IN RE MICROBAN PRODUCTS COMPANY

FIFRA Appeal No. 99-13

DECISION AND REMAND ORDER

Decided February 23, 2001

Syllabus

The United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Toxics and Pesticides Enforcement Division ("Pesticide Enforcement") filed an appeal seeking the Board's review of Administrative Law Judge William B. Moran's February 18, 1999 Order Determining Number of Violations and Ruling on Respondent's Motion for Accelerated Decision as to Penalty and his November 5, 1999 Initial Decision Regarding Penalty. By such orders, Judge Moran ("Presiding Officer") found Microban Products Company ("Microban") liable for five violations of section 12(a)(1)(B) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(1)(B), and assessed a $25,000 civil penalty against Microban. Section 12(a)(1)(B) makes it unlawful to distribute or sell a registered pesticide "if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration * * *." Pesticide Enforcement had alleged 32 violations based on 32 shipments of Microban Plastic Additive "B" to Hasbro Products, Inc. ("Hasbro").

The central issue presented for resolution by the Board is whether the Presiding Officer committed error in determining the number of violations of FIFRA section 12(a)(1)(B) committed by Microban. Pesticide Enforcement argues that FIFRA section 12(a)(1) makes each act of selling or distributing a pesticide product in a prohibited manner an independent offense and that administrative cases construing FIFRA section 12(a)(1) have consistently held that each illegal sale or distribution of a pesticide product constitutes an independent violation of FIFRA section 12(a)(1). Microban argues that the Presiding Officer correctly ruled that the "unapproved claims must be associated in a direct, real way" with a pesticide's distribution or sale. Microban asserts that this associative requirement is consistent with the Chief Judicial Officer's opinion in *In re Sporicidin International, Inc.*, 3 E.A.D. 589 (CJO 1991), requiring proof of "a sufficiently close link" between the shipments and the unauthorized claims. Although Microban did not appeal the penalty assessed, it argues that no more than one violation of section 12(a)(1)(B) should have been found.

Held: Reversed and remanded for further proceedings.

(1) It is manifest from the language and structure of FIFRA section 12(a)(1) that Congress intended the "unit of violation" to be based upon the statutorily defined act — "to distribute or sell." Any potential violation of this section must involve the act of distributing or selling. Linking the number of violations to the number of distributions or sales is consistent not only with the plain language of section 12(a)(1)(B), but also with the con-

sumer protection goals of FIFRA, which are intended to protect purchasers from being induced into purchasing a pesticide product based on unapproved claims that are potentially false or misleading. Accordingly, because the Presiding Officer relied on the number of documents containing unapproved claims as the basis for assessing five violations of section 12(a)(1)(B), rather than focusing on the number of distributions or sales of the pesticide product, he erred.

(2) The Presiding Officer's decisions are also deficient because he did not explicitly find, as required by section 12(a)(1)(B), that the unapproved claims identified in the five documents were made "as a part of" the alleged distributions or sales of Microban Plastic Additive "B" to Hasbro.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

On December 6, 1999, the United States Environmental Protection Agency, Office of Enforcement and Compliance Assurance, Toxics and Pesticides Enforcement Division ("Pesticide Enforcement") filed an appeal in the above-referenced matter with the Environmental Appeals Board ("Board"). *See* Complainant's Appeal As to the Number of Violations ("Appeal"). Pesticide Enforcement seeks the Board's review of Administrative Law Judge William B. Moran's February 18, 1999 Order Determining Number of Violations and Ruling on Respondent's Motion for Accelerated Decision as to Penalty (*hereinafter* Feb. 1999 Order) and his November 5, 1999 Initial Decision Regarding Penalty ("Initial Decision"). By such orders, Judge Moran ("Presiding Officer") found Microban Products Company ("Microban") liable for five violations of section 12(a)(1)(B) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(1)(B), and assessed a civil penalty of $25,000 against Microban.

Pesticide Enforcement asserts that this case presents an issue of first impression. *See* Appeal at 4. The issue presented for resolution by the Board is whether the Presiding Officer committed error in determining the number of violations of FIFRA section 12(a)(1)(B) allegedly committed by Microban. For the reasons outlined below, we find that the Presiding Officer committed error and remand this matter for further proceedings consistent with the Board's opinion.

I. *BACKGROUND*

A. *Statutory Background*

FIFRA is a federal statute regulating the manufacture, sale, distribution, and use of pesticides in the United States by means of a national registration system. 7 U.S.C. §§ 136-136y. Section 12(a) of FIFRA makes unlawful a number of actions relating to the sale or distribution of pesticides. 7 U.S.C. § 136j(a).

B. *Factual Background*

Microban is a corporation with its principal place of business located at 11515 Vanstory Drive, Suite 110, Huntersville, North Carolina. Microban is a "person" as that term is defined by FIFRA section 2(s). *See* 7 U.S.C. § 136(s). Microban produces a pesticide product called Microban Plastic Additive "B".

