IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT OF ILLINOIS
MADISON COUNTY

HOLIDAY SHORES SANITARY DISTRICT, Plaintiff, vs. SYNGENTA CROP PROTECTION INC. and GROWMARK, INC., Defendants.	)	NO. 2004-L-000710 JURY TRIAL DEMANDED

APPENDIX TO
SYNGENTA'S AND GROWMARK'S COMBINED
MOTIONS TO DISMISS PURSUANT TO 735 ILCS 5/2-619.1

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Illinois Pollution Control Board
State of Illinois

*1 PEOPLE OF THE STATE OF ILLINOIS, COMPLAINANT
v.
STATE OIL COMPANY, WILLIAM ANEST F/D/B/A S & S PETROLEUM PRODUCTS, PETER ANEST F/D/B/A S & S PETROLEUM PRODUCTS, CHARLES ABRAHAM, JOSEPHINE ABRAHAM, AND MILLSTREAM SERVICES, INC., RESPONDENTS
CHARLES ABRAHAM, JOSEPHINE ABRAHAM, AND MILLSTREAM SERVICES, INC., CROSS-COMPLAINANTS
v.
WILLIAM ANEST AND PETER ANEST, CROSS-RESPONDENTS
PCB 97-103
August 19, 1999

(Enforcement - Land, Water)

(Cross-Complaint)

ORDER OF THE BOARD

This case involves a site in McHenry, McHenry County, Illinois. The People of the State of Illinois (People) allege that all respondents caused or allowed water pollution in violation of Section 12(a) of the Environmental Protection Act (Act), 415 ILCS 5/12(a) (1998). The People also seek to recover from respondents Charles and Josephine Abraham and Millstream Services, Inc. over $150,000 the People expended to address contamination from underground storage tanks at the site. The People seek these costs under Section 57.12(a) of the Act, 415 ILCS 5/57.12(a) (1998).

Respondents Charles and Josephine Abraham and Millstream Services, Inc. (collectively, the Abrahams) filed a first amended cross-complaint (cross-complaint, cited as "Cross-Comp.") against respondents William and Peter Anest (the Anests). The Abrahams allege that the Anests violated various provisions of the Act, including prohibitions regarding water pollution, open dumping, and waste disposal. See 415 ILCS 5/12(d), 12(f), 21(a), 21(d)(2) (1998). The Abrahams also seek to recover cleanup costs from the Anests under Section 57.12(a) of the Act. See 415 ILCS 5/57.12(a) (1998). The Anests moved to dismiss the cross-complaint (motion, cited as "Mot.").

The Board first determines whether the cross-complaint is duplicitous or frivolous. For reasons set forth below, the Board finds that the cross-complaint is not duplicitous. The Board finds that the Abrahams' Section 12(f) and Section 57.12(a) claims, as well as a portion of their request for relief, are frivolous. The Board finds that the remainder of the cross-complaint is not frivolous. The Board denies the Anests' motion to dismiss the cross-complaint.

BACKGROUND

On February 26, 1999, the Abrahams filed the cross-complaint with the Board. The Abrahams state that the Anests once owned the site. The Abrahams allege that in early 1984, while the Anests still owned the site, gasoline began leaking from the underground storage tanks at the site and seeped into the stream that borders the site. Cross-Comp. at 2. According to the Abrahams, the tanks were tested and repaired at the time of this initial leak; however, gasoline was detected again in the stream in late 1984 and early 1985. Id. The Abrahams further allege that the Anests knew of these leaks and sold the site to Charles and Josephine Abraham in 1985. Id.

The Abrahams state that Charles and Josephine Abraham filed suit against the Anests in the circuit court of McHenry County (the McHenry County case). [FN1] In the McHenry County case, Charles and Josephine Abraham alleged that the Anests committed breach of contract and fraud when the Anests sold the site to them. Cross-Comp. at 2, 10. The Abrahams allege that the Anests were found liable to Charles and Josephine Abraham in that case. Id. at 2, 10-11. The Abrahams state that the breach of contract and fraud, in addition to the Anests' failure to assume responsibility for the leaks, "ultimately lead the State of Illinois to allegedly conduct and pay for certain remedial activities at the [site] relating to leakage of gasoline into the stream." Id. at 2. Based on these allegations, the Abrahams ask the Board to find the Anests jointly and severally liable for any relief to which the State of Illinois may be entitled. Id. at 14, 17, 19, 21. The Abrahams also request that the Board find the Anests in violation of 415 ILCS 5/12(d), 12(f), 21(a), 21(d)(2), and 57.12(a); order the Anests to remediate any gasoline and waste oil contamination at the site; and order the Anests to pay for all of the Abrahams' costs of this proceeding, including expert witness and attorney fees. Id. at 14, 17, 19, 21.

***2** Initially, the Board must consider whether the cross-complaint is duplicitous [FN2] or frivolous under Section 103.124(a) of the Board's procedural rules, which provides in part as follows:

> If [a] complaint is filed by a person other than the Agency, the Clerk shall also send a copy to the Agency; the Chairman shall place the matter on the agenda for Board determination whether the complaint is duplicitous or frivolous. 35 Ill. Adm. Code 103.124(a).

A complaint is duplicitous if the matter is identical or substantially similar to one brought in another forum. See, e.g., Dayton Hudson Corporation v. Cardinal Industries, Inc. (August 21, 1997), PCB 97-134, slip op. at 3. A complaint is frivolous if it fails to state a cause of action upon which the Board can grant relief. Id. A complaint also is frivolous if it requests relief that the Board cannot grant. See, e.g., Lake County Forest Preserve District v. Ostro (July 30, 1992), PCB 92-80, slip op. at 2.

The Board also must consider the Anests' April 7, 1999 motion to dismiss the cross-complaint. In the motion, the Anests contend that the Board should dismiss the cross-complaint, or portions thereof, on three bases: (1) res judicata bars the entire cross-complaint; (2) the open dumping and waste disposal claims under Sections 21(a) and 21(d)(2) of the Act, respectively, should be dismissed because those provisions do not apply to the facts of this case; and (3) the Section 57.12(a) claim should be dismissed because that section cannot be applied retroactively here. Mot. at 1, 3, 4. The Abrahams filed a response opposing the motion on May 10, 1999 (response, cited

as "Resp."). On May 24, 1999, the Anests filed a reply to the response, along with a motion to file the reply instanter. [FN3]

DISCUSSION

Duplicitous and Frivolous Determination

The Board finds that the cross-complaint is not duplicitous. While an action relating to the site was litigated in McHenry County Circuit Court, the claims litigated in that case were breach of contract, fraud, and Consumer Fraud and Deceptive Practices Act claims. Mot. at Exhibit A. The cross-complaint, by contrast, presents claims under Sections 12(d), 12(f), 21(a), 21(d)(2), and 57.12(a) of the Act. The claims presented in the two actions therefore are not identical or substantially similar. See, e.g., Morton College Board of Trustees v. Town of Cicero (January 8, 1998), PCB 98-59, slip op. at 5 (breach of contract claim pending in circuit court was not duplicitous of claim pending before the Board alleging violations of the Act).

The Board therefore must consider whether any of the claims are frivolous. First, the Board finds that the cross-complaint states a cause of action for a violation of Section 12(d). The cross-complaint alleges, among other things, that the Anests allowed oil and gasoline to remain in soils adjacent to the waters of the State and allowed the discharge of oil and gasoline into those waters. If proven, these facts would constitute a violation of Section 12(d) of the Act. This claim therefore is not frivolous.

***3** The Abrahams also allege that the Anests violated Section 12(f) of the Act. Section 12(f) reads in pertinent part:

> No person shall ... [c]ause, threaten or allow the discharge of any contaminant into the waters of the State ... without an NPDES [National Pollutant Discharge Elimination System] permit for point source discharges issued by the Agency under Section 39(b) of this Act, or in violation of any term or condition imposed by such permit, or in violation of any NPDES permit filing requirement established under Section 39(b), or in violation of any regulations adopted by the Board or of any order adopted by the Board with respect to the NPDES program. 415 ILCS 5/12(f) (1998).

The Abrahams allege that the Anests violated this provision by allowing the discharge of contaminants into the waters of the State. Cross-Comp. at 20. However, the Abrahams do not allege that the Anests allowed the discharge without an NPDES permit or in violation of NPDES requirements. As a result of this omission, the Abrahams failed to state a cause of action for a violation of Section 12(f). Accordingly, the Board finds this claim frivolous and strikes it from the cross-complaint.

Section 21(a) of the Act prohibits the open dumping of waste, and Section 21(d)(2) of the Act prohibits any person from, among other things, conducting a waste-disposal operation in violation of Board regulations. See 415 ILCS 5/21(a), 21(d)(2) (1998). In the motion to dismiss, the Anests argue that Sections 21(a) and 21(d)(2) do not apply and, in effect, that these claims are frivolous. The Anests maintain that the gasoline that leaked out of the underground storage tanks was valuable and that they intended to resell it. Mot. at 3-4. The Anests conclude that the gasoline was not "waste" under Sections 21(a) and 21(d)(2) and they therefore did not violate

those provisions. Id.

The Act defines "waste" as:

> any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities .... 415 ILCS 5/3.53 (1998).

