

COVID-19 pushes demand for surface disinfectants to fever pitch, raising regulatory and litigation risk

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INTRODUCTION

Since the COVID-19 pandemic began, retailers have struggled to meet consumer demand for surface disinfectants — products claiming to kill viruses and bacteria. To ensure surface disinfectants used in homes and businesses are safe and effective, the United States Environmental Protection Agency (EPA) took two important steps early in 2020:

- In January, EPA activated its Emerging Viral Pathogen Guidance for Antimicrobial Pesticides (Emerging Pathogen Guidance) for the first time, allowing an expedited application and approval process for companies seeking to make claims about a product's expected efficacy against SARS-CoV-2.
- In March, EPA released "List N," a list of products expected to kill SARS-CoV-2 when used as directed.

While intended to assist in the fight against COVID-19, both the Emerging Pathogen Guidance and List N contain traps for the unwary. Those traps, coupled with consumer demand and public scrutiny, mean that retailers could face increased regulatory and litigation risk in 2021.

LIST N

List N has grown from 85 initial products to over 500 products. It is one of EPA's most visited web pages, reportedly receiving over 2 million weekly hits.

Many companies continue to make incorrect efficacy claims about SARS-CoV-2, unaware that those claims create potential liability.

When EPA published List N, many outlets erroneously reported that it contained products *known* to kill SARS-CoV-2. Most products on the list, however, have never been tested against the virus. Instead, List N comprises products EPA *believes* will be effective given their past performance against similar or harder-to-kill viruses.

Further, inclusion on List N does *not* grant companies carte blanche to claim that their products can kill SARS-CoV-2. Companies

cannot make that claim unless the product has specifically been tested against the virus and EPA has approved the claim.

While EPA has focused its past enforcement efforts on manufacturers, anyone in the supply chain — including retailers — can be liable for unregistered or misbranded surface disinfectants.

To date, EPA has only approved a handful of products which claim that they kill SARS-CoV-2. Nevertheless, many companies continue to make incorrect efficacy claims about SARS-CoV-2, unaware that those claims create potential liability.

EMERGING PATHOGEN GUIDANCE

Even if EPA includes a product on List N, companies cannot market the product as likely effective against the virus without separate approval as outlined in the Emerging Pathogen Guidance. For companies to make that claim legally, they must apply to EPA with data demonstrating the product's efficacy against a "supporting virus" — one that is harder to kill than SARS-CoV-2. Once approved, a company may only make the following two statements:

- **[Product name]** has demonstrated effectiveness against viruses similar to SARS-CoV-2 on **[hard, porous and/or non-porous surfaces]**. Therefore, **[product name]** can be used against SARS-CoV-2 when used in accordance with the directions for use against **[name of supporting virus(es)]** on **[hard, porous/non-porous surfaces]**. Refer to the CDC website at <https://www.cdc.gov/coronavirus/2019-ncov/index.html> for additional information.
- COVID-19 is caused by SARS-CoV-2. **[Product name]** kills similar viruses and therefore can be used against SARS-CoV-2 when used in accordance with the directions for use against **[name of supporting virus(es)]** on **[hard, porous/non-porous surfaces]**. Refer to the CDC website at <https://www.cdc.gov/coronavirus/2019-ncov/index.html> for additional information.



Approved companies may only make these statements in four places: technical literature distributed exclusively to health care professionals; “1-800” consumer information services; social media sites; and company websites. Companies may not make any statements about a product’s efficacy against SARS-CoV-2 anywhere else, including on product labels or promotional literature.

REGULATORY AND LITIGATION RISK FOR RETAIL INDUSTRY

In 2020, EPA Administrator Wheeler called on the retail industry to help protect Americans from products making false or misleading SARS-CoV-2 claims. While EPA has focused its past enforcement efforts on manufacturers, anyone in the supply chain — including retailers — can be liable for unregistered or misbranded surface disinfectants.

The increased emphasis on disinfecting public spaces means that plaintiffs could also seek to hold employers and public-facing businesses liable, in addition to the manufacturers and retailers typically targeted in litigation.

EPA has already issued several “stop-sale” orders for unregistered products making noncompliant efficacy statements. Moving forward, retailers should keep a close watch on EPA’s enforcement strategy, particularly as EPA leadership changes under the Biden administration.

On the litigation front, the pandemic has expanded the pool of potential litigants. Increased consumer use means more potential plaintiffs, especially those unfamiliar with personal protective equipment requirements, Safety Data Sheets and the importance of following label instructions.

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Although courts have held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) may preempt product liability claims based on a “failure to warn” theory, other liability theories remain viable. Motivated plaintiffs’ counsel may leverage the virus’s novelty to both challenge the preemption status quo and seek recovery on theories not typically preempted.

Even if surface disinfectants do not form the basis of a claim, failure to use products from List N could potentially be evidence of negligence by a company facing COVID-19 personal injury or wrongful death claims.

Claims related to surface disinfectants could take several forms:

- Consumer class actions arising out of alleged misrepresentations about virus efficacy, price gouging, price premiums, breach of warranty and similar theories. Similar suits have already been filed involving hand sanitizers and respirators.¹ Every state has a statutory scheme to protect consumers from deceptive trade practices, and most permit consumers to recover attorney’s fees, as well as double, treble or punitive damages.
- Personal injury claims alleging that a particular product was not effective against the virus, leading plaintiffs to contract COVID-19. For decades, plaintiffs in asbestos and silica litigation have pursued similar claims asserting that certain respirators failed to protect against inhalation hazards. However, given the limited evidence of virus spread from surfaces and the difficulty of proving causation in any COVID-19 case, we do not expect such cases would ultimately be successful.
- More conventional product liability claims, including that exposure to unvetted or misused chemicals caused plaintiffs to develop some other condition, like a respiratory ailment, skin irritation or more serious injury. At least one suit alleging injury from an EPA-registered chemical used to coat COVID-19 personal protective equipment has already been filed.²

CONCLUSION

Lessons learned in 2020 provide a valuable roadmap for risk mitigation in 2021. We recommend that companies in the retail industry:

- vet surface disinfectant products to ensure all claims are EPA-approved and comply with EPA’s Emerging Pathogen Guidance;
- use only products on List N when disinfecting workplaces and businesses, and follow label instructions carefully; and
- avoid making independent statements about product efficacy (including through advertising, in-store displays and salespeople or customer service representatives).

Notes

¹ See, e.g., *Moreno et al. v. Vi-Jon Inc.*, No. 20-cv-1446 (S.D. Cal.); *Mier v. CVS Pharmacy Inc.*, No. 20-cv-1979 (C.D. Cal.); *SourceAmerica v. World Tech Toys Inc.*, No. 20-cv-914 (E.D. Va.).

² See *Lazenby v. Renfro Corp.*, No. 20-cv-178 (E.D. Tenn.).

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at ereese@huntonak.com. This article was originally published in January 2021 in the firm's *Retail Industry in Review 2020* report and reflects the situation at the time it was written based on the rapidly changing nature of the COVID-19 pandemic. Republished with permission

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