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Federal Court Grants Partial Summary Judgment Against Refinery in Citizen Suit

St. Bernard Citizens for Environmental Quality and Louisiana Bucket Brigade v. Chalmette Refining, L.L.C., 2005 U.S. Dist. LEXIS 1605 (E.D. LA 2005)

Two environmental citizen group plaintiffs sued the Chalmette Refining facility near New Orleans under the federal citizen suit provisions of the Clean Air Act (42 U.S.C. §7641(a)) and of the Emergency Planning Community Right to Know Act (42 U.S.C. §11046(b)(1)). The violations alleged that the Chalmette facility was violating its hourly permit emission limits, flare performance standards and monitoring requirements, benzene emission limits for its storage tanks, state reporting requirements for unauthorized discharges, and EPCRA reporting requirements.

Plaintiffs filed their own motion for summary judgment on standing, seeking the court to declare that each group had standing to assert their claims in federal court. The court found that the organizations' affidavits met two of the three elements of organizational standing; namely, that the interests they seek to protect are germane to their purposes as an organization and neither the claim asserted nor the relief requested require participation of individual members. The organizations' affidavit showed that one of the purposes of the organizations was to protect residents from pollution coming from surrounding petrochemical industries. The affidavit further showed that the organization did not seek monetary damages or particularized relief limited to a single person or group. The remaining question for the court was whether the members had standing to sue in their own right, which is also a prong of organizational standing.

The court found, based on affidavits, that the individual members had standing to sue on their own behalf as their injury-in-fact was allegations of "odors" emanating from the facility. The court stated that plaintiffs were not required to show any health effects from the odors. All the plaintiffs had to show to establish this prong for standing is that they breathed and smelled polluted air.

The court also found that the second element of individual standing, the first being injury-in-fact, is that the odors were fairly traceable to the Chalmette facility. That is, plaintiffs did not have to show that the Chalmette facility was the only cause of their injury to satisfy the causation ele-

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ment of standing, rather only that it "contributed" to their injury. Plaintiffs also submitted evidence that the Chalmette facility admitted that it was causing the chemical odors.

The court also found in favor of the plaintiffs on the third leg of standing, that is, that the relief requested, both injunctive relief and penalties, would abate the conduct the plaintiffs complained of. The plaintiffs' allegations were that the Chalmette facility was "repeatedly" violating the Clean Air Act and that was sufficient to warrant injunctive relief. The court also found that penalties would deter defendants from continuing violations of the Clean Air Act.

The court finally found that there were 34 documented instances of unauthorized discharges by the Chalmette facility and that each were violations of Louisiana law, as the emissions were "preventable" and not exempt under a state law defense of malfunction, which is a sudden or non-avoidable breakdown of the process or control equipment.

As a result of the foregoing, the court found, and granted partial summary judgment, that plaintiffs had standing and that the defendant was in violation of state law which prohibits discharge of air contaminants without a permit on the basis of the 34 instances of unauthorized discharge notifications. The court also found that the citizen groups' request for injunctive relief requiring that the Chalmette facility stop violating the Clean Air Act was warranted.

This case shows the relative ease in which environmental plaintiffs can meet standing requirements if it has members that live near a polluting facility and it carefully crafts its affidavits in alleging its organizational interests, injury-in-fact, causation and redressability. The case also illustrates how fairly easy it is for environmental plaintiffs to review records at regulatory agencies, such as LDEQ's reports of unauthorized discharges, and to develop a violation case. The court may have missed that some of the LDEQ reporting regulations are not part of the Clean Air Act state implementation plan and thus may not have been violations of the Clean Air Act.

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Storm Water Permit Deadline for Oil and Gas Construction Activities Postponed Until June 12, 2006

On March 9, 2005, the EPA published an emergency final rule in the Federal Register amending 40 CFR 122.26(e)(8) to postpone until June 12, 2006, the requirement for oil and gas construction activity that disturbs one to five acres of land to obtain National Pollutant Discharge Elimination System (NPDES) storm water permit coverage. The rule also applies to sites disturbing less than one acre but that are part of a larger common plan of development or sale that disturbs between one and five acres.