Microban Plastic Additive "B" was registered by the U.S. Environmental Protection Agency ("EPA") under section 3 of FIFRA, 7 U.S.C. § 136a, on August 15, 1983. EPA's Notice of Registration for Microban Plastic Additive "B" stated that:

> This product is being accepted as a preservative and bacteriostatic agent effective only against *non-health related* organisms which may contribute to deterioration of the treated articles or to control odors by such organisms.

See Notice of Pesticide Registration for Microban (Aug. 15, 1983) (emphasis added). Microban Plastic Additive "B" is registered under the EPA registration number 42182-1. *Id.* The claims made by Microban for Microban Plastic Additive "B" as part of the statement required in connection with its registration application include the following: "A preservative, bacteriostatic agent for use in the manufacture of polymer plastic and latex." Second Amended Complaint at ¶ 11 (Jan. 26, 1998). The term "bacteriostatic" refers to an agent that inhibits the growth or multiplication of bacteria. *See* Dorlands Illustrated Medical Dictionary, 182 (27th ed. 1988).

By letter dated July 10, 1987, EPA provided Microban with a list of non-health related claims that were acceptable for use in conjunction with the sale and distribution of Microban Plastic Additive "B". The acceptable claims included:

1. *Provides a hygienic surface;*
2. *Inhibits growth of bacteria;*
3. *Resists bacterial growth;*
4. *Inhibits/controls growth or odor-causing bacteria and mildew (fungus); and*
5. *Resists mildew and bacteria growth.*

Letter from J. Kempter, Prod. Mgr., EPA FIFRA Reg. Div., Disinfectants Branch, to W.L. Morrison, Microban Pres. at 3 (July 10, 1987).

In May 1995, Microban and Hasbro, Inc. ("Hasbro"), a manufacturer of plastic toys, began discussing the incorporation of Microban Plastic Additive "B" into Hasbro's plastic toy products. Microban made a presentation to Hasbro regarding Microban's corporate capabilities on May 31, 1995. This presentation,

memorialized in a document entitled, "Presentation to Hasbro, Inc.," included the statement that Microban Plastic Additive "B" was "the ultimate in germ-fighting protection." *See* Presentation to Hasbro Inc. (May 31, 1995) ("Hasbro Presentation").

On April 12, 1996, Microban and Hasbro entered into a multi-year License and Supply Agreement ("Agreement") whereby Hasbro would incorporate Microban Plastic Additive "B" into certain Hasbro plastic toys, games and juvenile products.[1] The Agreement outlines the relationship between Microban, as Licensor, and Hasbro, as Licensee. The Agreement also contemplates that Microban would, for the term of the Agreement, provide marketing assistance to Hasbro, and that Hasbro would provide Microban with samples of products and marketing materials for approval by Microban prior to commercial sale of the products. *See* Hearing Testimony of G. Cueman, Microban Pres. and CEO, at 355-56 (May 27, 1999). Pursuant to the Agreement, Microban made shipments of Microban Plastic Additive "B" to various contractors designated by Hasbro for incorporation into Hasbro's plastic toys, games and juvenile products.[2]

On October 28, 1996, Microban commented on a draft label for Hasbro plastic toys containing the Microban Plastic Additive "B" pesticide. Microban suggested that the Hasbro toy labels state, "Only Playskool has the exclusive Microban germ-fighting technology built right into the toy. This unique technology inhibits the growth of germs on toys to help provide a healthier (or better) environment for your child." Facsimile from S. Smith, Microban Mktg. Mgr., to C. Beeley, Hasbro Toy Group (Oct. 28, 1996) ("Draft Label").

Subsequently, in January 1997, Microban participated in a media training session for Hasbro employees. Microban produced a questionnaire about Microban products for use at the training session. *See* Facsimile from S. Smith, Microban Mktg. Mgr., to G. Serby, Hasbro (Jan. 13, 1997) ("Questionnaire"). The Questionnaire provides:

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[1] Microban asserts that the entire Agreement is Confidential Business Information ("CBI") protected from disclosure. Respondent's Reply to EAB Order Regarding CBI Documents at 3 (Nov. 30, 2000); *see* 7 U.S.C. § 136h(b); 40 C.F.R. § 22.22(a)(2). Any information in this decision regarding the Agreement is drawn from non-CBI sources in the record.

[2] Microban also asserts that the 32 invoices documenting such shipments are CBI protected from disclosure under FIFRA. This decision does not recite any of the specific information provided in these invoices, such as the date, destination, and price of the shipments. For purposes of this opinion, it is important to know generally that 32 shipments of Microban Plastic Additive "B" to Hasbro's contractors occurred between October 1996 and January 1997, as alleged in the Second Amended Complaint.

