IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT OF ILLINOIS
MADISON COUNTY

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

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

NOW COMES Syngenta Crop Protection Inc. ("Syngenta") and Growmark, Inc. ("Growmark"), through their respective attorneys, and for their combined motions to dismiss pursuant to 735 ILCS 5/2-619.1 state as follows:

INTRODUCTION

1. On July 2, 2004, Holiday Shores Sanitary District ("plaintiff") filed a class action complaint against Syngenta and Growmark. Thereafter, plaintiff filed and served an amended complaint. In fact, plaintiff filed six separate, identical complaints against Growmark. In five of those cases, including this matter, Growmark filed a motion to dismiss based on a prior pending action under 735 ILCS 5/2-619(a)(3). As of this filing, the court has not ruled on Growmark's prior pending action motion.

2. Plaintiff is a municipal water district near Edwardsville, Illinois, claiming the water it sells to the public is unsafe. Am. Compl. ¶¶ 6, 19. Plaintiff claims that its water contains small amounts of atrazine, an agricultural herbicide widely used by Illinois farmers to

control broadleaf and grass weeds on corn fields. Atrazine is highly regulated by both the United States and Illinois Environmental Protection Agencies ("USEPA" and "IEPA," respectively). Under the Safe Drinking Water Act ("SDWA"), the USEPA adopts a Maximum Contaminant Level ("MCL") for various chemicals, including atrazine. 42 U.S.C. § 300g-1(b)(1). Plaintiff acknowledges that its water contains atrazine in levels below the USEPA's MCL.

3. Syngenta manufactures various products that contain atrazine as an active ingredient. Am. Compl. at ¶ 3. Growmark is allegedly a distributor of agricultural products. Am. Compl. at ¶ 4. Growmark is one of many companies that sells atrazine.

ARGUMENT

I. THE USEPA HAS PRIMARY JURISDICTION OVER ATRAZINE LEVELS.

4. Plaintiff's complaint should be dismissed under 735 ILCS 5/2-615 because the USEPA has primary jurisdiction to set the standard for atrazine in drinking water. Drinking water safety is strictly regulated by the federal Safe Drinking Water Act ("SDWA") and the associated National Primary Drinking Water Regulations ("NPDWR"). 42 U.S.C. § 300f, *et seq.*; 56 Fed. Reg. 3526-01 (Jan. 30, 1991). The USEPA has the jurisdiction to set MCLs for atrazine. 42 U.S.C. § 300g-1(b)(1). Courts give substantial deference to the administrative agencies that have the power, granted by the legislature, to regulate the sale and use of atrazine. *See Monsanto Co. v. Pollution Control Bd.*, 67 Ill. 2d 276, 290 (1977). Courts should be reluctant to exercise their powers over activities highly regulated by statute, as the administrative agencies charged with regulating those activities are the ones capable of handing them appropriately. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 386 (2004).

II. PLAINTIFF LACKS STANDING TO BRING THESE CLAIMS.

5. Plaintiff's complaint should be dismissed under 735 ILCS 5/2-619(a)(9) because

plaintiff, as a non-home-rule municipal corporation without statutory authority to bring these claims, lacks standing. Plaintiff was established by court order in October 1972 under The Sanitary District Act of 1936. 70 ILCS 2805/0.1, *et seq.*; *see* certified copy of the court order attached to the memorandum in support as Exhibit A. Special districts like plaintiff have only the powers granted by law. ILLINOIS CONST., ART. VII § 8 (2004). Such powers are construed strictly against special districts. *Pesticide Public Policy Found. v. Wauconda*, 117 Ill. 2d 107, 113 (1987). In this case, plaintiff's operative statute limits it to seeking injunctive relief or mandamus. 70 ILCS 2805/27(d).

6. Since plaintiff lacks standing, plaintiff's complaint should also be dismissed under 735 ILCS 5/2-615 because it fails to allege an injury in fact. According to plaintiff's complaint, it is seeking redress for atrazine levels less than the MCL of 3 parts per billion ("ppb"). If the concentration is less than the MCL, there is no redressable injury. *Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Protection, Inc.*, 45 F. Supp. 2d 934, 941-43 (S.D. Ala. 1999).

III. PLAINTIFF FAILS TO IDENTIFY THE PRODUCT THAT ALLEGEDLY CAUSED HARM.

7. The court should also dismiss the plaintiff's complaint under 735 ILCS 5/2-615 because it does not identify the product that allegedly caused its injury. Syngenta is one of six registered manufacturers of atrazine, according to plaintiff. Am. Compl. ¶ 3. Plaintiff admits that Syngenta's atrazine is identical to the other manufacturers' atrazine. *Id.* Growmark is alleged to be a distributor of atrazine. Am. Comp. ¶ 4. There are many other distributors of atrazine. Plaintiff does not allege that Syngenta manufactured or that Growmark distributed the atrazine that it claims is in its water.