§122.26(e)(8) now reads:

> (8) For any storm water discharge associated with small construction activity identified in paragraph (b)(15)(i) of this section, see § 122.21(c)(1). Discharges from these sources, other than discharges associated with small construction activity at oil and gas exploration, production, processing and treatment operations or transmission facilities, require permit authorization by March 10, 2003. Discharges associated with small construction activity at such oil and gas sites require permit authorization by June 12, 2006.

The EPA has postponed the deadline to allow it time to complete its analysis of the economic impacts and the legal and procedural implications of the options that it is considering regarding the regulation of storm water discharges from oil and gas-related constructions sites, and to evaluate the practices and methods operators currently employ to control such discharges. One particular issue the EPA will be examining is how to resolve conflicts between any new rule requiring storm water permit coverage for such sites and Clean Water Act § 402(l)(2), which exempts certain storm water discharges from oil and gas exploration, production, processing or treatment operations or transmission facilities from NPDES permit requirements.

To that end, EPA plans to convene at least one public meeting with industry representatives to discuss the effectiveness of current industry controls, and to obtain industry input on the appropriate approach for addressing construction storm water discharges. EPA intends to publish a notice of proposed rulemaking addressing these discharges by September 9, 2005 and to thereafter invite public comment.

The Louisiana Department of Environmental Quality has followed the EPA's lead and issued its own emergency rule on March 10, 2005 to amend Title 33, Chapter 25, Section 2511, the state counterpart to §122.26 (e)(8), to extend the storm water permit coverage deadline for such oil and gas construction activity until June 12, 2006.

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Naphtha Gas Release Class Certified: Physical Injury In; Fear & Fright Out

Howard v. Union Carbide Corp., 2004-1035 (La.App. 5 Cir. 2/15/05), 2005 WL 356594

The Louisiana Fifth Circuit has unanimously affirmed the certification of a class of people who claimed physical injuries due to exposure to naphtha gas accidentally released from Union Carbide Corporation's plant in Taft, Louisiana. However, the Fifth Circuit also affirmed the district judge's decision that plaintiffs who were not physically injured could not recover "fear and fright" damages.

On September 10 and 11, 1998 the floating roof on a liquid naphtha storage tank at a Union Carbide plant in Taft, Louisiana partially collapsed due to an overburden of rain water from a tropical storm. Naphtha escaped from the tank and became an airborne vapor which traveled to nearby areas until 17 hours later when the defendants succeeded in covering the exposed chemical with foam. District Judge Kirk Granier certified a class defined as those persons living within a specified geographic area who experienced physical symptoms during the 17 hour period as a result of exposure to naphtha gas.

Union Carbide appealed Judge Granier's decision arguing that the class should not have been certified because there was insufficient proof that a large number of people had been physically injured in the incident. The plaintiffs appealed arguing that Judge Granier should not have restricted the class only to those people who had sustained physical injuries. Plaintiffs contended that the judge should have included people who suffered merely from "fear and fright."

Numerosity. In order to certify a case as a class action, there are several elements that must be proven by plaintiffs. The element at issue in this case was "numerosity" – the defendant argued that plaintiffs failed to prove that a large number of individuals sustained injuries as a result of the naphtha release. Supporting defendant's argument was the testimony of their expert air modeler and their expert industrial hygienist. John Woodward, the air modeler, testified that the concentration of naphtha in the affected areas was only 6 parts per million ("ppm"), or in a worst case scenario 24 ppm. Dr. Stanley Haimes, the industrial hygienist, testified that, although naphtha can be smelled at only 1 ppm, it does not cause physical irritation in the average person until airborne concentrations reach 880

ppm. However, federal workplace standards set a "level of concern" at 33 ppm.

Plaintiffs had their own experts who disagreed. Their air modeler, Dr. Vasilis Fthenakis, testified that there was a greater concentration of naphtha in the affected area that reached 35 ppm at the outermost edges of the plume. Dr. William Nassetta, an expert in the field of occupational medicine, testified that most individuals would not experience physical irritation such as coughing and burning of eyes and throat until concentration levels reached 100 ppm. However, he also testified that symptoms will increase with the length of exposure – in this case 17 hours. According to Dr. Nassetta, there is a "level of concern" at 38 ppm.

