LEXSEE 2002 U.S. DIST. LEXIS 15746

STEWART–STERLING ONE, LLC VERSUS TRICON GLOBAL RESTAURANTS, INC., ET AL

CIVIL ACTION NO. 00–477 SECTION "N"

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2002 U.S. Dist. LEXIS 15746

August 9, 2002, Decided
August 9, 2002, Filed; August 9, 2002, Entered

DISPOSITION: [*1] Motions to Dismiss by Defendants KFC, Martin Franchises, Inc., Cooper Industries and McGraw Edison, Supervisory Services, Inc. and Cleaners Machinery, Inc. denied.

LexisNexis(R) Headnotes

COUNSEL: For STEWART–STIRLING ONE, LLC, plaintiff: Gladstone N. Jones, III, Peter Newton Freiberg, Kevin Earl Huddell, Jones, Verras & Freiberg, LLC, New Orleans, LA.

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JUDGES: KURT D. ENGELHARDT, UNITED STATES DISTRICT JUDGE.

OPINIONBY: KURT D. ENGELHARDT

OPINION:

ORDER AND REASONS

Before the Court is a Motion to Dismiss for Lack of Subject Matter Jurisdiction or, Alternatively, to Dismiss or Stay Pursuant to the *Burford* Abstention and Primary Jurisdiction Doctrines, filed by defendants Kentucky Fried Chicken of California, Inc. and Tricon Global Restaurants, Inc. (now Yum! Brands, Inc.) (collectively, "KFC"). Also before the Court are motions to dismiss and/or stay, identical to KFC's, filed by defendants Cooper Industries and McGraw Edison ("Cooper"), Supervisory Services, Inc. ("SSI") and Cleaners Machinery, Inc. ("CMI"), and Martin Franchises, Inc. For the reasons that follow, these motions are DENIED.

I. BACKGROUND

Plaintiff, Stewart–Sterling, L.L.C., the owner of Oakridge Shopping Center at 800 Metairie Road, [*3] alleges that the dry–cleaning chemical perchloroethylene ("PCE") and its metabolites have migrated onto its property from the adjacent property at 700 and 702 Metairie Road. Seeking remediation of its property pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA"), as well as damages under state law, plaintiff has sued KFC (the current owner of the 700 and 702 properties), as well as various companies connected to the dry cleaning businesses that operated on the property up through 1991, the year KFC bought the property. Joseph Lowenthal operated at least two dry–cleaning related businesses on the property prior to

1991: (1) SSI, a franchisee of Martin Franchises, which operated a One–Hour Martinizing dry–cleaning business, and (2) CMI, a dealer for dry–cleaning equipment.

The Phase I Environmental Site Assessment prepared for KFC in 1991 revealed that the tenant, One–Hour Martinizing, was a hazardous waste generator who appeared to be handling its waste in an approved manner with the exception of an outdoor storage tank to the rear of the property, which had at one time contained the chemical PCE. KFC required that the tank be taken off the property as a condition [*4] of closing. After closing, KFC razed the existing building and built a fried chicken retail establishment, which it operated until January 1998. Since then, the property has been vacant and for sale. During sale negotiations with a potential buyer in October 1998, a property assessment confirmed that the property was contaminated with PCE in the soil and groundwater.

II. LAW AND ANALYSIS

A. Motions to Dismiss and/or Stay:

The defendants argue that plaintiff's RCRA claim is a matter for the Louisiana Department of Environmental Quality ("LDEQ"), not for this Court. They argue that the Court should either (1) dismiss the case for lack of subject matter jurisdiction or (2) dismiss or stay the matter pursuant to the *Burford* abstention and/or primary jurisdiction doctrines.

1. Subject Matter Jurisdiction:

RCRA "is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFC Western, Inc., 516 U.S. 479, 483, 134 L. Ed. 2d 121, 116 S. Ct. 1251,* (1996); *see 42 U.S.C. §§ 6901*–6992. It "permits any citizen to file suit in federal district [*5] court against any person to enforce the operating and permitting requirements of the regulatory scheme under *42 U.S.C. § 6972*(a)(1)(A), or to abate an imminent and substantial endangerment to human health or the environment under *42 U.S.C. § 6972*(a)(1)(B)." *Acme Printing Ink Co. v. Menard, Inc., 881 F. Supp. 1237, 1243 (E.D.Wis. 1995).* n1 Suits under subsection (a)(1)(A) are often referred to as citizen "enforcement" actions, while suits under subsection (a)(1)(B) are sometimes called citizen "imminent hazard" suits. *See, e.g., United States v. State of Colorado, 990 F.2d 1565, 1578 (10th Cir.1993), cert. denied, 510 U.S. 1092, 127 L. Ed. 2d 216, 114 S. Ct. 922 (1994).* The two provisions were enacted at different times and serve different purposes. Subsection (a)(1)(A) applies to ongoing violations and does not provide redress for violations that occurred in the past. *Acme Printing Ink Co. v. Menard, Inc., 870 F. Supp. 1465, 1477–78 (E.D.Wis. 1994).* Subsection (a)(1)(B) was added in 1984 and was designed to create RCRA liability for past acts presenting a present danger. [*6] *Id.* (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 57 n.2, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987)).*

n1 Section 6972(a) provides in pertinent part:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf—
>
> (1)(A) against any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
>
> (B) against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