When determining whether material is a "waste," the Board considers federal court interpretations of the definition of "solid waste" under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. ss 6901 et seq. See R.R. Donnelley & Sons Co. v. Illinois Environmental Protection Agency (February 23, 1989), PCB 88-79, slip op. at 3-5. The RCRA definition of "solid waste" is nearly identical to the definition of "waste" under the Act. [FN4]

Federal courts interpreting the RCRA definition have found that once petroleum leaks from an underground storage tank, it becomes "discarded material" and thus a "solid waste." See, e.g., Agricultural Excess & Surplus Insurance Company v. A.B.D. Tank & Pump Co., 878 F. Supp. 1091, 1095 (N.D. Ill. 1995) ("[L]eaked gasoline from an underground storage tank is no longer useful and is appropriately defined as discarded material or solid waste."); Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) ("[G]asoline is no longer a useful product after it leaks into, and contaminates, the soil."). The Board finds these cases persuasive here.

***4** The Board further finds that the facts pled, if proven, would demonstrate violations of Sections 21(a) and 21(d)(2). See, e.g., Village of Niles v. Mobil Oil Co. (July 24, 1997), PCB 98-10, slip op. at 2. Accordingly, the Board will not dismiss the Abrahams' claims under Sections 21(a) and 21(d)(2) as frivolous, and denies the Anests' motion to dismiss these claims.

The Abrahams also assert a claim under Section 57.12(a) of the Act, which provides:

> Notwithstanding any other provision or rule of law, the owner or operator, or both, of an underground storage tank shall be liable for all costs of investigation, preventive action, corrective action and enforcement action incurred by the State of Illinois resulting from an underground storage tank. 415 ILCS 5/57.12(a) (1998).

In the motion to dismiss, the Anests note that Section 57.12(a) became effective after the Anests sold the site. Mot. at 4. The Anests therefore contend that they could not have violated Section 57.12(a) and that Section 57.12(a) cannot be applied retroactively. Id. The Abrahams urge a different reading of the statute based on the definition of "owner" that applies in Section 57.12(a). Resp. at 10.

The Board need not reach these arguments, however, because the plain language of Section 57.12(a) shows that it applies only to state enforcement actions, not private enforcement actions. Accordingly, the Board dismisses the Abrahams' Section 57.12(a) claim as frivolous. This finding renders the Anests' motion to dismiss this claim moot, and the Board therefore denies that portion of the motion.

In determining whether a complaint is frivolous, the Board also must consider whether the complaint requests relief that the Board cannot grant. The Abrahams request that the Board award them "all costs of this proceeding, including but

not limited to expert witness fees and attorneys' fees ...." Cross-Comp. at 14, 17, 19, 21. The Board cannot award the Abrahams litigation costs, including expert witness fees and attorney fees. See, e.g., Charter Hall Homeowners Association v. Overland Transportation System (January 22, 1998), PCB 98-81, slip op. at 2. Accordingly, the Board strikes this portion of the cross-complaint.

Motion to Dismiss on Res Judicata Grounds

Initially, the Board notes that the motion is untimely. Under Section 103.140(a) of the Board's procedural rules, "[a]ll motions by respondent to dismiss or strike the complaint ... shall be filed within 14 days after receipt of [the] complaint ...." 35 Ill. Adm. Code 103.140(a). The Board finds that this limit applies to cross-complaints as well as complaints. The Abrahams filed the cross-complaint on February 26, 1999, but the Anests did not file the motion to dismiss until April 7, 1999. Accordingly, the motion is untimely.

However, the Board notes that the motion could be re-filed as a motion for summary judgment, and that motions for summary judgment need not be filed within 14 days after respondent's receipt of the complaint. The Board further notes that the Abrahams have not objected to the motion as untimely, and that this is the second time that the parties have briefed the res judicata issue. (The Anests sought to dismiss the original cross-complaint on res judicata grounds, but the Board dismissed that cross-complaint on other grounds.) There is little to be gained by requiring the parties to brief this issue a third time, so the Board will exercise its discretion to consider the motion to dismiss in the interests of judicial economy.

***5** Under the doctrine of res judicata, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies and constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. See River Park, Inc. v. City of Highland Park, 184 Ill. 2d 290, 302, 703 N.E.2d 883, 889 (1998). The bar extends to what was actually decided in the first action, as well as those matters that could have been decided in that suit. See River Park, 184 Ill. 2d at 302, 703 N.E.2d at 889.

In general, res judicata applies when three elements are present: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of the parties or their privies; and (3) an identity of cause of action. See River Park, 184 Ill. 2d at 302, 703 N.E.2d at 889. The burden of establishing res judicata "is on the party invoking it, and to operate as such it must either appear upon the face of the record or be shown by extrinsic evidence that the precise question, or point, was raised in determining the former suit." Torcasso v. Standard Outdoor Sales, Inc., 157 Ill. 2d 484, 491, 626 N.E.2d 225, 228-229 (1993).

Even if all of the elements for res judicata are present, however, res judicata will not apply "if the court in the first action lacked subject matter jurisdiction over that claim." Village of Maywood Board of Fire and Police Commissioners v. Department of Human Rights of the State of Illinois, 296 Ill. App. 3d 570, 580, 695 N.E.2d 873, 880 (1st Dist. 1998). In this case, res judicata will not apply if the McHenry County Circuit Court lacked subject matter jurisdiction over the claims that the Abrahams now assert before the

Board. This in turn raises the question of whether the Board has exclusive jurisdiction over citizens' complaints under the Act.

Generally:

> [T]he courts of Illinois have original jurisdiction over all justiciable matters. The legislature may vest exclusive original jurisdiction in an administrative agency. However, if the legislative enactment does divest the circuit courts of their original jurisdiction through a comprehensive statutory administrative scheme, it must do so explicitly. Employers Mutual Companies v. Skilling, 163 Ill. 2d 284, 287, 644 N.E.2d 1163, 1165 (1994).

Several provisions of the Act address the Board's jurisdiction over actions brought by private parties such as the Abrahams. Section 31(d) of the Act provides: "Any person may file with the Board a complaint, meeting the requirements of subsection (c) of this Section, against any person allegedly violating this Act or any rule or regulation thereunder or any permit or term or condition thereof." 415 ILCS 5/31(d) (1998). One of the primary authors of the Act, David Currie, stated that while the Attorney General or State's Attorney generally may bring an action before a court or the Board, [FN5] "the citizen ... has no option to file in court in the first instance." D. P. Currie, Enforcement Under the Illinois Pollution Law, 70 Nw. L. Rev. 389, 452 n.308 (July-August 1976).

***6** This reading of the Act is consistent with Section 45(b) of the Act, which allows citizens to sue for injunctive relief in circuit court, but only after first seeking relief before the Board:

> Any person adversely affected in fact by a violation of this Act or of regulations adopted thereunder may sue for injunctive relief against such violation. However, except as provided in subsection (d), no action shall be brought under this Section until 30 days after the plaintiff has been denied relief by the Board in a proceeding brought under subsection [(d)] of Section 31 of this Act. 415 ILCS 5/45(b) (1998).

Several courts have found that the Board has exclusive jurisdiction over citizen complaints. Most recently, in City of Elgin v. County of Cook, 257 Ill. App. 3d 186, 629 N.E.2d 86 (1st Dist. 1993), aff'd in part on other grounds and rev'd in part on other grounds, 169 Ill. 2d 53, 660 N.E.2d 875 (1995), the court considered a challenge to a zoning ordinance that Cook County passed granting a special use permit to a solid waste facility known as a "balefill." In so doing, the court noted:

> The legislature conferred exclusive jurisdiction upon the [Board] to adjudicate actual or threatened violations of the [Act], IEPA permits or [[Board] rules and regulations. Where an administrative agency is vested with exclusive jurisdiction to hear an action, the exhaustion of remedies doctrine provides that a party must pursue all available administrative remedies before seeking judicial review when an adequate administrative remedy exists. City of Elgin, 257 Ill. App. 3d at 195, 629 N.E.2d at 93.

The City of Elgin court also dismissed a count that another plaintiff, the Village of South Elgin, brought to enjoin the development or construction of the balefill pending the siting approval required by various provisions of the Act. The court held:

> While the State's Attorney or the Attorney General is permitted to institute an immediate injunctive action in the circuit court to enjoin violations of

> the [Act] or halt any activity causing or contributing to a substantial danger to the environment or public welfare, section 45 of the [Act] requires any person adversely affected by a violation of the [Act] to exhaust their administrative remedies before seeking injunctive relief in the circuit court. Because the Village of South Elgin has not exhausted its administrative remedies here, the circuit court is without jurisdiction to consider the violations of the [Act] alleged .... City of Elgin, 257 Ill. App. 3d at 198, 629 N.E.2d at 95, citing People v. Fiorini, 143 Ill. 2d 318, 337-338, 574 N.E.2d 612, 619-620 (1991).

See also Village of South Elgin v. Waste Management of Illinois, 62 Ill. App. 3d 815, 820-822, 379 N.E.2d 349, 354-355 (2d Dist. 1978) (upholding circuit court's dismissal of claim seeking to have certain landfill permits declared void on the grounds that complainants had not exhausted their administrative remedies before the Board).