In addition to these experts, plaintiffs put a number of class members on the stand who testified to their experience of odors, nausea, headaches, coughing, and burning eyes and throat. They also produced lists of "thousands" of other people who had made similar claims to attorneys serving on the plaintiffs' committee.

The Fifth Circuit found that the trial judge simply credited the plaintiffs' experts and witnesses more than the defendant's experts. Given that this provided a "reasonable basis" for the finding of numerosity, the Fifth Circuit found no obvious error in the certification of a class.

Fear and fright. The trial court ruled that in order for any individual plaintiff to recover mental anguish damages, the plaintiff would have to prove physical injury. Plaintiffs appealed this ruling arguing that Louisiana recognizes a free-standing claim for "fear and fright" without physical injury.

The Fifth Circuit reviewed prior case law on recovery of mental anguish awards without physical injury. In *Rivera v. United Gas Pipeline Co.*, 1996-0502 (La.App. 5 Cir. 6/30/97), 697 So.2d 327, *writs denied*, 97-2030-2034 (La.12/12/97), 704 So.2d 1196-97, the Fifth Circuit held that a plaintiff may recover for mental anguish without physical injury if he was within the "zone of danger", if his fear was reasonable under the circumstances, and if his fear amounted to more than "mere inconvenience". The Fifth Circuit also cited earlier Louisiana Supreme court cases which held that normally mental anguish without physical injury is not compensable, and that in order to recover the plaintiff must show a particular likelihood of genuine and serious mental distress arising from special circumstances.

The plaintiffs who testified at the class certification hearing all testified to a generalized fear, but failed to prove "genuine and serious mental distress". Plaintiffs' expert psychiatrist, Dr. Chester Scrignar, only examined two of the plaintiffs and his testimony only revealed a possibility of generalized fear and fright damages. Further, he could not say how many people out of the proposed class experienced mental distress as a result of the naphtha release.

The Fifth Circuit concluded that the plaintiffs had not carried their burden of proving that they suffered from genuine and serious mental distress such as to guarantee that their mental distress claims were not spurious. Accordingly, the trial judge did not err in limiting the class to those who experienced physical injury.

- *Madeleine Fischer*

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"Arranger" Liability — Another Basis For Parent Corporation Liability Under CERCLA?

GenCorp, Inc. v. Olin Corp., 390 F.3d 433 (6th Cir. 11/22/04)

In *United States v. Bestfoods*, 524 U.S. 51 (1998), the U.S. Supreme Court held that a parent corporation may be liable under the Comprehensive Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq.*, for cleanup of a facility owned or operated by its subsidiary (1) derivatively, if the "corporate veil" may be pierced, or (2) directly, if the parent corporation is itself an "operator" of the polluting facility within the meaning of CERCLA. CERCLA, however, imposes liability not only on facility owners and operators, but also on transporters and persons who arranged for disposal or treatment of the waste ("arrangers"). *See* 42 U.S.C. § 9607(a). An "arranger," under 42 U.S.C. § 9607(a)(3), is:

> any person who by contract, agreement, or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

In *GenCorp, Inc. v. Olin Corp*., 390 F.3d 433 (6th Cir. 11/22/04), the Federal Sixth Circuit Court of Appeal imposed CERCLA liability on the business partner of an entity whose facility generated the waste at issue, on grounds that the partner "arranged for disposal" of the waste. Although *GenCorp* did not involve parent corporation liability, it suggests that *Bestfoods* did not describe the *only* bases for parent corporation liability under CERCLA. Or, stated differently, *GenCorp* is a reminder that CERCLA imposes liability not only on "operators" of facilities, which was at issue in *Bestfoods*, but also on other persons, including "arrangers."

GenCorp involved a business relationship that, in the words of the court, "defie[d] easy categorization." Briefly, Olin and GenCorp entered into a contract whereby Olin would construct a plant on GenCorp's property to manufacture a chemical needed by GenCorp. Olin leased the property from GenCorp and, in return, GenCorp agreed to purchase 50% of the plant's output. To oversee the construction, operation, and management of the plant, the parties formed a committee composed equally of Gencorp

and Olin representatives. GenCorp supplied and paid the plant's hourly workers, and Olin supplied and paid the plant's salaried supervisory employees, including the plant manager, although GenCorp employees did serve in some management positions. All employees reported ultimately to the Olin-appointed plant manager. The plant manager hired a transporter to carry waste offsite from the plant to a disposal facility, which ultimately became a Superfund site. EPA issued a CERCLA unilateral administrative order to Olin requiring it to remediate the disposal facility, which led to the litigation between Olin and GenCorp. Olin contended the GenCorp had "arranged for disposal" of the waste and, therefore, was liable for some or all of the cleanup costs.