8. Under Illinois law, plaintiff has the burden of pleading and proving by a preponderance of evidence that defendant caused the complained-of harm or injury; conjecture or speculation is insufficient. *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 232 (1990). This principle applies to all of plaintiff's claims. Merely manufacturing the same type of product that allegedly caused plaintiff's injury does not establish causation. Plaintiff must allege that a specific defendant's alleged tortious act caused the alleged injury, and court's dismiss complaints at the pleading stage for failure to make such allegations. *See, e.g., Lewis v. Lead Indus. Ass'n Inc.*, 342 Ill. App. 3d 95, 103 (1st Dist. 2003). Plaintiff fails to allege causation. Therefore this complaint should be dismissed.

IV. PLAINTIFF'S INDIVIDUAL CLAIMS FAIL AND SHOULD BE DISMISSED PURSUANT TO 735 ILCS 5/2-615.

9. In plaintiff's trespass count, plaintiff fails to allege that either Syngenta or Growmark were in control of the atrazine at the time it entered plaintiff's property. Such control is a necessary prerequisite to state an actionable trespass claim. *Traube v. Freund*, 333 Ill. App. 3d 198, 202 (5th Dist. 2002). Plaintiff's trespass claim should be dismissed.

10. Plaintiff's nuisance count fails to identify an infringement of a public or private right. Am. Compl. ¶ 19. This is a necessary requirement for pleading both public and private nuisance. *Donaldson v. Central Ill. Public Serv. Co.*, 199 Ill. 2d 63, 101 (2002); *In re Chicago Flood Litig.*, 176 Ill. 2d 179, 203 (1997). Nuisance is also limited in the context of heavily-regulated products. *City of Chicago v. Beretta U.S.A., Inc.*, 213 Ill. 2d 351 (2004). This case is similar to *Beretta*. Defendants operate in a complex regulatory environment and plaintiff has not alleged that defendants failed to comply with applicable regulations. *Beretta*, 213 Ill. 2d at 389.

11. Plaintiff's negligence claim fails because it does not adequately allege a duty. Illinois courts consider four factors to determine whether such a duty exists: (1) the reasonable

foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant. *Bajwa v. Metropolitan Life Ins. Co.*, 208 Ill.2d 414 (2004). As in *Beretta*, the manufacturers and distributors in this case do not owe the general public a duty to protect it from harm that might be caused by a purchaser's use of a highly regulated product. *Beretta*, 213 Ill.2d at 362. Plaintiff fails to allege a duty and therefore, its negligence claim should be dismissed.

12. Plaintiff's strict liability claim admits that atrazine performs as an ordinary user would expect when used in the intended manner. "Defendants atrazine products were used in a manner in which they were intended and foreseeably certain to be used." Am. Compl. at ¶ 52. For a product to be unreasonably dangerous because of a design defect, plaintiff must allege that the product in question "is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics." *Hunt v. Blasius*, 74 Ill. 2d 203 (1979). Plaintiff has not made any such allegations. Accordingly, its claim should be dismissed.

13. Plaintiff's IEPA Act claim fails because plaintiff failed to exhaust administrative remedies before the Illinois Pollution Control Board ("Board") prior to seeking relief in the court system. 415 ILCS 5/31(d). The Illinois legislature conferred exclusive jurisdiction upon the Board over actual or threatened violations of USEPA, IEPA permits, or Board rules and regulations under the IEPA Act. 415 ILCS 5/31. A private litigant can sue in court only after he or she has sought and been denied relief by the Board. 415 ILCS 5/45(b).

14. This court should dismiss the Illinois Water Pollution Discharge Act claim against Growmark because it may only be brought against the *owner of a facility responsible for the discharge* of oil or other pollutants. 415 ILCS 25/5. Plaintiff has made no such allegations.

V. PLAINTIFF'S CLAIMS VIOLATE THE UNITED STATES CONSTITUTION.

15. Finally, plaintiff's claims violate the Commerce and Due Process Clauses of the United States Constitution, and should be dismissed under 735 ILCS 5/2-615. U.S. CONST., ART. I, § 8, cl. 3; amends. V, XIV. No state—let alone a municipal unit of government like plaintiff—may regulate commercial conduct occurring wholly outside its borders. *See, e.g., Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). Here, plaintiff is effectively seeking to curb or even ban the sale of atrazine in Illinois, thus halting a portion of interstate commerce: the sale of this particular herbicide ingredient. Illinois courts prohibit the violation of the Commerce Clause, and forbid local and state governments from regulating where the regulation impinges on the United States Constitution. *See Lakehead Pipeline Co. v. Illinois Commerce Comm'n*, 296 Ill. App. 3d 942, 951 (3d Dist. 1988). Plaintiff further seeks to violate the U.S. Constitution by attempting to impose punishment on manufacturers of atrazine for lawfully selling a legal product to a distributor. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n. 17 (1996). For these reasons, plaintiff's complaint must be dismissed.

CONCLUSION

WHEREFORE, Defendants Syngenta Crop Protection Inc. and Growmark, Inc. request that this court dismiss all claims against them pursuant to 735 ILCS 5/2-619.1 and grant other relief as this court deems appropriate.

DATED: June 20, 2005

Respectfully submitted,

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