> Microban antimicrobial protection is being introduced into consumer products to address the growing public concern over the prevalence of germs and bacteria, such as E. coli, Salmonella, Staph and Strep.
>
> * * * * * * *
>
> Microban protection has been shown to be effective in virtually eliminating the growth of most common household germs, including E. coli, Salmonella, Staph. and Strep. as well as mold and fungus.

Questionnaire at 1, 3.

In April and May of 1997, Pesticide Enforcement's duly designated officers conducted two inspections of Microban. Pesticide Enforcement requested information from Microban regarding the sale and distribution of Microban Plastic Additive "B" to Hasbro. Included in the information provided to Pesticide Enforcement was an undated Microban brochure ("Brochure") which states that "Microban has been proven to safely reduce the growth of many common harmful bacteria (including E. coli, Salmonella, Staph. and Strep.) by 99.9 percent." Brochure at 6 (undated). Microban also provided to Pesticide Enforcement a document titled, "Facts about Microban ," which states that:

> Microban protection is being introduced into consumer products to address the growing public concern over the prevalence of germs and bacteria, such as E. coli, Salmonella, Staph. and Strep. *Independent laboratory tests have shown conclusively that Microban can safely reduce the presence of bacteria on these products by 99.9 percent.*

Facts about Microban at 1 (undated). Based upon the inspections and the information collected from Microban, Pesticide Enforcement charged Microban with 32 violations of FIFRA section 12(a)(1)(B) based upon 32 shipments of Microban Plastic Additive "B" to various destinations.

C. *Procedural Background*

On December 5, 1997, Pesticide Enforcement filed a Complaint against Microban alleging, in a single count, that Microban committed 32 violations of FIFRA section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B), based on the 32 sales or distributions of Microban Plastic Additive "B" described in the Complaint "in that [Microban] in each instance sold or distributed a registered pesticide *with* claims that were substantially different from claims made in connection with its registration." Complaint ¶ 32 (emphasis added). Section 12(a)(1)(B) makes it unlawful for any person to distribute or sell a registered pesticide "if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration."

7 U.S.C. § 136j(a)(1)(B). Pesticide Enforcement proposed a civil penalty of $160,500 based on 31 violations at $5,000 per violation, and one violation at $5,500 per violation.[3]

On December 16, 1997, Pesticide Enforcement filed an Amended Complaint which restated the violations of FIFRA section 12(a)(1)(B), but also included an "Alternative Pleading" alleging 32 violations of FIFRA section 12(a)(1)(A) under the theory that the 10 percent active ingredient form of Microban Plastic Additive "B" was an unregistered pesticide.[4]

On April 3, 1998, the Presiding Officer granted Complainant leave to file a Second Amended Complaint in which EPA restated its allegations with respect to Microban's violations of FIFRA section 12(a)(1)(B). The Second Amended Complaint did not change with respect to the alternative pleading provided in the Amended Complaint. With respect to Microban's violations of FIFRA section 12(a)(1)(B), Complainant alleged facts to support its allegation that the claims made by Microban in the May 1995 Hasbro Presentation, the January 1997 Questionnaire, the October 1996 Draft Label, and the April 1996 Agreement, substantially differed from "those claims made in connection with the registration of Microban Plastic Additive 'B', EPA Reg. No. 42182-1." Second Amended Complaint at ¶¶ 23-28.

On September 16, 1998, the Presiding Officer issued a partial accelerated decision as to liability. *See* Order on Motions for Discovery, Filing of Sur-Reply and Partial Accelerated Decision (ALJ, Sept. 18, 1998) (*hereinafter* Sept. 1998 Order). The Presiding Officer concluded that a finding of liability could be found by "holding up, on the one hand, the terms of EPA's registration approval"[5] and then, * * * determining whether Microban made any claims as a part of its distribution or sale which substantially differ from those made in connection with its registration approval." Sept. 1998 Order at 14.

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[3] The single violation assessed at $5,500 allegedly occurred after January 30, 1997, the effective date of the Civil Penalty Inflation Adjustment Rule, 40 C.F.R. parts 19 and 27. This rule was promulgated in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701.

[4] FIFRA section 12(a)(1)(A) makes it unlawful to sell or distribute unregistered, canceled, or suspended pesticides. *See* 7 U.S.C. § 136j(a)(1)(A). Pesticide Enforcement's alternative pleading under FIFRA section 12(a)(1)(A) sought to counter a potential assertion by Microban that the 10 percent solution of Microban Plastic Additive "B" was not a registered pesticide. *See* Order on Motions for Discovery, Filing of Sur-Reply and Partial Accelerated Decision at 1 n.3 (ALJ, Sept. 18, 1998). Since Microban's answer admitted that the 10 percent solution of Microban Plastic Additive "B" was a registered pesticide, the alternative pleading was not pursued further, and no decision was issued by the Presiding Officer regarding the protective alternative pleading.