In addressing Olin's claims, the Sixth Circuit first observed that CERCLA does not define what it means to "arrange" for disposal of waste. Looking to the traditional definitions of the word, it noted that to "arrange" for something means to "plan or prepare" for it, though not necessarily to implement the plan. Further, making preparations does not require a formal disposal agreement, and the arrangements may arise from a broader "transaction" rather than from a discreet event. And although some intent to make preparations for waste disposal is required, the intent does not have to relate to disposing of wastes in a particular manner or at a particular location, and the requisite intent could be inferred from the totality of the circumstances. Hence, the inquiry is highly fact-driven.

Applying these principles, the court concluded that GenCorp had arranged for the disposal of the waste generated at the Olin plant and disposed of at the disposal site. GenCorp and Olin had entered into an agreement to build the plant, and the generation of waste was a natural by-product of the plant's manufacturing process. The constructions plans, which were approved by GenCorp, specifically provided that the hazardous waste generated at the plant would be placed in drums and buried at an off-site location. Further, the committee on which GenCorp representatives served discussed the disposal of the waste, and the GenCorp committee members, in particular, researched and recommended waste disposal locations. The court found that these and other facts, considered together, amply showed that GenCorp "intended to enter into a transaction that included an arrangement for the disposal of hazardous substances" under CERCLA.

The court then considered, and rejected, GenCorp's argument that it was not liable as an "arranger" because it never "owned or possessed" the waste at issue, as is provided in the statute. GenCorp emphasized that the trial court had never found that it had title to or physically held the waste.

The court, however, concluded that "arranger" liability may be based on constructive ownership or possession, and GenCorp's control over the waste sufficed to establish constructive ownership or possession. As a result, GenCorp was liable for cleanup costs under CERCLA.

Significantly, the court stated that GenCorp's position placed too much weight on *Bestfoods*. It explained that *Bestfoods* only dealt with a parent corporation's liability as an "operator," and did not alter the basic principles for ascertaining "arranger" liability under CERCLA.

GenCorp, obviously, addressed the CERCLA liability of a business partner, rather than a parent corporation. The same principles, however, likely apply to both, as was recognized by the Supreme Court in *Bestfoods*. *Bestfoods*, 524 U. S. at 65 (An operator is directly liable "regardless of whether that person is the facility's owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice"). Thus, *Bestfoods'* holding that a parent corporation may be liable if the corporate veil is pierced or if the parent corporation itself was an "operator" of the facility, tells only part of the story. Parent corporations — and other persons such as shareholders, officers, directors, and employees — may also be liable if they fall within other categories of liable persons under CERCLA, including "arrangers."

- *Boyd A. Bryan*

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5th Circuit Affirms Maximum OSHA Penalty in Improper Asbestos Abatement Action

Chao v. Occupational Safety and Health Review Commission, et. al. 2005 U.S. App. LEXIS 2979 (5th Cir. 2005)

In a recent case, the 5th Circuit affirmed the decision of the Occupational Safety and Health Review Commission to assess penalties against Erik K. Ho for willfully disregarding safety and health regulations during the renovation of his building.

Ho purchased an asbestos-containing building that he intended to develop into residential housing. Although he was aware that the on-site asbestos was to be removed only by personnel licensed by the Texas Department of Health, he hired unlicensed individuals who, in turn, hired illegal immigrants to do the work.

The workers were never told of the risks associated with working near asbestos. Likewise, they were only occasionally given dust masks as respiratory protection. In addition, they were not given protective clothing, medical surveillance, asbestos monitoring, or adequate ventilation while working. Moreover, after a city inspector visited the site and issued a stop-work order, Ho directed them to work at night.