***7** Several Illinois Supreme Court cases, however, find that the Board does not have exclusive jurisdiction over all citizen enforcement actions. In People v. Fiorini, 143 Ill. 2d 318, 574 N.E.2d 612 (1991), the Illinois Attorney General sought injunctive relief and statutory penalties against Geno and Bernardine Fiorini for causing or allowing waste to be deposited at a dump site in violation of the Act, Board regulations, and the Illinois Public Nuisance Act. The Fiorinis filed a third-party complaint alleging that several third-party defendants violated Sections 21(a) and 21(e) of the Act by improperly dumping waste at the dump site. The Fiorinis sought injunctive relief and cleanup costs.

Third-party defendants moved to dismiss the third-party complaint on the grounds that the Fiorinis failed to exhaust their administrative remedies, as Section 45(b) of the Act requires. While holding that third-party defendants waived this issue by failing to raise it in the trial court, the Illinois Supreme Court opined that "Section 45(b) does not ... express the standard for potential third-party complaints brought from actions by the State pending in the circuit court. Further, as this court stated in People ex rel. Scott v. Janson (1974), 57 Ill. 2d 458-459, 312 N.E.2d 620, concurrent jurisdiction exists in the circuit court and the proper administrative agency for actions alleging violations of the Act." Fiorini, 143 Ill. 2d at 337-338, 574 N.E.2d at 619. The Fiorini court concluded that "[t]o require that a portion of the instant action be heard before the [Board] at this juncture would frustrate judicial economy and common sense." Fiorini, 143 Ill. 2d at 338, 574 N.E.2d at 619.

While Fiorini could be read to suggest that the circuit courts have concurrent jurisdiction with the Board over all citizen enforcement actions under the Act, courts in subsequent cases have limited Fiorini to third-party claims. See People v. NL Industries, 152 Ill. 2d 82, 93, 604 N.E.2d 349, 353 (1992) ("In [[Fiorini], this court held that, pursuant to the Environmental Protection Act, the circuit court has concurrent jurisdiction to adjudicate ... third-party complaint[s], filed by private litigants, seeking injunctions and recovery costs."); City of Elgin, 257 Ill. App. 3d at 198, 629 N.E.2d at 95 (citing Fiorini and dismissing claim for injunctive relief under the Act when plaintiff had not exhausted its administrative remedies); see also Shepard v. R. A. Cullinan & Sons, Case No. 95-1227 (C.D. Ill. July 16, 1997), slip op. at 2-3 (holding that private parties seeking to enforce the

Act must first proceed before the Board, and noting that Fiorini and NL Industries "were very clearly distinguishing between actions initiated by the State, for which concurrent jurisdiction exists without regard to administrative remedies, and private actions, in which exhaustion is required.") [FN6]

A finding that the Board has exclusive jurisdiction over citizens' complaints is also consistent with the comprehensive regulatory scheme that the Act establishes. Courts have found that similar statutes also grant exclusive jurisdiction, even if the statute does not use the word "exclusive." In Cessna v. City of Danville, 296 Ill. App. 3d 156, 693 N.E.2d 1264 (4th Dist. 1998), for example, the court found that the Illinois Public Labor Relations Act (IPLRA) granted the Illinois State Labor Relations Board (Labor Board) exclusive jurisdiction over certain claims, despite the absence of the word "exclusive" in the statute. The court noted that the IPLRA provided for direct appeal of the decisions of the Labor Board to the appellate courts, and that no provision of the IPLRA expressly allowed employees to file suit in circuit court. The Cessna court concluded that "[c]oncurrent jurisdiction in the circuit courts would allow inconsistent decisions and forum shopping, which would undermine the goal" of the IPLRA. Cessna, 296 Ill. App. 3d at 163, 693 N.E.2d at 1269; see also Board of Education of Community School District No. 1, Coles County v. Compton, 123 Ill. 2d 216, 221-226, 526 N.E.2d 149, 152-154 (1988) (holding that the Illinois Educational Labor Relations Act divests the circuit courts of jurisdiction over labor arbitration awards, and vests exclusive jurisdiction over such matters in the Illinois Educational Labor Relations Board).

***8** Similarly, the Act provides for direct appeal of Board decisions to the appellate court, and no provision of the Act expressly allows citizens to file suit under the Act in the circuit court (except under Section 45(b) of the Act, 415 ILCS 5/45(b) (1998), after the Board denies relief to the citizen). In addition, concurrent jurisdiction would invite forum shopping and could result in inconsistent decisions.

The Board therefore finds that it has exclusive jurisdiction over private enforcement actions under the Act, except in cases in which the State is the original plaintiff. For that reason, the Abrahams could not have brought the claims in the cross-complaint, which are claims under the Act, in the McHenry County case. Res judicata does not apply, and the Board therefore denies the Anests' motion to dismiss the cross-complaint on these grounds.

CONCLUSION

The Board finds that the cross-complaint is not duplicitous. The Board further finds that the Section 12(f) and Section 57.12(a) claims, as well as the Abrahams' request for litigation costs, including expert witness fees and attorney fees, are frivolous and are therefore stricken. The Board finds that the remainder of the cross-complaint is not frivolous. The Board denies the Anests' motion to dismiss the Abrahams' claims under Sections 21(a) and 21(d)(2), and denies as moot the Anests' motion to dismiss the Abrahams' Section 57.12(a) claim. Finally, the Board denies the Anests' motion to dismiss the cross-complaint on the grounds of res judicata.

IT IS SO ORDERED.

Board Members E.Z. Kezelis and N.J. Melas concurred.
Board Member R.C. Flemal dissented.

K. M. Hennessey

FN1. Millstream was not a party to the McHenry County case. Mot. at Exhibit A.

FN2. The Board and the courts consistently have read the term "duplicitous" as "in the sense of being duplicative." Winnetkans Interested in Protecting the Environment v. Pollution Control Board, 55 Ill. App. 3d 475, 478, 270 N.E.2d 1176, 1179 (1st Dist. 1977). Furthermore, although Section 103.124(a) refers to "complaints," the Board has made this determination with respect to counterclaims and cross-claims and will do so here. See, e.g., People v. Rogers O'Hare Terminal Limited (March 19, 1998), PCB 96-240 and 98-107 (cons.), slip op. at 2-3; Miehle v. Chicago Bridge & Iron Company (December 16, 1993), PCB 93-150, slip op. at 1.

FN3. No one objected to the motion to file instanter. The Board grants the motion.

FN4. Under RCRA, "solid waste" means "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities ...." 42 U.S.C. s 6903(27).

FN5. See 415 ILCS 5/42, 43 (1998).

FN6. The Board is aware that some federal courts have read NL Industries as holding that "'circuit courts have concurrent jurisdiction with the [Board] over cost recovery actions under the [Act]."' Midland Life Insurance Company v. Regent Partners I General Partnership, 1996 U.S. Dist. Lexis 15545, *17 (N.D. Ill. Oct. 17, 1996), quoting Krempel v. Martin Oil Marketing, Ltd., 1995 U.S. Dist. Lexis 18236 (N.D. Ill. Dec. 8, 1995); see also Mehta Motors, Inc. v. A.V.W. Equipment Co., Inc., 1996 U.S. Dist. Lexis 9666 (N.D. Ill. July 10, 1996). However, these cases do not recognize that the NL Industries court addressed only cost recovery claims under Section 22.2 of the Act. NL Industries does not address the question of whether the Board and the circuit courts have concurrent jurisdiction over private actions to enforce Sections 12 and 21 of the Act in which cost recovery is sought as a remedy, the action that the Abrahams present here. Accordingly, the Board declines to follow the holdings in these federal cases. (While Fiorini did involve an action under Section 21 of the Act, the cases cited above demonstrate that it is limited to third-party actions.)

1999 WL 676187 (Ill.Pol.Control.Bd.)

END OF DOCUMENT

Only the Westlaw citation is currently available.

Appellate Court of Illinois, Fourth District.

James PATTON, as Executor of the Last Will of Lorraine Fuiten, Deceased; Mark Fuiten; and Mildred Taylor, Plaintiffs-Appellants,
v.
THE COUNTRY PLACE CONDOMINIUM ASSOCIATION, Defendant-Appellee,
and
SENTINEL INSECT CONTROL, INC., a Corporation, Defendant.
and
James PATTON, as Executor of the Last Will of Lorraine Fuiten, Deceased; Mark Fuiten; and Mildred Taylor, Plaintiffs-Appellants,
v.
DOW AGROSCIENCES LLC, formerly known as Dow-Elanco, a Division or Subsidiary of Dow Chemical Company, a Corporation, and the Country Place Condominium Association, Defendants-Appellees,
and
SENTINEL INSECT CONTROL, INC., a Corporation, Defendant.

No. 4-00-0008.

July 7, 2000.

Appeal from Circuit Court of Sangamon County. Nos. 96L343 97LM2038.

Dean T. Barnhard, Barnes & Thornburg, Indianapolis, IN, for Dow Agrosciences LLC, formerly known as Dow-Elanco, a division or subsidiary of The Dow Chemical Company.

Scott T. Longman, Barnes & Thornburg, Chicago, for Dow Agrosciences LLC, formerly known as Dow-Elanco, a division or subsidiary of The Dow Chemical Company.

R. Gerald Barris, Sorling, Northrup, Hanna, Cullen and Cochran, Ltd. Springfield, for Dow Agrosciences LLC, formerly known as Dow-Elanco, a division or subsidiary of The Dow Chemical Company.