[5] *See supra* section I.B quoting EPA's Notice of Pesticide Registration for Microban Plastic Additive "B".

The Presiding Officer's analysis began with the simple conclusion that Microban and Hasbro were "persons" and that Microban was located in a "State," required elements of a FIFRA section 12(a)(1)(B) violation. *Id.* at 14 n.9. The Presiding Officer then concluded that the claims made in the following five documents: 1) Brochure, 2) Facts About Microban, 3) Hasbro Presentation, 4) Draft Label, and 5) Questionnaire; "'substantially differ[ed]' from those approved with Microban's registration and *did so as a part of its distribution or sale*."[6] *Id.* at 16 (emphasis added). Nevertheless, the Presiding Officer directed the parties to submit briefs on the issue of the number of violations in this case.

The parties submitted their briefs, and on February 18, 1999, the Presiding Officer ruled that Microban was liable for five violations based on the number of offending documents containing unauthorized claims. Feb. 1999 Order at 14-15. Pesticide Enforcement filed a motion with the Board seeking interlocutory review of the Feb. 1999 Order, which the Board denied. *See* Order Denying Motion for Interlocutory Review (EAB, May 10, 1999).

The Presiding Officer ruled that Microban committed five violations of FIFRA section 12(a)(1)(B). Initial Decision at 2. His Feb. 1999 Order, incorporated into the Initial Decision by reference, stated that "for any given case, determining the unit of violation for § 12(a)(1)(B) requires a particularized inquiry into the surrounding facts." Feb. 1999 Order at 15. In particular, the Presiding Officer found that, here, the five documents containing unauthorized claims "were not particularly tied" to the 32 shipments of Microban Plastic Additive "B" to Hasbro's contractors, rather "they existed independently of *any* particular sale or distribution." *See id.* at 9-10 (emphasis added).

The Presiding Officer rejected as overreaching and likely to produce unreasonable results EPA's argument that there were 32 violations based on the number of shipments to Hasbro's contractors. *Id.* at 9-10. He maintained that EPA's construction of the statute would improperly penalize pesticide producers based on the amount of product sold or distributed, rather than on the number of unauthorized claims made. *Id.* at 10 n.1. Nevertheless, the Presiding Officer also disagreed with Microban's construction, i.e., that the five documents are linked to a single sale to Hasbro and thus amount to no more than a single violation, as too narrow a reading of the statute and at odds with the purpose of FIFRA section 12(a)(1)(B). *Id.* at 10. In the Presiding Officer's view, Microban's interpretation would negate the individual harm created with each instance of making an unauthorized claim. Hence, the Presiding Officer concluded that Microban had committed five violations of FIFRA section 12(a)(1)(B), one for each of the five documents containing claims that substantially differed from the statements made in

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[6] The Presiding Officer's conclusion that the claims in the five documents "substantially differ[ed]" from the claims made as a part of the registration is not in dispute here.

connection with the registration for Microban Plastic Additive "B". Subsequently, after a penalty hearing, the Presiding Officer issued an Initial Decision that imposed a $25,000 penalty for five violations of FIFRA section 12(a)(1)(B).

D. *The Appeal*

Pesticide Enforcement now seeks review of the Presiding Officer's decisions with respect to the number of violations and the corresponding penalty. Microban filed a response to Pesticide Enforcement's appeal, but did not appeal the Presiding Officer's determinations.

Pesticide Enforcement argues that FIFRA section 12(a)(1) makes each act of selling or distributing a pesticide product in a prohibited manner an independent offense. Appeal at 2-3. Pesticide Enforcement also asserts that the 1990 FIFRA Enforcement Response Policy treats each illegal sale or distribution of a pesticide as an independent violation. *Id.* at 3-4. Finally, Pesticide Enforcement argues that administrative cases construing FIFRA section 12(a)(1) consistently hold that each illegal sale or distribution of a pesticide product constitutes an independent violation of FIFRA section 12(a)(1). *Id.* at 4-8. Thus, reasons Pesticide Enforcement, the Presiding Officer erred by basing the number of violations on the number of documents containing unauthorized claims, rather than the number of shipments of pesticide product as alleged in the Second Amended Complaint.