42 U.S.C. § 6972(a) (emphasis added).

[*7]

Exclusive jurisdiction over both types of citizen suits is lodged in the federal district courts. *42 U.S.C. § 6972*(a) ("The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties... ."). However, KFC argues that this Court is without jurisdiction because Louisiana has implemented a hazardous waste program, which has been approved by the Environmental Protection Agency ("EPA") and operates "in lieu of" the federal program. RCRA does allow the EPA to relinquish its permitting program in states that implement qualifying programs. *See 42 U.S.C. § 6926*(b) (a state whose hazardous waste program is approved by the EPA "is authorized to carry out such program in lieu of the Federal program

under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . . ."). Based on this provision, a few courts have held that in states where this has occurred, private citizens' enforcement suits are no longer truly federal claims under the RCRA since the regulations and permits such citizens are seeking to enforce have become [*8] state regulations and permits rather than federal ones. n2 *See, e.g., Dague v. City of Burlington, 732 F. Supp. 458 (D. Vt. 1989).* However, "those courts which have dismissed citizen suit actions where the applicable federal requirements of RCRA have been superseded by an EPA–authorized state hazardous waste program have faced citizen suit actions brought under section 6972(a)(1)(A)," not (a)(1)(B). *Craig Lyle Ltd. Partnership v. Land O'Lakes, Inc., 877 F. Supp. 476, 483–84 (D. Minn. 1995).* Every court that has addressed the effect of state–run hazardous waste programs on imminent hazard suits under subsection (a)(1)(B) has concluded that such suits are "not superseded by [the] state program." *Id. at 484; see also Dague v. City of Burlington, 935 F.2d 1343, 1352–53 (2nd Cir.1991), rev'd in part on other grounds, 505 U.S. 557, 120 L. Ed. 2d 449, 112 S. Ct. 2638 (1992); Murray v. Bath Iron Works Corp., 867 F. Supp. 33, 40–43 (D. Me. 1994)* (dismissing (a)(1)(A) enforcement action due to state–run program, but retaining jurisdiction over (a)(1)(B) imminent hazard claim); *Clorox Co. v. Chromium Corp., 158 F.R.D. 120, 124 (N.D. Ill.1994)* [*9] (same); *Coalition for Health Concern v. LWD, Inc., 834 F. Supp. 953, 959 (W.D. Ky. 1993)* ("Kentucky's program supplants this regulatory Permit Program, not the statutory provisions of RCRA. Those provisions still apply in Kentucky, and claims of their violation necessarily arise under federal law."), *rev'd on other grounds, 60 F.3d 1188 (6th Cir. 1995).*

> n2 Several courts, however, have held that EPA–approved state permitting programs do not dislodge federal courts' jurisdiction over enforcement suits. *See, e.g., Glazer v. American Ecology Environmental Services Corp., 894 F. Supp. 1029, 1040 (E.D. Tex. 1995)* ("Because Texas' hazardous waste program ... became effective pursuant to RCRA ... . plaintiff's may enforce Texas' hazardous waste program by bringing a citizen suit under section 6972(a)(1)(A)."); *Acme Printing Ink Co. v. Menard, Inc., 881 F. Supp. 1237, 1244 (E.D.Wis. 1995)* (same reasoning); *Environmental Compliance Oversight Corp. v. Smithkline Beecham Corp., 1994 U.S. Dist. LEXIS 17424, 1994 WL 695803* at *2 (E.D. Pa. Nov 21, 1994) (same reasoning).

[*10]

In none of the cases cited by KFC did the court address a citizen imminent danger suit or employ reasoning that could be extended to the citizen imminent danger suit. KFC relies heavily on *Harmon Industries, Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999).* n3 However, *Harmon* was not a citizen suit, but an enforcement action brought by the EPA after a state already had brought its own enforcement action. The court held that in such cases, the EPA may not bring its own enforcement action without first complying with the RCRA's notice provisions and allowing the state an opportunity to correct any alleged deficiencies in its handling of the case. *Id. at 902.* Not only did the court's analysis hinge on statutory provisions altogether different from those at issue here, the court expressly distinguished citizen actions in reaching its holding. When the EPA pointed to the citizen suit provision as support for its argument that Congress is express when it wants to put limitations on a party's right to sue under RCRA, n4 the court replied:

> Section 6972(b)(1)(B) of the RCRA provides the parameters for private litigation. In the course of providing [*11] such parameters, Congress apparently found it necessary to delineate exactly when and how a private citizen may initiate a civil action against an alleged environmental violator. In contrast, section 6926 of the RCRA addresses the interplay between federal and state authorization.

