellation in that forum. The two farmers contended that the Facet registrations were flawed because (1) the products were registered under the incorrect FIFRA section; (2) EPA did not formally sign and publish in 1992 its determination that the first Facet registration met FIFRA’s safety and public interest standards; and (3) EPA did not publish a *Federal Register* notice in 1992 of its decision to register Facet. On July 27, 2005, the district court stayed the suit in light of the pendency before EPA of plaintiffs’ petition to cancel the Facet registrations, which, if granted in plaintiffs’ favor, would moot their claims.

When EPA had not issued a decision on the petition to cancel Facet by January 2008, the case was reactivated at the request of plaintiffs and EPA. BASF was granted intervenor status in the case at that time because it is the principal registrant, data submitter, owner, and manufacturer for Facet products. *Hardin v. Jackson*, 600 F. Supp. 2d 13 (D.D.C. 2009). In August 2009, the district court granted EPA’s and BASF’s motions to dismiss plaintiffs’ complaint for lack of jurisdiction because plaintiffs failed to file the lawsuit within the statute of limitations period in 28 U.S.C. § 2401(a), which allows a party to challenge an agency action within six years after the right of action accrues. *Hardin v. Jackson*, 648 F. Supp. 2d

42 (D.D.C. 2009). Because plaintiffs did not challenge the jurisdictional nature of the statute of limitations period, the district court assumed it was jurisdictional and, therefore, did not reach alternative bases for dismissal, including the lack of jurisdiction under FIFRA for a civil action challenging a pesticide registration. *See id.* at 47, n.8.

The D.C. Circuit Affirms the Dismissal and Applies the Discovery Rule in the Pesticide Registration Context

Hardin and Blasingame argued on appeal that application of the discovery rule resulted in their right of action accruing much later than the date of Facet’s registration. Pursuant to the discovery rule, “a cause of action accrues when the injured party discovers—or in the exercise of due diligence should have discovered—that it has been injured.” *Hardin*, 625 F.3d at 743. Plaintiffs contended that they did not discover their procedural injuries until July 2000 when BASF put it on notice that the Facet products were registered under FIFRA through assertion of the preemption defense in the Arkansas federal case, or alternatively, until 1999 when the University of Arkansas issued results of a study regarding spray drift from Facet application. *Id.* at 743–44. Plaintiffs also claimed that the district court’s reinstatement of the case in 2008 when EPA had not acted on their petition to cancel triggered the running of a new statute of limitations period because the restatement was in effect a denial of their petition. Final Brief for Appellants, 2010 WL 2753905, *24 (C.A.D.C. June 23, 2010).

EPA and BASF argued that plaintiffs’ claims were untimely because the statute of limitations period in 28 U.S.C. section 2401(a) is jurisdictional and cannot be extended by equitable tolling doctrines like the discovery rule. *Hardin*, 625 F.3d at 743. EPA and BASF further contended that even if the discovery rule applied, plaintiffs’ claims were late because they were aware in the early 1990s of their alleged injuries from Facet, and that EPA approved the Facet registration. *Id.* In addition, BASF argued in the alternative that FIFRA provided the exclusive basis for jurisdiction over a civil action challenging a pesticide registration and that absent a ruling on plaintiffs’ petition to cancel

Facet, the plaintiffs could not bring their lawsuit. Brief for Appellee BASF Corporation, 2010 WL 2753903, *23–26 (C.A.D.C. June 23, 2010).

In October 2010, a little over a month after oral argument, a unanimous panel of the D.C. Circuit affirmed the district court’s dismissal of the case, applying a similar analysis of the six-year statute of limitations period and the discovery rule. Unlike the district court, the D.C. Circuit held that the six-year statute of limitations in 28 U.S.C. section 2401(a) was jurisdictional, which dispelled questions raised by recent Supreme Court opinions regarding the jurisdictional nature of section 2401(a). *Hardin*, 625 F.3d at 740, n.1. In another threshold issue, the D.C. Circuit acknowledged the question of whether the discovery rule could act to toll the six-year statute of limitations period—which is jurisdictional—particularly in a case alleging a procedural defect in agency action. *See, e.g., Felter v. Norton*, 412 F. Supp. 2d 118, 122 (D.D.C. 2006) (“Traditionally, when a statute of limitations has been deemed jurisdictional, it has acted as an absolute bar and could not be overcome by the application of judicially recognized exceptions . . . such as . . . the discovery rule.”). The *Hardin* panel, however, like the district court, reserved this issue and decided that the discovery rule did not save any cause of action that the plaintiffs might have. *Hardin*, 625 F.3d at 743. The D.C. Circuit found that plaintiffs should have known that the Facet products were registered by EPA when the state tort cases were filed in the early 1990s because the fact that Facet was registered under FIFRA was “obvious from the registration notice appearing on the label of Facet 50.” *Id.* In addition, the court found that plaintiffs “could have investigated the product’s FIFRA registrations as soon as they were put on notice of it.” *Id.* at 744.

The *Hardin v. Jackson* decision demonstrates that courts will apply strictly the statute of limitations and the discovery rule to lawsuits alleging defects in the registration of a pesticide. As the court noted, the discovery rule may not be applicable to a pesticide registration because the statute of limitations is jurisdictional. Moreover, any publication of the registration could provide constructive notice to start the running of the statute of limitation period.

Importantly, the court’s ruling was not affected by the fact that, at the time of decision, plaintiffs’ administration petition to cancel had been pending for seven years. The court was not persuaded by plaintiffs’ argument that the statute of limitations period was restarted by the district court’s reinstatement of the case in 2008 following EPA’s failure to rule on plaintiffs’ petition by that time.

The dismissal of the registration challenge despite the delay in EPA action on the plaintiffs’ petition to cancel supports the position that pesticide registrations must be evaluated by EPA through the FIFRA section 6 petition to cancel process in the first instance. As mentioned above, BASF argued that plaintiffs’ petition to EPA was the only proper forum for their challenge to the registrations and that the lack of jurisdiction under FIFRA provided an alternative basis for affirmance of the district court’s dismissal. Brief for Appellee BASF Corporation, 2010 WL 2753903, *23–26 (C.A.D.C. June 23, 2010) (FIFRA section 6 cancellation provisions demonstrate that Congress intended FIFRA to provide the exclusive means for removing a pesticide from use); *see also Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1299 (8th Cir. 1989) (“We believe Congress intended that FIFRA provide the exclusive means of cancelling a registration.”). Accordingly, even if a lawsuit challenging a registration were timely and therefore provided threshold jurisdiction, such a lawsuit could be dismissed for lack of jurisdiction under FIFRA unless EPA had been presented with and ruled on a petition to cancel. *See, e.g., Beyond Pesticides/Nat’l Coal. Against the Misuse of Pesticides v. Whitman*, 360 F. Supp. 2d 69, 70–71 (D.D.C. 2004) (dismissing a challenge to a pesticide registration for lack of jurisdiction under FIFRA because EPA had not yet ruled on a petition to cancel the pesticide registration at issue).

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