Microban's reply construes the Presiding Officer's decisions as correctly finding that Pesticide Enforcement failed to allege[7] or offer any evidence that the unauthorized claims were made as "a part of" each of the 32 shipments made by Microban. Respondent's Reply to Complainant's Appeal as to the Number of Violations at 4-8 (*hereinafter* Reply). Microban also asserts that the Presiding Officer correctly ruled that "unapproved claims must be associated in a direct, real way such as being attached to a pesticide's distribution or sale." *Id.* at 9. Microban asserts this requirement is consistent with the Chief Judicial Officer's opinion in *In re Sporicidin International, Inc.*, 3 E.A.D. 589 (CJO 1991), requiring Pesticide Enforcement to prove "a sufficiently close link" between the shipments and the unauthorized claims, and the U.S. EPA's Office of General Counsel's opinion that "unapproved claims must 'accompany' a sale or distribution of a pesticide product to support an independent violation of Section 12(a)(1)(B)." Reply at 9-11 & n.7 (citing U.S. EPA Office of General Counsel, *Collection of Legal Opinions*, Vol. 1

[7] Pesticide Enforcement alleged that Microban "sold or distributed a registered pesticide *with* claims that were substantially different from claims made in connection with its registration." Second Amended Complaint ¶ 33 (emphasis added). To the extent Microban may be arguing that there is a deficiency in pleading by reason of Pesticide Enforcement's use of the word "with" instead of the statutory phrase "as a part of," we reject the argument. The allegation in the complaint provides adequate notice of the statutory basis for the alleged violation. *In re Sporicidin Int'l, Inc.*, 3 E.A.D. 589, 596 (CJO 1991) ("A complaint need not track the statutory language exactly * * *.").

at 439 (Dec. 1970 — Dec. 1973)). Finally, Microban asserts that the Presiding Officer erred "by mechanically counting the number of documents containing claims that he found to be unauthorized. * * * [and] should have concluded that the 32 shipments constituted only one sale or distribution and that the 5 documents were a part of the one sale or distribution." *Id.* at 12. Microban argues that no more than one violation of FIFRA section 12(a)(1)(B) should have been found. *Id.* at 13. Nonetheless, Microban did not appeal the penalty imposed.

We now turn to the issues presented on appeal.

II. *DISCUSSION*

We begin with a recitation of the relevant statutory provisions, for the starting point in any exercise of statutory construction is the statute itself. "The starting point in statutory interpretation is 'the language [of the statute] itself.'" *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)). *See also American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). We must ask whether Congress gave its view on the precise question at issue; if congressional intent is clear, then Congress' intent must be given effect. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Only if the language of the statute is unclear may we resort to other means of interpretation. *Id*. at 842 ("If the intent of Congress is clear, that is the end of the matter * * *."). "If the statute is silent or ambiguous with respect to the specific issue, the court [that reviews the agency's decision] must determine whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. For the reasons discussed below, it is our view that the language of the statute is clear, and that the Presiding Officer's decision to assess five violations of FIFRA section 12(a)(1)(B) based on the number of documents containing unapproved claims, is unsupported by the plain language of the statute.

A. *The Statute's Plain Language Proscribes Certain Distributions and Sales of Pesticides and Devices*

Determining the appropriate "unit of violation" for FIFRA section 12(a)(1)(B) under these circumstances is a question of legislative intent as expressed by the plain language of the statute. *See In re McLaughlin Gormley King Co.*, 6 E.A.D. 339, 344 & n.6 (EAB 1996) (determining the "unit of violation" under FIFRA section 12(a)(2)(Q)). The "unit of violation" is the civil, or, more precisely in this instance, "administrative" counterpart of the criminal "unit of

prosecution."[8] Consistent with our holding in *McLaughlin*, we hold here simply that the "unit of violation" under FIFRA section 12(a)(1)(B) in this case must be based on the number of proven distributions or sales of the registered pesticide by Microban to Hasbro. Accordingly, the Presiding Officer's reliance on the number of documents containing unapproved claims as the basis for assessing five violations of FIFRA section 12(a)(1)(B) is error.

We first look to the plain language of FIFRA section 12(a)(1), which provides:

> [I]t shall be unlawful for any person in any State to *distribute or sell* to any person --
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> (A) any pesticide that is not registered * * * or whose registration has been canceled or suspended, * * *;
>
> (B) any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under section 136a of this title;
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> (C) any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration under section 136a of this title;
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> (D) any pesticide which has not been colored or discolored pursuant to the provisions of section 136w(c)(5) of this title;
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> (E) any pesticide which is adulterated or misbranded; or
>
> (F) any device which is misbranded.

7 U.S.C. § 136j(a)(1)(A)-(F) (emphasis added).

The term "to distribute or sell" means:

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[8] In criminal law, "[the] * * * 'unit of prosecution,' [refers to] * * * how many different instances of a given offense the defendant's behavior exemplifies." Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 Cal. L. Rev. 335, 355 (2000). "Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice [referring to congressional prescription of the 'allowable unit of prosecution']." *Sanabria v. United States*, 437 U.S. 54, 69 (1978).

> to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.