Gary S. Schwab, Heyl, Royster, Voelker & Allen, Springfield, for Sentinel Insect Control, Inc.

Kirk W. Laudeman, Randall A. Mead, Drake, Narup & Mead, P.C., Springfield, for the Country Place Condominium Association.

Robert G. Heckenkamp, John R. Keith, Heckenkamp, Simhauser, Ward & Zerkle, Springfield, for James Patton, as Executor of the Last Will of Loraine Fuiten, Deceased, Mark Fuiten and Mildred Taylor.

ORDER

KNECHT.

***1** Plaintiffs, James Patton, as executor of the last will of Lorraine Fuiten, deceased; Mark Fuiten; and Mildred Taylor, appeal from the denial of their motion to reconsider the dismissal of their third-amended complaint against defendants, Dow Agrosciences LLC (Dow), formerly known as Dow-Elanco, and The Country Place Condominium Association (Country Place). The trial court found the allegations against Dow were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 U.S.C.A. §§ 136 through 136y (West 1999)) and no private cause of action exists under FIFRA. The trial court also found the Illinois Pesticide Act (Act) (415 ILCS 60/1 et seq. (West 1998)) did not create a duty on Country Place to regulate Sentinel Insect Control, Inc. (Sentinel), in its application of a termiticide and the Act did not create a private right of action in plaintiffs. We affirm.

I. BACKGROUND

Plaintiffs Lorraine Fuiten (deceased) and Mildred Taylor owned condominiums at a development known as The Country Place. Plaintiff Mark Fuiten resided with his mother, Lorraine, in her condominium. In late 1995, Country Place retained the services of Jon R. Hockenyos, d/b/a Sentinel, to eradicate termites in the condominiums owned by plaintiffs. Sentinel applied Dursban TC (Dursban), a termiticide manufactured by Dow.

Plaintiffs filed their original complaint against defendant Country Place and Sentinel on December 6, 1996. Sentinel is not a party to this appeal. In the

original complaint, each plaintiff attempted to state a cause of action against Country Place for negligently applying termiticide and for breach of contract. On March 6, 1997, the trial court dismissed the complaint and gave plaintiffs leave to file an amended complaint. Plaintiffs filed their amended complaint on March 27. The complaint contained allegations against Country Place for nuisance and for breach of contract. The trial court dismissed this complaint on May 7 and again gave plaintiffs leave to file an amended complaint.

On June 14, 1997, plaintiffs filed their second-amended complaint against Country Place and Sentinel. The complaint's allegations against Country Place again included temporary nuisance and negligence in maintaining the common areas of the condominium property and failure to see that Sentinel complied with provisions of the Act.

On November 12, 1997, plaintiffs filed a product liability complaint against all three defendants. On January 8, 1998, plaintiffs voluntarily withdrew all product liability counts against Country Place and Sentinel. The trial court consolidated the product liability case and the second-amended complaint in February 1998. On April 20, the trial court dismissed the product liability counts against Dow as preempted by FIFRA, as well as several counts of the second-amended complaint directed against Sentinel. The court again gave plaintiffs leave to amend their complaint.

Plaintiffs filed their third-amended complaint in October 1998. The claims made against Country Place were for temporary nuisance, negligence in failing to require Sentinel to comply with the Act, and product liability. The claims against Dow were for product liability in a negligence count and in a strict liability count.

***2** In its motion to dismiss, Dow argued (1) the allegations were a recasting of the original allegations in an effort to circumvent FIFRA preemption; (2) they were an attempt to create a private right of action under FIFRA; and (3) the complaint failed to meet Illinois pleading requirements. Plaintiffs voluntarily withdrew the product liability allegation against Country Place. Country Place then argued it was not liable for the acts of Sentinel, its independent contractor, and the Act did not create a private right of action.

The trial court dismissed all remaining counts against both Dow and Country Place on June 30, 1999. Concerning Dow, the trial court found plaintiffs' strict liability claims were repleaded without any substantive change and remain preempted by FIFRA; plaintiffs' negligence claims fail because they are preempted by FIFRA; and no private cause of action exists under FIFRA. As for Country Place, the trial court found the Act created no duty on the part of Country Place to regulate Sentinel and the Act does not create a private right of action. Plaintiffs filed a motion to reconsider, which the trial court denied on December 17, 1999. Pursuant to Supreme Court Rule 304(a) (155 Ill.2d R. 304(a)), the court found no just reason to delay enforcement or appeal of its order. This appeal followed.

II. ANALYSIS

Plaintiffs first argue FIFRA does not preempt all of their strict liability and negligence claims against Dow. They argue FIFRA does not preempt all claims against a pesticide manufacturer but only those claims that contain allegations of failure to warn or a labeling claim. They admit their allegations of failure to warn are properly stricken but maintain other allegations of negligence in manufacturing or in testing Dursban are not preempted. Specifically, they contend the following allegations of negligence against Dow are not preempted:

"(d) Manufactured, distributed[,] and sold a highly toxic compound which [d]efendant Dow knew, or should have known, would be distributed to the general public and to [plaintiffs'] residence in particular.

(e) Failed to properly test or research, follow[ ]up, and otherwise determine what injurious effects the compound had caused to members of the public.

(f) Failed to adequately test or research Dursban TC and its ingredients in order to render it safe for distribution to the public.

(g) Negligently tested and manipulated scientific test results in animals so as to conceal blood cell depression results.

* * *

(i) Failed to report blood cell depression to the Environmental Protection Association [sic]."

FIFRA was enacted in 1947 to give the United States Department of Agriculture regulatory authority over pesticide licensing and packaging. In 1972, it became a "comprehensive regulatory statute" governing the use, sale, and labeling of pesticides. Ruckelshaus v.. Monsanto Co., 467 U.S. 986, 991, 81 L.Ed.2d 815, 825, 104 S.Ct. 2862, 2866-67 (1984). FIFRA requires all pesticides sold or distributed in the United States must be registered with the Administrator of the Environmental Protection Agency (EPA). 7 U.S.C.A. § 136a(a) (West 1999). The EPA may register a pesticide only if it first determines:

*3 "(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of [FIFRA];

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment." 7 U.S.C.A. § 136a(c)(5) (West 1999).

"Environment" as used in FIFRA is defined to include human beings. 7 U.S.C.A. § 136(j) (West 1999).

For a pesticide to be accepted for federal registration, a manufacturer must submit proposed labeling and instructions upon application for registration. 7 U.S.C.A. § 136a(c)(1)(C) (West 1999). The EPA requires each registrant to submit research and data allowing the EPA "to assess hazards to humans." 40 C.F.R. § 158.202(e) (1999). To confirm the validity and reliability of the data received, the EPA imposes "good laboratory practice standards" (40 C.F.R. §§ 160.1 through 160.195 (1999)) and conducts and sponsors independent research (7 U.S.C.A. §§ 136r(a) through (c), 136y(3) (West 1999)).

To insure uniformity in labeling and warning, FIFRA contains an express preemption provision:

"(b) Uniformity

[A] state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C.A. § 136v(b) (West 1999).

The term "requirements" as used in section 136v includes common-law damage awards as one form of state regulation. Papas v. Upjohn Co., 985 F.2d 516, 518 (11th Cir.1993).

FIFRA expressly preempts state law damage claims based on packaging and labeling and, therefore, any alleged failure to warn. Illinois case law has recognized FIFRA preemption as a defense to a State law claim for failure to warn. Dickman v. E.I. Du Pont de NeMours & Co., 278 Ill.App.3d 776, 781, 663 N.E.2d 507, 510 (1996).

However, claims for negligent testing, manufacturing, and formulating are not preempted by FIFRA if they are based solely on a manufacturer's testing and research practices and are not related to advertising or promotion. Taylor Ag Industries v. Pure-Gro, 54 F .3d 555, 561 (9th Cir.1995); Worm v. American Cyanamid Co., 5 F.3d 744, 747-48 (4th Cir.1993). Plaintiffs argue their claims are based on manufacturing and testing of Dursban and not on labeling. Dow contends the plaintiffs' claims are, at base, failure-to-warn claims packaged to look like negligent manufacturing and testing claims.

In determining whether a claim is preempted as related to labeling or warning, the test is "whether one could reasonably foresee that the manufacturer, in seeking to avoid liability for the error, would choose to alter the product or the label." Worm, 5 F.3d at 747-48. Several of the allegations made by plaintiffs are of failure to properly test Dursban to render it safe to be used around the general public. No allegations suggest the product did not work as expected, i.e., kill termites, but the implication of the allegations is that it was highly toxic and dangerous to humans. The cure for this problem would then be a different label or warning and not a change in the product. Therefore, the allegations were related to labeling and are preempted.

*4 Where plaintiffs alleged a failure to test, they have alleged an incomplete tort. The failure to test is not a negligent act in itself; rather, a failure to test leads to a failure to correct either a manufacturing defect or a failure to warn of harm resulting from the product. Thus, the duty to test does not cause injury by itself but is a subpart of designing a safe product, manufacturing it safely, and providing adequate warnings of dangers inherent in the use of

the product. Kociemba v. G.D. Searle & Co., 707 F.Supp. 1517, 1527 (D.Minn.1989). Plaintiffs' allegations, quoted earlier, include no design defect claims. No allegations suggest the product did not perform as intended or contained a manufacturing defect. The allegations are not directed at a mistake in the manufacturing of the batch of Dursban used in plaintiffs' condominiums but suggest the product itself caused harm to the public. This topic is covered by the warning labels required by the EPA under FIFRA. The product was licensed by FIFRA and contained the required warnings. Any additional warning requirements imposed by a Illinois state court claim is preempted by FIFRA.