Ho's actions were discovered when he told one of his employees to tap into an unmarked valve that he believed was a water line. The valve contained gas. An explosion occurred when an employee started his truck. As a result, three workers were injured.

The Secretary of Labor charged Ho and his companies, Ho Ho Ho Express, Inc. and Houston Fruitland, Inc. with 10 severe and 29 willful violations of the Safety and Health Regulations for Construction for failing to provide respirators to employees and failing to train them in the asbestos removal procedure. The Secretary issued the violations per employee, and also charged Ho and his companies with willfully violating OSHA's general duty clause.

An Administrative Law Judge upheld the Secretary's assessment except for the general duty clause section. On review, the OSHA Commission affirmed the ruling that Ho was subject to OSHA and that the violations of the respiratory and training standards were willful. The Commis-

sion dismissed Ho's companies, finding that they were not the alter egos of Ho and thus could not be held liable for Ho's actions.

The Commission also found that Ho did not willfully violate OSHA's general duty clause when he directed the employee to tap into the valve. The general duty clause requires employers to free the workplace of "recognized hazards that are causing or likely to cause death or serious physical harm to an employee." Furthermore, the Commission vacated all, but two of the Secretary's assessed violations. Finally, the Commission affirmed the Secretary's assessment of penalties against Ho and further increased the amount of penalties to the maximum allowed under the law.

Both sides appealed. Ho argued that his activities did not violate OHSA because his actions did not affect interstate commerce. However, the 5th Circuit agreed with the Commission and found that his activities, when taken in the aggregate, directly affected interstate commerce. Moreover, the Court found that Ho affected interstate commerce by specifically depriving an asbestos abatement firm licensed by the Texas Department of Health of a legitimate commercial job opportunity.

The Secretary challenged the Commission's finding that Ho's two businesses were not his alter egos. The 5th Circuit agreed with the Commission finding that there was enough separateness between the companies and Ho to insulate them from liability.

The Secretary also challenged the Commission's finding that Ho did not willfully violate OSHA's general duty clause. The 5th Circuit, in affirming the Commission on this issue, found that there was no evidence in the record of willfulness in Ho's decision to tap into the unmarked valve. Accordingly, the 5th Circuit affirmed.

Finally, the 5th Circuit agreed with the Commission that the Secretary could not issue citations on a per employee basis for violating the asbestos respirator standard because the plain language of the statute proscribed a single work practice as a violation. However, the 5th Circuit found that the asbestos training violation could, in the Secretary's discretion, be issued per employee. Under the Court's analysis, however, the Secretary's decision to assess liability for the violations on a per employee basis was unreasonable because there were no employee-specific circumstances. Therefore, the 5th Circuit again agreed with the Commission's findings.

Accordingly, the 5th Circuit affirmed the OHSA Commission on all of its findings including the levy of maximum statutory penalties per assessed violation for his illegal and unsafe practices.

- *Michelle D. Craig*

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Appellate Court Overturns Conviction of Man Who Hauled Away Pump

Copeland v. State, 2004 WL 2634469 (Tex.App.-El Paso Nov. 4, 2004)

After noting that "while there might have been knowledge of [the owner] was about [to do], and the Appellant was present during the offense, his actions in taking away a tool does not serve to demonstrate a contribution toward a common purpose," the Texas Court of Appeals for the 8th District reversed the Appellant's criminal conviction for intentional and knowing unauthorized sewage discharge.

The evidence showed that the owner of the trailer park acted alone in committing the offense and that appellant's only involvement was carrying away the pump after the owner has disassembled the remaining pipes. The appellate court found that the act of taking away a tool did not serve to demonstrate a contribution toward a common purpose and held that the prosecution did not show that the defendant was a participant in the offense.

More specifically, the appellate court noted that mere presence or even knowledge of an offense does not make one a party to the offense. In reaching its conclusion, the court cited a criminal appeals case for the proposition that "[t]he evidence must show that at the time of the offense, the parties were acting together, each contributing some part toward the execution of the common purpose." In determining whether a defendant participated in an offense as a party, courts may examine events that occurred before, during, and after the commission of the offense, and may rely on the actions of the defendant that show an understanding and common design to commit the offense."

- *Tara Gayle Richard*

# # # #

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding this E*Zine or this practice group, please contact:

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