7 U.S.C. § 136(gg).

It is manifest from the language and structure of FIFRA section 12(a)(1) that Congress intended the "unit of violation" to be based upon the statutorily defined act — "to distribute or sell." Any potential violation of this section must involve the act of distributing or selling. This is clear from the main clause of FIFRA section 12(a)(1) that, "it shall be unlawful for any person in any State to distribute or sell to any person." Paragraphs (A) through (F), being subordinate to the main clause, describe in greater detail the types of distributions or sales that are unlawful. In the case of FIFRA section 12(a)(1)(B), distributions or sales of a registered pesticide are unlawful, "if any claims made for it as a part of its distribution or sale substantially differ from any claims * * * in connection with its registration." 7 U.S.C. § 136j(a)(1)(B). Under this reading, a single shipment (a form of distributing or selling) of a registered pesticide constitutes one violation of FIFRA section 12(a)(1)(B), *if* the elements of paragraph (B) are satisfied. Multiple shipments are potentially multiple violations, once again, *if* the elements of paragraph (B) are satisfied with respect to each shipment. This is the case, irrespective of the number of unapproved claims made in association with each distribution or sale.[9]

The Board has consistently found the number of instances of the proscribed act, i.e., the "unit of violation" under FIFRA section 12(a)(1), to be based upon the number of proven distributions or sales. *See, e.g., In re Chempace Corp.*, 9 E.A.D. 119, 129-30 (EAB 2000) (finding the "unit of violation" for sections 12(a)(1)(A) and (E) to be the number of distributions or sales). A number of U.S. EPA's Administrative Law Judges have so held. *See In re Chempace Corp.*, Dkt. No. 5-FIFRA 96-017 (ALJ, Oct. 15, 1997) (ALJ Pearlstein); *In re E.I. DuPont de Nemours & Co., Inc.*, Dkt. No. FIFRA 95-H-02 (ALJ, Apr. 30, 1998) (ALJ Kuhlmann); *In re Accuventure, Inc.*, Dkt. No. FIFRA-1092-07-01-012 (ALJ, May 25, 1994) (ALJ Vanderheyden). We see no logical reason — and as discussed below, the Presiding Officer has not articulated any — for applying a different rule to paragraph (B) than that applied to other paragraphs of FIFRA section 12(a)(1). Rather, the plain language of FIFRA section 12(a)(1), buttressed by its parallel structure, compels the conclusion that each paragraph should be treated uniformly in determining the number of violations. *See K Mart Corp. v. Cartier, Inc.*,

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[9] *See infra* section II.B for a discussion of the additional requirement under FIFRA section 12(a)(1)(B) that unapproved claims be made "as a part of" the distribution or sale of registered pesticides.

486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, [a] court must look to * * * the language and design of the statute as a whole.").

In this case, the Presiding Officer concluded that there were five violations of FIFRA section 12(a)(1)(B) based upon five documents containing claims for Microban Plastic Additive "B" that substantially differed from the claims made in connection with its registration. *See* Feb. 1999 Order at 14. He reasoned that "the gravamen of the offense addressed by this provision is directed at the prevention of unapproved claims, not unapproved sales." *Id.* at 13. This reasoning, we find, cannot be reconciled with the plain language of the statute. As explained above, the act of distributing or selling is the common element for a FIFRA section 12(a)(1) violation. Each paragraph of FIFRA section 12(a)(1) specifically defines the type of distribution or sale that is unlawful. Paragraph (B) of section 12(a)(1) forbids those distributions or sales of registered pesticides which have, "as a part of" the distribution or sale, claims that substantially differ from those made as a part of their registration. Clearly, if the additional elements of paragraph (B) are met, but no distribution or sale of a registered pesticide occurred, Pesticide Enforcement could not prove a violation and a presiding officer could not conclude that the section had been violated. If, on the other hand, multiple unapproved claims are linked to only one distribution or sale, the analysis presented here suggests that only a single violation of FIFRA section 12(a)(1)(B) would result.[10] The Presiding Officer committed error by focusing on the number of documents, rather than the number of distributions or sales of Microban Plastic Additive "B" to Hasbro in determining the number of violations to assess in this case.[11]

This interpretation of the plain language of the statute is fully consistent with the purpose of the statute. "Over and over we have stressed that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank of Oregon v. Indep. Ins. Agents*, 508 U.S. 439, 455 (1993) (citations omitted). *See also Cabel v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945) ("[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of a dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sym-

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[10] A slight variation of this mode of analysis may, in fact, underlie Pesticide Enforcement's complaint in which five documents containing unapproved claims and 32 sales or distributions are alleged, yet the total number of alleged violations is limited to 32.

[11] We note that each of the five documents contains at least two claims that substantially differ from the claims made in connection with the Microban Plastic Additive "B" registration. *See* Complainant's Motion for Accelerated Decision as to Liability at 6-14 (July 15, 1998). Thus, at a minimum, the five documents contain ten unapproved claims. If the "gravamen" of FIFRA section 12(a)(1)(B) is "unapproved claims," as the Presiding Officer suggests, *see* Feb. 1999 Order at 13, the number of documents containing unapproved claims does not accurately reflect the number of possible violations in this case.

pathetic and imaginative discovery is the surest guide to their meaning."). In other words, examining the statutory purpose and plain language of a statute go hand in hand. *United States v. Texas*, 507 U.S. 529, 538 (1993) ("The evident purpose of the Debt Collection Act reinforces our reading of the plain language."); *see also Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 472 (1991) (observing that the lower court's plain language interpretation of the statute was "buttressed by the statutory purpose of ensuring Union democracy").