Plaintiffs' allegation in their negligence count Dow "manufactured, distributed[,] and sold a highly toxic compound" to the general public, as well as the allegations made by plaintiffs in their strict liability count, are also preempted because they imply Dow failed to warn the public of the toxicity of the product. Plaintiffs' allegations of strict liability were as follows:

> "(6) Said Dursban Tc [sic] was in an unreasonably dangerous condition in that it was hazardous to the health of those who inhaled the fumes of same, because:
> (a) Said Dursban TC was a highly toxic compound which [d]efendant Dow knew, or should have known, would be distributed to the general public and to [plaintiffs'] residence in particular.
> (b) The termiticide, Dursban TC, used by [d]efendant Sentinel[,] contained dangerous chemicals that endangered the health and life of persons when the product as [sic] used in the manner in which it was intended to be used."

The insecticide in question is toxic, but that does not make it defective because it is sold as an insecticide with the purpose of eradicating termites and it is manufactured for that purpose. The fact it may also be harmful to other living beings, such as humans, does not make it defective. See Camp Creek Duck Farm, Inc. v. Shell Oil Co., 103 Ill.App.3d 81, 84-85, 430 N.E.2d 385, 387 (1981). Without an inherent defect, the remaining issue is whether the product is unreasonably dangerous and the manufacturer has failed to provide an adequate warning of the danger. See Camp Creek Duck Farm, 103 Ill.App.3d at 85-86, 430 N.E.2d at 387-88. Such a failure-to-warn claim is preempted by FIFRA.

Plaintiffs also allege Dow was negligent because it "failed to report blood cell depression to the Environmental Protection Association [sic]." This is essentially a claim for fraud perpetrated on the EPA. Setting aside the fact plaintiffs' allegations of injury do not mention a case of "blood cell depression" but consist of allegations of lung and breathing injuries, private plaintiffs and state courts cannot police a manufacturer's compliance with FIFRA's reporting requirements.

*5 Private regulatory fraud claims are impliedly preempted by Congress:

> "Permitting such claims would allow juries to second-guess federal agency regulators through the guise of punishing those whose actions are deemed to have interfered with the proper functioning of the regulatory process. If that were permitted, federal regulatory decisions that Congress intended to be dispositive would merely be the first round of decision making, with later [,] more important rounds to be played out in the various state courts. Virtually any federal agency decision that stood in the way of a lawsuit could be challenged indirectly by a claim that the industry involved had misrepresented the relevant data or had otherwise managed to skew the regulatory result." Lewis v. Brunswick Corp., 107 F.3d 1494, 1505 (11th Cir.1997).

Plaintiffs rely on the doctrine that violation of a statute or regulation designed for the protection of life or property is prima facie evidence of negligence to support their claim for a private cause of action. Abbasi v. Paraskevoulakos, 187 Ill.2d 386, 394, 718 N.E.2d 181, 185 (1999). This doctrine is not determinative of whether a private cause of action exists, however. In determining whether Congress intended to preempt private causes of action, the decisive factor is legislative intent. Martin v. Ortho Pharmaceutical Corp., 169 Ill.2d 234, 240-41, 661 N.E.2d 352, 355 (1996).

FIFRA requires all pesticides sold or distributed in the United States to be registered with the Administrator of the EPA. 7 U.S.C.A. § 136a(a) (West 1999). It is unlawful to sell an unregistered, adulterated, or misbranded pesticide. 7 U.S.C.A. § 136j (West 1999). The EPA has broad enforcement powers and can forbid the sale of any pesticide found in violation of FIFRA. 7 U.S.C.A. § 136k(a) (West 1999). The EPA may also impose substantial

civil and criminal penalties for violations of FIFRA or its implementing regulations. 7 U.S.C.A. §§ 1361(a), (b) (West 1999). EPA decisions are subject to review by United States district courts and courts of appeal. 7 U.S.C.A. §§ 136n(a), (b), (c) (West 1999).

The majority of courts that have considered this issue have agreed that, due to the enforcement scheme set up under FIFRA, it does not provide a private cause of action based on alleged violations of the statute. Almond Hill School v. United States Department of Agriculture, 768 F.2d 1030, 1035-38 (9th Cir.1985); In re "Agent Orange" Product Liability Litigation, 635 F.2d 987, 992 n. 9 (2d Cir.1980); Lescs v. Dow Chemical Co., 976 F.Supp. 393, 398 (W.D.Vir.1997); Miller v. E.I. DuPont de Nemours & Co., 880 F.Supp. 474, 479-80 (S.D.Miss.1994); Rodriguez v. American Cyanamid Co., 858 F.Supp. 127, 131 (D.Ariz.1994); Oeffler v. Miles, Inc., 642 N.Y.S.2d 761, 765 (1996); contra Romah v. Hygienic Sanitation Co., 705 A.2d 841 (1997), aff'd, 558 Pa. 378, 737 A.2d 249 (1999).

The policy behind FIFRA is to provide for uniform federal regulation of pesticides and, therefore, no private cause of action exists for violations of FIFRA.

***6** Plaintiffs contend Country Place created a temporary nuisance in their condominiums through the application of Dursban and Country Place negligently allowed the application of improperly diluted termite extermination chemicals. These contentions require Country Place be held liable for the actions of Sentinel, its independent contractor. Plaintiffs allege Country Place violated a covenant to maintain the common elements of the condominiums and was negligent in the operation, management, and control of the common areas in allowing improperly diluted termite extermination chemicals to be pumped into the crawl space under inhabited units and was also negligent in failing to require Sentinel to comply with the Act.

Country Place has no duty to require Sentinel to comply with the Act because no private cause of action exists under the Act, nor is it liable for Sentinel's actions in improperly applying Dursban. Country Place, in fulfilling its duty of maintaining the common areas of the condominiums, contracted with Sentinel to apply a pesticide to prevent termite infestation. Sentinel was an independent contractor. Absent the right to control the actions of an independent contractor, the general rule is a principal can not be held liable for the acts of its independent contractor. Wabash Independent Oil Co. v. King & Wills Insurance Agency, 248 Ill.App.3d 719, 723, 618 N.E.2d 1214, 1217 (1993); Bear v. Power Air, Inc ., 230 Ill.App.3d 403, 408, 595 N.E.2d 77, 81 (1992).

No special circumstances are alleged to show Country Place owed a special duty of care requiring it be held liable for the actions of Sentinel, its independent contractor. As the trial court found, no duty imposed by the Act requires Country Place to regulate the actions of Sentinel despite plaintiffs' assertions to the contrary. The Act regulates the labeling, distribution, use, and application of pesticides in Illinois, expressly reserving authority for enforcement to different State agencies. 415 ILCS 60/3, 15, 16 (West 1998). Plaintiffs cite section 10(5) of the Act in support of their argument Country Place has a duty to regulate Sentinel. This provision of the Act indicates it does not relieve pesticide applicators from liability for damage caused through their application of pesticides. 415 ILCS 60/10(5) (West 1998). It does not, however, place a duty on those who hire pesticide applicators to regulate those applicators in the application of pesticides.

Plaintiffs have alleged a failure on the part of Country Place to require Sentinel to comply with unspecified provisions of the Act in an effort to plead a private cause of action under the Act.

Plaintiffs again cite Abbasi, arguing violation of a statute designed to protect human life or property is prima facie evidence of negligence and, therefore, a private cause of action exists for the failure of Country Place to see that Sentinel complied with the Act. However, the Act was designed so State agencies could regulate the use of pesticides so they do not cause unreasonably adverse effects on the environment or injury to animals or humans when used properly. 415 ILCS 60/2 (West 1998). Enforcement of the Act was delegated to the Illinois Department of Agriculture, Illinois Department of Public Health, and the Illinois Environmental Protection Agency. 415 ILCS 60/3, 15, 16 (West 1998). We conclude plaintiff cannot plead or pursue

a private cause of action under the Act.

***7** Finally, plaintiffs contend they should be allowed to amend and file a fourth-amended complaint. In their motion for reconsideration, they added a sentence requesting they be allowed to amend their complaint again and file another. They did not, however, include a copy of the proposed fourth-amended complaint. Whether to allow leave to file an amended complaint is a matter of the trial court's discretion and is not subject to reversal absent an abuse of that discretion. Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc., 186 Ill.2d 419, 432, 712 N.E.2d 330, 337 (1999). Without a copy of any proposed amendments before us, we cannot say the trial court abused its discretion in failing to allow plaintiffs leave to amend.

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

KNECHT, J., with STEIGMANN and MYERSCOUGH, JJ., concurring.

2000 WL 33728374 (Ill.App. 4 Dist.)

END OF DOCUMENT

LEXSEE 1995 U.S. APP. LEXIS 17313

SHEARSON LEHMAN BROTHERS INC., Plaintiff-Appellee, v. HERBERT LESLIE GREENBERG, Defendant- Appellant

No. 93-55535

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1995 U.S. App. LEXIS 17313

November 3, 1994, Argued and Submitted
July 3, 1995, Filed

NOTICE: [*1]

RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *60 F.3d 834, 1995 U.S. App. LEXIS 25503.*

PRIOR HISTORY: Appeal from the United States District Court for the Central District of California; Manuel L. Real, District Judge, Presiding; D.C. No. CV-93-00609-R, D.C. No. CV-93-00623-R.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant claimant sought review of a decision of the United States District Court for the Central District of California granting appellee corporation summary judgment against his claim brought under the Unfair Business Practices Act, *Cal. Bus. & Prof. Code § 17200.* The claimant sought to enjoin the corporation and force it to change allegedly unfair business practices.

OVERVIEW: The claimant brought an action against the corporation under the Unfair Business Practices Act, *Cal. Bus. & Prof. Code § 17200* seeking to force it to change allegedly unfair business practices. The court affirmed the lower court's decision granting corporation summary judgment, noting that the district court properly exerted diversity jurisdiction over this matter because it did not involve a class action and therefore was not bound by the amount in controversy requirements applicable to class actions. The court noted that the Unfair Business Practices Act, § 17200, was inapplicable to security transactions and had most likely been preempted by federal statutes.

OUTCOME: The court affirmed the decision granting summary judgment to the corporation.

CORE TERMS: class action, customer, Baby FTC Acts, diversity jurisdiction, amount in controversy, summary judgment, de novo

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] A court reviews a district court's grant of summary judgment de novo.

Securities Law > Bases for Liability
[HN2] The Unfair Business Practices Act, *Cal. Bus. & Prof. Code § 17200* is inapplicable to securities transactions.

Securities Law > Bases for Liability
[HN3] The scope of the Unfair Business Practices Act, *Cal. Bus. & Prof. Code § 17200* was only to include anything that can properly be called a business practice and that at the same time is forbidden by law. In fact, it seems likely that the Unfair Business Practices Act, § 17200 is preempted entirely by federal securities laws. It

is reasonable that Baby Federal Trade Commission Acts should not apply to securities transactions which were already subject to pervasive and intricate regulation under the Securities Act of 1933, and the Securities and Exchange Act of 1934.

JUDGES: Gibson, ** Hug, and Poole, Circuit Judges.

** Honorable Floyd R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

OPINION:

MEMORANDUM

Appellant Greenberg appeals pro se the district court's summary judgment in favor of Shearson Lehman Brothers, Inc., in a lawsuit brought by Greenberg alleging misleading business practices and unfair competition by Shearson in violation of *Cal. Bus. & Prof. Code § 17200.* [HN1] We review the district court's grant of summary judgment de novo, *Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994),* and we affirm.

I.

This action was initiated in California state court, but was subsequently removed to federal district court. The district court did not err in its assumption of subject matter jurisdiction **[*2]** in the case, and we likewise review such a decision de novo. *Nike, Inc. v. Comercial Iberica De Exclusivas, 20 F.3d 987, 990 (9th Cir. 1994).*

Appellant fallaciously maintains that the district court lacked jurisdiction because the $ 50,000 amount in controversy required for diversity jurisdiction was not met by each and every member of the general public, on whose behalf Greenberg has brought this suit. His argument relies almost exclusively on *Snow v. Ford Motor Co., 561 F.2d 787 (9th Cir. 1977),* which elucidated the principal that distinct individual claims may not be aggregated. However, Snow is easily distinguished from the instant case, because it applied the principle of non-aggregation only to class action cases. See *Snow, 561 F.2d at 789* ("[I]n a class action brought under *Fed. R. Civ. P. 23(b)(3),* plaintiffs may not aggregate. . . .").

Despite Appellant's attempts to portray his claim as a type of class action, he is misguided. This case is not a class action, and it does not possess any of the defining characteristics of a class action. Greenberg has never attempted to certify a class, nor has he even sought to join in his action any actual customers **[*3]** of Shearson. In the absence of a finite group of class members who each assert separate and distinct claims, Snow is not controlling. This is a private attorney general action, and there is no authority to suggest that such a claim should be treated as a class action for purposes of determining whether the jurisdictional amount has been satisfied.

In valuing the amount in controversy, the $ 50,000 threshold has been met under the test set out in *Ridder Bros. v. Blethen, 142 F.2d 395, 398-99 (9th Cir. 1944).* Shearson has aptly demonstrated that the damage it would suffer in complying with any injunction would far exceed $ 50,000. Greenberg's claim that Ridder Bros. has been effectively overruled is without merit. Ridder Bros. is only superseded to the extent that it is inconsistent with *Snyder v. Harris, 394 U.S. 332, 22 L. Ed. 2d 319, 89 S. Ct. 1053 (1969). Snow, 561 F.2d at 790 n.5.* Because the plaintiff's viewpoint rule espoused in Snyder is applicable only to class actions, it is Ridder Bros. rather than Snyder which controls this claim.

Thus, the district court properly asserted diversity jurisdiction over this claim.

II.

Regarding the **[*4]** merits of this case, the district court did not err in determining that [HN2] *Cal. Bus. & Prof. Code § 17200* is inapplicable to securities transactions. In interpreting the California statute, we follow the trend set by the vast majority of other jurisdictions that have considered this question, and hold that California's "Baby FTC Act" was not intended to apply to security transactions. n1

n1 At least 16 other jurisdictions which have considered whether investment securities are within the scope of their consumer protection statutes have come to a similar conclusion, holding that claims based upon securities violations are not within the ambit of the statutes. See, e.g., *Spinner Corp. v. Princeville Dev. Corp., 849 F.2d 388 (9th Cir. 1988)* (Hawaii law); *Smith v. Cooper, 846 F.2d 325 (5th Cir. 1988)* (Louisiana law); *Swenson v. Engelstad, 626 F.2d 421 (5th Cir. 1980)* (Texas Law); *Nichols v. Merrill Lynch, Pierce, Fenner & Smith, 706 F. Supp. 1309 (M.D. Tenn. 1989)* (Tennessee law); *Morris v. Gilbert, 649 F. Supp. 1491 (E.D.N.Y. 1986)* (New York law); *Robertson v. White, 633 F. Supp. 954 (W.D. Ark. 1986)* (Arkansas and Oklahoma law); *In re Catanella, 583 F. Supp. 1388 (E.D. Penn. 1984)* (New Jersey law); *Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983)* (Georgia law); *Russell v. Dean Witter, 200 Conn. 172, 510 A.2d 972 (Conn. 1986)* (Connecticut law); *Cabot Corp. v. Baddour, 394 Mass. 720, 477 N.E.2d*

399 (Mass. 1985) (Massachusetts law); *State v. Piedmont Funding Corp., 119 R.I. 695, 382 A.2d 819 (R.I. 1978)* (Rhode Island law); *Skinner v. E.F. Hutton, 314 N.C. 267, 333 S.E.2d 236 (N.C. 1985)* (North Carolina law); *State ex rel McLeod v. Rhoades, 275 S.C. 104, 267 S.E.2d 539 (S.C. 1980)* (South Carolina law); *Kittilson v. Ford, 23 Wash. App. 402, 595 P.2d 944 (Wash. Ct. App. 1979)*, aff'd, *93 Wash. 2d 223, 608 P.2d 264 (Wash. 1980)* (Washington law); see also, Melinda R. Smolin, "Investment Securities: Beyond the Scope of California's Consumers Legal Remedies Act?" *25 Loyola L. Rev. 127, 153 (Nov. 1991).*

[*5]

The California Baby FTC Act is remarkably similar to the Hawaiian Baby FTC Act, which we have held does not apply to security transactions. *Spinner Corp. v. Princeville Dev. Corp., 849 F.2d 388 (9th Cir. 1988).* There is nothing to suggest that the primary intent of the California legislature in enacting this act was any different from the primary intent of the Hawaiian legislature, which "was to protect consumers from unethical business practices resulting in relatively small commercial injuries." *Id. at 391.*

The few jurisdictions which have held contrary to this view are distinguishable in that the legislative histories of several acts clearly demonstrate that the states intended their Baby FTC Acts to be applied expansively. See *Corbin v. Pickrell, 136 Ariz. 589, 667 P.2d 1304 (Ariz. 1983); Denison v. Kelly 759 F. Supp. 199 (M.D. Pa. 1991).* In contrast, there is no such legislative history suggesting that the California legislature anticipated the expansive reading of § 17200 that Greenberg asks of the court. [HN3] The scope of the Unfair Business Practices Act was only to "include anything that can properly be called a business practice and that at the same time is **[*6]** forbidden by law." *Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1266, 833 P.2d 545 (Cal. 1992).* Greenberg has asserted no behavior by Shearson which would legitimate this claim under the auspices of § 17200.

In fact, it seems likely that § 17200 is preempted entirely by federal securities laws. See *15 U.S.C. § 78bb.* It is reasonable that Baby FTC Acts should not apply "'to securities transactions which were already subject to pervasive and intricate regulation under the . . . Securities Act of 1933, and the Securities and Exchange Act of 1934.'" *Spinner, 849 F.2d at 393* (quoting *Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162, 167-68 (4th Cir. 1985)).*

Lastly, it is questionable whether Appellant even has standing to pursue these claims because he is not a Shearson customer. Even if he had appropriate standing, however, his claim for injunctive relief violates the Commerce Clause of the United States Constitution.