Linking the number of violations to the number of distributions or sales is consistent not only with the plain language of FIFRA section 12(a)(1)(B), but also with the consumer protection goals of FIFRA, which are intended to protect purchasers from being induced into purchasing a pesticide product based on unapproved claims that are potentially false or misleading.[12] Consonant with the consumer protection goals of the statute, each distribution or sale that is linked, as discussed in section II.B below, to one or more unapproved claim(s) logically represents a potential violation of FIFRA section 12(a)(1)(B).

B. *Were the Unapproved Claims Made "as a part of" the Distribution or Sale of Microban Plastic Additive "B"?*

In examining the record before us, we also find that the decisions of the Presiding Officer are deficient because he did not explicitly find that the unapproved claims identified in the five documents were made "as a part of" the alleged distribution or sale of Microban Plastic Additive "B" to Hasbro. Pesticide

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[12] The statutory background behind the consumer protection goal was previously recounted by Judge McCallum as follows:

> Stretching as far back as 1910, with the enactment of the Insecticide Act, "Congress was primarily concerned with the effectiveness of [pesticides] and [with] protecting purchasers from deceptive labeling." *Stearns Elec. Paste Co. v. EPA*, 461 F.2d 293, 302 (7th Cir. 1972). FIFRA, enacted in 1947, repealed the Insecticide Act, but "like its predecessor," FIFRA's "text indicated a primary interest in protecting consumers from the purchase of ineffective products." *Id.* By allowing the federal government to "'become familiar with the formula, label, and claims made with respect to any [pesticide] before it is offered to the public,'" FIFRA made it possible to "'prevent false and misleading claims, and to prevent worthless articles from being marketed.'" *Id.* at 303 (quoting House Report on 1947 Act). Congress continued these goals when it amended FIFRA in 1972 and put the Act into its current format. Under the current Act, a pesticide is registrable if EPA determines, among other things, that the pesticide's "composition is such as to warrant the proposed claims for it." FIFRA § 3(c)(5)(A), 7 U.S.C. § 136a(c)(5)(A). In short, these particular goals of FIFRA and its predecessors have been consistent for nearly a century: Congress wants to protect consumers from misrepresentations as to pesticides' efficacy, safety, or other qualities, and thus manufacturers must prove that the "claims" they make for their products are true.

In re Roger Antkiewicz & Pest Elim. Prods. of Amer., Inc., 8 E.A.D. 218, 242 (EAB 1999) (McCallum, concurring) (footnotes omitted).

Enforcement argues that unapproved claims need not "physically accompany a particular pesticide product during its sale or distribution" in order to find a violation of FIFRA section 12(a)(1)(B). Appeal at 5. Microban asserts otherwise. Reply at 10-11.

The elements of a FIFRA section 12(a)(1)(B) violation are clearly enumerated by the statute. First, there must be a person charged with the violation.[13] Second, that person must be located in a state.[14] Third, that person must have distributed or sold[15] a registered pesticide[16] to another person.[17] Fourth, there must be "claims"[18] made for [the registered pesticide] *as a part of its distribution or sale* [which] substantially differ from any claims made for it as a part of the statement required in connection with its registration." 7 U.S.C. § 136j(a)(1)(B) (emphasis added).

Upon scrutiny of the Presiding Officer's liability determination, the Board concludes that it is the language, emphasized above, in the fourth element of a FIFRA section 12(a)(1)(B) offense that the Presiding Officer's decisions have failed to satisfy, both in determining liability as well as the number of violations. Specifically, the "as a part of" language in FIFRA section 12(a)(1)(B) went virtually unnoticed in the Presiding Officer's decisions. A court should "'give effect, if possible, to every clause and word of a statute.'" *Hoffman v. Connecticut*, 492 U.S. 96, 103 (1989) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). In his February 1999 Order, the Presiding Officer made findings that "[t]he five documents which form the heart of EPA's case in this instance *were not particularly tied* to the thirty-two Microban sales or distributions. Rather they *existed independently* of any particular sale or distribution." Feb. 1999 Order at 9-10 (emphasis added); *see also* Initial Decision at 2. These findings would appear to be in direct conflict with the requirement in FIFRA section 12(a)(1)(B) that the unapproved claims be

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[13] It is undisputed that Microban is a person as defined by FIFRA. *See* 7 U.S.C. § 136(s).