Appellant's complaint seeks to use a state statute to impose a nationwide permanent injunction against Shearson activities until it changes its business practices, including altering its internal account forms, the format of its monthly **[*7]** statements, and its communications with its customers. These are not local decisions; they necessitate decision-making at the national level, which for Shearson would take place in Delaware or New York, not in California. Thus, this action seeks to directly regulate interstate commerce, and is therefore unconstitutional. See *Edgar v. Mite Corp., 457 U.S. 624, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1981).*

AFFIRMED.

Restatement (Second) of Torts § **402A** (1965)

Restatement of the Law -- Torts
Restatement (Second) of Torts
Current through April 2005

Division 2. Negligence
Chapter 14. Liability Of Persons Supplying Chattels For The Use Of Others
Topic 5. Strict Liability

§ **402A.** Special Liability Of Seller Of Product For Physical Harm To User Or Consumer

Link to Case Citations

[Westlaw Note: This section has been superseded by the Restatement of the Law Third, Torts: Products Liability. To retrieve the Restatement of the Law Third, Torts: Products Liability documents, enter the following query: ci(torts-pl % t.d. p.f.d.).]

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

See Reporter's Notes.

Caveat:

The Institute expresses no opinion as to whether the rules stated in this Section may not apply
(1) to harm to persons other than users or consumers;
(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or
(3) to the seller of a component part of a product to be assembled.

Comment:

a. This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product. The Section is inserted in the Chapter dealing with the negligence liability of suppliers of chattels, for convenience of reference and comparison with other Sections dealing with negligence. The rule stated here is not exclusive, and does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.

b. History. Since the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products. As long ago as 1266 there were enacted special criminal statutes imposing penalties upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied "corrupt" food and drink. In the earlier part of this century this ancient attitude was reflected in a series of decisions in which the courts of a number of states sought to find some method of holding the seller of food liable to the ultimate consumer even though there was no showing of negligence on the part of the seller. These decisions represented a departure from, and an exception to, the general rule that a supplier of chattels was not liable to third persons in the absence of negligence or privity of contract. In the beginning, these decisions displayed considerable ingenuity in evolving more or less fictitious theories of liability to fit the case. The various devices included an agency of the intermediate dealer or another to purchase for the consumer, or to sell for the

seller; a theoretical assignment of the seller's warranty to the intermediate dealer; a third party beneficiary contract; and an implied representation that the food was fit for consumption because it was placed on the market, as well as numerous others. In later years the courts have become more or less agreed upon the theory of a "warranty" from the seller to the consumer, either "running with the goods" by analogy to a covenant running with the land, or made directly to the consumer. Other decisions have indicated that the basis is merely one of strict liability in tort, which is not dependent upon either contract or negligence.

Recent decisions, since 1950, have extended this special rule of strict liability beyond the seller of food for human consumption. The first extension was into the closely analogous cases of other products intended for intimate bodily use, where, for example, as in the case of cosmetics, the application to the body of the consumer is external rather than internal. Beginning in 1958 with a Michigan case involving cinder building blocks, a number of recent decisions have discarded any limitation to intimate association with the body, and have extended the rule of strict liability to cover the sale of any product which, if it should prove to be defective, may be expected to cause physical harm to the consumer or his property.

c. On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

d. The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only "physical harm" in the form of damage to the user's land or chattels, as in the case of animal food or a herbicide.

e. Normally the rule stated in this Section will be applied to articles which already have undergone some processing before sale, since there is today little in the way of consumer products which will reach the consumer without such processing. The rule is not, however, so limited, and the supplier of poisonous mushrooms which are neither cooked, canned, packaged, nor otherwise treated is subject to the liability here stated.

f. Business of selling. The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor, and to the operator of a restaurant. It is not necessary that the seller be engaged solely in the business of selling such products. Thus the rule applies to the owner of a motion picture theatre who sells popcorn or ice cream, either for consumption on the premises or in packages to be taken home.

The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business. Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars, and this even though he is fully aware that the dealer plans to resell it. The basis for the rule is the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods. This basis is lacking in the case of the ordinary individual who makes the isolated sale, and he is not liable to a third person, or even to his buyer, in the absence of his negligence. An analogy may be found in the provision of the Uniform Sales Act, § 15, which limits the implied warranty of merchantable quality to sellers who deal in such goods; and in the similar limitation of the Uniform Commercial Code, § 2-314, to a seller who is a merchant. This Section is also not intended to apply to sales of the stock of merchants out of the usual course of business, such as execution sales, bankruptcy sales, bulk sales, and the like.

g. Defective condition. The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. The burden of proof that the product was in a defective condition at the time that it left the hands of the particular seller is upon the injured plaintiff; and unless evidence can be produced which will support the conclusion that it was then defective, the burden is not sustained.

Safe condition at the time of delivery by the seller will, however, include proper packaging, necessary sterilization, and other precautions required to permit the product to remain safe for a normal length of time when handled in a normal manner.

h. A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment *j*), and a product sold without such warning is in a defective condition.

The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way in which the product is prepared or packed. No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole. Where the container is itself dangerous, the product is sold in a defective condition. Thus a

carbonated beverage in a bottle which is so weak, or cracked, or jagged at the edges, or bottled under such excessive pressure that it may explode or otherwise cause harm to the person who handles it, is in a defective and dangerous condition. The container cannot logically be separated from the contents when the two are sold as a unit, and the liability stated in this Section arises not only when the consumer drinks the beverage and is poisoned by it, but also when he is injured by the bottle while he is handling it preparatory to consumption.

i. Unreasonably dangerous. The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by "unreasonably dangerous" in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fuel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

j. Directions or warning. In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous for other reasons, warning as to use may be required.

But a seller is not required to warn with respect to products, or ingredients in them, which are only dangerous, or potentially so, when consumed in excessive quantity, or over a long period of time, when the danger, or potentiality of danger, is generally known and recognized. Again the dangers of alcoholic beverages are an example, as are also those of foods containing such substances as saturated fats, which may over a period of time have a deleterious effect upon the human heart.

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

k. Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. An outstanding example is the vaccine for the Pasteur treatment of rabies, which not uncommonly leads to very serious and damaging consequences when it is injected. Since the disease itself invariably leads to a dreadful death, both the marketing and the use of the vaccine are fully justified, notwithstanding the unavoidable high degree of risk which they involve. Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous. The same is true of many other drugs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of a physician. It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

l. User or consumer. In order for the rule stated in this Section to apply, it is not necessary that the ultimate user or consumer have acquired the product directly from the seller, although the rule applies equally if he does so. He may have acquired it through one or more intermediate dealers. It is not even necessary that the consumer have purchased the product at all. He may be a member of the family of the final purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser. The liability stated is one in tort, and does not require any contractual relation, or privity of contract, between the plaintiff and the defendant.

"Consumers" include not only those who in fact consume the product, but also those who prepare it for consumption; and the housewife who contracts tularemia while cooking rabbits for her husband is included within the rule stated in this Section, as is also the husband who is opening a bottle of beer for his wife to drink. Consumption includes all ultimate uses for which the product is intended, and the customer in a beauty shop to whose hair a permanent wave solution is applied by the shop is a consumer. "User" includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it, as in the case of an employee of the ultimate buyer who is making repairs upon the automobile which he has purchased.

Illustration:

1. A manufactures and packs a can of beans, which he sells to B, a wholesaler. B sells the beans to C, a jobber, who resells it to D, a retail grocer. E buys the can of beans from D, and gives it to F. F serves the beans at lunch to G, his guest. While eating the beans, G breaks a tooth, on a pebble of the size, shape, and color of a bean, which no reasonable inspection could possibly have discovered. There is satisfactory evidence that the

pebble was in the can of beans when it was opened. Although there is no negligence on the part of A, B, C, or D, each of them is subject to liability to G. On the other hand E and F, who have not sold the beans, are not liable to G in the absence of some negligence on their part.

m. "Warranty." The liability stated in this Section does not rest upon negligence. It is strict liability, similar in its nature to that covered by Chapters 20 and 21. The basis of liability is purely one of tort.

A number of courts, seeking a theoretical basis for the liability, have resorted to a "warranty," either running with the goods sold, by analogy to covenants running with the land, or made directly to the consumer without contract. In some instances this theory has proved to be an unfortunate one. Although warranty was in its origin a matter of tort liability, and it is generally agreed that a tort action will still lie for its breach, it has become so identified in practice with a contract of sale between the plaintiff and the defendant that the warranty theory has become something of an obstacle to the recognition of the strict liability where there is no such contract. There is nothing in this Section which would prevent any court from treating the rule stated as a matter of "warranty" to the user or consumer. But if this is done, it should be recognized and understood that the "warranty" is a very different kind of warranty from those usually found in the sale of goods, and that it is not subject to the various contract rules which have grown up to surround such sales.

The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller. The seller is strictly liable although, as is frequently the case, the consumer does not even know who he is at the time of consumption. The rule stated in this Section is not governed by the provisions of the Uniform Sales Act, or those of the Uniform Commercial Code, as to warranties; and it is not affected by limitations on the scope and content of warranties, or by limitation to "buyer" and "seller" in those statutes. Nor is the consumer required to give notice to the seller of his injury within a reasonable time after it occurs, as is provided by the Uniform Act. The consumer's cause of action does not depend upon the validity of his contract with the person from whom he acquires the product, and it is not affected by any disclaimer or other agreement, whether it be between the seller and his immediate buyer, or attached to and accompanying the product into the consumer's hands. In short, "warranty" must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort.

n. Contributory negligence. Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

Comment on Caveat:

o. Injuries to non-users and non-consumers. Thus far the courts, in applying the rule stated in this Section, have not gone beyond allowing recovery to users and consumers, as those terms are defined in Comment *l.* Casual bystanders, and others who may come in contact with the product, as in the case of employees of the retailer, or a passer-by injured by an exploding bottle, or a pedestrian hit by an automobile, have been denied recovery. There may be no essential reason why such plaintiffs should not be brought within the scope of the protection afforded, other than that they do not have the same reasons for expecting such protection as the consumer who buys a marketed product; but the social pressure which has been largely responsible for the development of the rule stated has been a consumers' pressure, and there is not the same demand for the protection of casual strangers. The Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by such persons.

p. Further processing or substantial change. Thus far the decisions applying the rule stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this Section. If, for example, raw coffee beans are sold to a buyer who roasts and packs them for sale to the ultimate consumer, it cannot be supposed that the seller will be relieved of all liability when the raw beans are contaminated with arsenic, or some other poison. Likewise the seller of an automobile with a defective steering gear which breaks and injures the driver, can scarcely expect to be relieved of the responsibility by reason of the fact that the car is sold to a dealer who is expected to "service" it, adjust the brakes, mount and inflate the tires, and the like, before it is ready for use. On the other hand, the manufacturer of pig iron, which is capable of a wide variety of uses, is not so likely to be held to strict liability when it turns out to be unsuitable for the child's tricycle into which it is finally made by a remote buyer. The question is essentially one of whether the responsibility for discovery and prevention of the dangerous defect is shifted to the intermediate party who is to make the changes. No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.

q. Component parts. The same problem arises in cases of the sale of a component part of a product to be assembled by another, as for example a tire to be placed on a new automobile, a brake cylinder for the same purpose, or an instrument for the panel of an airplane. Again the question arises, whether the responsibility is not shifted to the

assembler. It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer. But in the absence of a sufficient number of decisions on the matter to justify a conclusion, the Institute expresses no opinion on the matter.

Restatement (Second) of Torts § **821B** (1979)
(Publication page references are not available for this document.)

C

Restatement of the Law – Torts
Restatement (Second) of Torts
Current through April 2005

Division 10. Invasions Of Interests In Land Other Than By Trespass
Chapter 40. Nuisance
Topic 1. Types Of Nuisance

§ 821B. Public Nuisance

Link to Case Citations

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Comment:

a. History. In its inception a public, or common, nuisance was an infringement of the rights of the Crown. The earliest cases appear to have involved purprestures, which were encroachments upon the royal domain or the public highway and could be redressed by a suit brought by the King. By the time of Edward III the principle had been extended to the invasion of the rights of the public, represented by the Crown, by such things as interference with the operation of a public market or smoke from a lime-pit that inconvenienced a whole town. The term "nuisance," which had acquired no very definite meaning other than that of something causing harm or inconvenience, was applied rather loosely to these interferences. By degrees the class of offenses was greatly enlarged until it came to include, in the words of a leading writer on criminal law, any "act not warranted by law, or omission to discharge a legal duty, which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects." Stephen, General View of the Criminal Law of England (1890) 105. The remedy remained exclusively a criminal one in the hands of the Crown until the sixteenth century, when it was first held that a private individual who had suffered particular damage differing from that sustained by the public at large might have a tort action to recover damages for the invasion of the public right. (See § 821C).

Restatement of the Law -- Torts
Restatement (Second) of Torts
Current through April 2005

Division 10. Invasions Of Interests In Land Other Than By Trespass
Chapter 40. Nuisance
Topic 2. Private Nuisance: Elements Of Liability

§ 825. Intentional Invasion--What Constitutes

Link to Case Citations

TEXT

An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor (a) acts for the purpose of causing it, or (b) knows that it is resulting or is substantially certain to result from his conduct.

COMMENTS

Comment:

a. The rule stated in this Section is a special application of the rule stated in § 8A.

b. The rule here stated applies to conduct that results in a private nuisance, as defined in § 821D. It also applies, when it is pertinent, to conduct resulting in a public nuisance, as defined in § 821B. Most public nuisances involve criminal liability for intentional interferences with a public right, but in some cases the intent may have particular importance. Thus a special statute may require that for a particular type of public nuisance the interference with the public right must be intentional; or, under the rule stated in § 908, punitive damages may be recovered by a private individual for harm resulting to him from a public nuisance (see § 821C) only when the defendant's conduct is intentional and outrageous. When questions of this nature arise in connection with public nuisance, the rule here stated is commonly applied.

c. Meaning of "intentional invasion." To be "intentional," an invasion of another's interest in the use and enjoyment of land, or of the public right, need not be inspired by malice or ill will on the actor's part toward the other. An invasion so inspired is intentional, but so is an invasion that the actor knowingly causes in the pursuit of a laudable enterprise without any desire to cause harm. It is the knowledge that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional or unintentional. It is not enough to make an invasion intentional that the actor realizes or should realize that his conduct involves a serious risk or likelihood of causing the invasion. He must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from his conduct. For a special application of the general rule of § 826 to the case in which the actor desires to produce the invasion, see § 829.

d. Continuing or recurrent invasions. Most of the litigation over private nuisances involves situations in which there are continuing or recurrent invasions resulting from continuing or recurrent conduct; and the same is true of many public nuisances. In these cases the first invasion resulting from the actor's conduct may be either intentional or unintentional; but when the conduct is continued after the actor knows that the invasion is resulting

from it, further invasions are intentional.

Illustrations: 1. A owns and occupies a house and lot adjacent to a house and lot owned and occupied by B. While B is entertaining guests in his house A, who has a grudge against B, builds a bonfire on his premises with substances that he knows will emit foul-smelling smoke. A knows that the wind will blow this smoke into B's house, and A's only purpose in building the fire is to annoy B. The smoke is blown in B's house, rendering it virtually uninhabitable for several hours. The invasion of B's interest in the use and enjoyment of his land is intentional. 2. A owns land on which he erects and starts to operate a factory. B owns land 200 yards from A's factory, on which he operates a poultry farm. A small stream flows across A's land and then onto B's land. B utilizes this stream in his poultry business. A, wishing to dispose of ten barrels of waste matter from his factory and knowing that the pollution of the stream will interfere with the operation of B's poultry farm, but having no desire to harm B, dumps the waste matter into the stream. This fouls the water for several days and causes a substantial interference with B's poultry business. The invasion of B's interest in the use and enjoyment of his land is intentional. 3. The same facts as in Illustration 2, except that there is no stream on A's or B's land. B gets water for his poultry business from a well on his land, and A dumps the waste matter into a depression on his land, from which it seeps into the ground and is carried 300 yards underground to B's well by a flow of percolating water unknown to A. The water in B's well is contaminated so that it cannot be used in his poultry business for some time. The invasion of B's interest in the use and enjoyment of his land is not intentional. 4. The same facts as in Illustration 3, except that after learning of the pollution of B's well A continues to dump waste into the same depression, which causes further pollution of the well and more interference with B's poultry business. These further invasions of B's interest in the use and enjoyment of his land are intentional.

Case Citations

Reporter's Notes & Cross References Through December 1977

Case Citations 1978 -- June 1987

Case Citations July 1987 -- June 2004

Case Citations July 2004 -- November 2004

COMMENTS

Reporter's Notes & Cross References Through December 1977:

REPORTER'S NOTE

Cases in which the defendant acted for the purpose of causing the harm include: Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663 (1903); Burnett v. Rushton, 52 So.2d 645 (Fla.1951); Hornsby v. Smith, 191 Ga. 491, 13 S.E.2d 20 (1941); Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N.E. 849 (1904); Barclay v. Abraham, 121 Iowa 619, 96 N.W. 1080 (1903); Chesley v. King, 74 Me. 164, 43 Am.Rep. 569 (1882); Smith v. Morse, 148 Mass. 407, 19 N.E. 393 (1889); Flaherty v. Moran, 81 Mich. 52, 45 N.W. 381 (1890); Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N.W. 907 (1903); Burris v. Creech, 220 N.C. 302, 17 S.E.2d 123 (1941); Hibbard v. Halliday, 58 Okl. 244, 158 P. 1158 (1916); Racich v. Mastrovich, 65 S.D. 321, 273 N.W. 660 (1937); Medford v. Levy, 31 W.Va. 649, 8 S.E. 302 (1888); Erickson v. Hudson, 70 Wyo. 317, 249 P.2d 523 (1952); Hollywood Silver Fox Farm v. Emmett, [1936] 2 K.B. 468.

Cases in which the defendant knew that the nuisance would result include Smith v. Staso Milling Co., 18 F.2d 736 (2nd Cir.1927); Vaughn v. Missouri Power & Light Co., 89 S.W.2d 699 (Mo.App.1935).

See discussion in Copart Industries, Inc. v. Consolidated Edison Co., 41 N.Y.2d 564, 394 N.Y.S.2d 169, 362 N.E.2d 968 (1977); Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978).