[14] It is a fact that Microban is located in the State of North Carolina.

[15] It is also undisputed that Microban distributed or sold Microban Plastic Additive "B" to Hasbro. As noted above, the term "distribute or sell" includes "sell [or] offer for sale, * * * ship [or] deliver for shipment." 7 U.S.C. § 136(gg). It is undisputed that Microban sold Hasbro Microban Plastic Additive "B" pursuant to the April 1996 Agreement, and that Microban made 32 shipments of Microban Plastic Additive "B" to Hasbro's contractors between October 1996 and January 1997.

[16] Microban Plastic Additive "B" is a registered pesticide under the EPA registration no. 42182-1.

[17] Hasbro is a person as defined by FIFRA. *See* 7 U.S.C. § 136(s).

[18] It is undisputed that Microban made claims for Microban Plastic Additive "B" in the five "offending documents." *See* Sept. 1998 Order at 15-19 (describing the five documents and the unapproved human-health related claims contained therein); *supra* section I.B.

made "as a part of," not independently of, the distribution or sale of the pesticide. None of the Presiding Officer's decisions contain an explicit finding that any unapproved claims were made "as a part of" the distribution or sale of Microban's pesticide products to Hasbro.

The statutory term "as a part of" requires that a nexus exist between the unapproved claims and the distribution or sale of the pesticide. The Chief Judicial Officer in *In re Sporicidin International, Inc.*, 3 E.A.D. 589, 602-05 (CJO 1991), ruled that a "sufficiently close link" existed between the claims and sales and distributions of pesticides in that case.[19] He construed the statutory phrase broadly, and ruled that claims and corresponding distributions or sales need not be contemporaneous. *Sporicidin*, 3 E.A.D. at 603. It follows, therefore, that a rigid test, applicable to all situations, for determining whether claims have been made as a part of the distribution or sale of a pesticide is not contemplated as part of the statutory scheme. Rather, it is necessary to examine all of the surrounding facts and circumstances to make such a determination. In this case, the Board recognizes, for purposes of remand only, that some or all of the unapproved claims may have had some connection to the nascent, and ultimately, ongoing contractual relationship that existed at times between Microban and Hasbro involving the distribution or sale of Microban Plastic Additive "B". Whether those claims were made as a part of the distribution or sale of the pesticide would appear to be a mixed question of law and fact that should be determined on remand. Therefore, the nature of the contractual relationship as it evolved, and how the parties implemented it, are matters that need to be closely examined on remand before making a determination of liability and, more particularly, the extent thereof.

To guide the Presiding Officer on remand, we suggest that each of the specific documents containing unapproved claims be examined in this respect. For example, Microban's undated brochure should be investigated in the context of forming the contractual relationship with Hasbro. When was the Brochure provided to Hasbro? Was it provided to Hasbro before the Agreement was entered into? Was it intended to induce the purchase of Microban Plastic Additive "B" by Hasbro? Was the Brochure provided to Hasbro at any time during the term of the Agreement? Was the Brochure physically included with its shipments of Microban Plastic Additive "B"? The answers to these inquiries, together with similar inquiries directed at the other documents, could elucidate whether the unapproved claims in the Brochure were made "as a part of" the distributions or sales of Microban Additive "B" to Hasbro.

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[19] Microban asserts that *Sporicidin* supports the proposition that Pesticide Enforcement must "show the existence of a relationship between the unauthorized claims and a sale or distribution as a necessary element for each separate Section 12(a)(1)(B) violation." *See* Reply at 10-11.

III. *CONCLUSION*

Because the record before us demonstrates that the Presiding Officer placed undue emphasis on the number of documents containing unapproved claims rather than the number of sales or distributions in determining the number of violations, we reverse the Presiding Officer's Sept. 1998 Order, Feb. 1999 Order, and Initial Decision with respect to the conclusion that Microban is liable for five violations of FIFRA section 12(a)(1)(B). We also find deficiencies in the Presiding Officer's analysis of the nexus between the unapproved claims and the 32 shipments of Microban Plastic Additive "B" to Hasbro's contractors. The case is remanded for further proceedings consistent with this decision.

The Presiding Officer is directed on remand to determine, *inter alia*, whether, consistent with this opinion:

> 1. Any unapproved claims in the five documents were made "as a part of" — within the meaning of FIFRA section 12(a)(1)(B) — the 32 shipments of Microban Plastic Additive "B" to Hasbro or its contractors, either pursuant to the Agreement or otherwise; and
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> 2. Whether the Agreement contains unapproved claims as alleged in the Second Amended Complaint, and if so, whether such unapproved claims were made "as a part of the distribution or sale" of Microban Plastic Additive "B" to Hasbro or its contractors.

The Presiding Officer's penalty determination is also remanded without opinion for assessment of a penalty consistent with the conclusion of the further proceedings ordered herein.

So ordered.