Harmon, 191 F.3d at 900. Nowhere did the *Harmon* court suggest that state–run programs supplant a citizen's right to bring an imminent hazard suit in federal court. Indeed, the quoted language suggests the contrary, emphasizing that Congress has "delineated exactly when and how" a citizen may bring suit under RCRA. *Id.* In section 6972(b)(2), Congress has spelled out precisely when citizen imminent hazard suits are barred: (1) where the plaintiff has failed to give ninety–days notice to the EPA, the State, and the alleged offender; and (2) where the EPA or the State already is diligently prosecuting an enforcement action. *See 42 U.S.C. § 6972*(b)(2). Notably absent from this list is any provision barring such suits in states where the EPA has approved a state–run hazardous waste management program.

> n3 Another case relied upon by KFC is *Chemical Weapons Wkg. Grp., Inc. v. U.S. Dept. of the Army, 990 F. Supp. 1316 (D. Utah 1997).* It is clear from the facts of that case that the only claim before the court was an enforcement action, not an imminent hazard suit. Specifically, the plaintiff's sought to reverse a decision by the Utah Division

of Solid & Hazardous Waste to add a particular subcontractor as co–permittee on the Army's permit to operation its chemical facility. Moreover, the two cases relied on by the court in concluding that plaintiff had no federal claim were *Dague, supra*, and *Murray v. Bath Iron Works Corp., 867 F. Supp. 33, 42 (D.Me.1994). Chemical Weapons, 990 F. Supp. at 1319.* In both of these cases, the court retained jurisdiction over an imminent hazard claim under subsection (a)(1)(B). Likewise, in *Thompson v. Thomas, 680 F. Supp. 1, 3 (D.D.C. 1987)*, another case relied upon by KFC, the only claim before the court was an "action to enforce the open dumping provision." *Id. at 3.*
[*12]

n4 *See 42 U.S.C. § 6972*(b) (listing the circumstances under which a citizen is barred from bringing a RCRA suit).

Nor does section 6926(b) support KFC's argument. KFC argues that this section authorizes state programs to operate "completely in lieu of RCRA." n5 Congress could have drafted section 6926(b) to say this, but did not. What section 6926(b) actually says is that a state whose hazardous waste program is approved by the EPA "is authorized to carry out such program in lieu of the Federal program under this subchapter [Subchapter III] . . . and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste . . . ." *See 42 U.S.C. § 6926*(b). Unlike suits under subsection (A), "a subsection B suit does not depend on any specific subchapter III provision." *Dague, 935 F.2d at 1352–53.* Rather, subsection (B) "is more general, and allows a direct cause of action against those whose activities 'may present an imminent and substantial endangerment to health or the environment,'" without reference [*13] to any state or federal regulation or permit. *Id.* (quoting *42 U.S.C. § 6972*(a)(1)(B)). Accordingly, it is not superseded by state–run programs. *Id.*

n5 Oral Argument of Counsel for KFC, Aug. 7, 2002.

2. *Burford* Abstention:

Alternatively, the movants ask the Court to stay this matter under the *Burford* abstention doctrine. They argue that abstention is warranted because KFC has hired a consultant, Professional Services, Inc. ("PSI"), and with permission of the LDEQ has been investigating ways of remediating its property. The Court disagrees that abstention is appropriate.

The *Burford* abstention is an "'extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it.'" *Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 728, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996)* (quoting *Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)).* [*14] Specifically, "*Burford* allows a federal court to dismiss a case only if it presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar,' or if its adjudication in a federal forum 'would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *517 U.S. at 726–27* (quoting *NOPSI v. Council of City of New Orleans, 491 U.S. 350, 361, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989))* (internal quotations omitted). A decision to abstain under *Burford* must be "based on a careful consideration of the federal interests in retaining jurisdiction over the dispute" and ultimately represents a determination "that the State's interests are paramount and that [the] dispute would best be adjudicated in a state forum." *517 U.S. at 728.*

Although there is no "formulaic test" for deciding whether the case at bar comes within the narrow exception of *Burford*, n6 the Fifth Circuit has extracted five factors that should be considered: (1) "whether the cause of action arises under federal or state law;" (2) "whether the case [*15] requires inquiry into unsettled issues of state law;" (3) "the importance of the state interest involved;" (4) "the state's need for a coherent policy in that area;" and (5) "the presence of a special state forum for judicial review." *Wilson v. Valley Elec. Membership Corp., 8 F.3d 311, 314 (5th Cir. 1993).*

n6 *Quackenbush, 517 U.S. at 727.*

Here, as in *NOPSI*, the plaintiff's claim is neither founded on state law nor "entangled in a skein of state law that must be untangled before the federal case can proceed." *NOPSI, 491 U.S. at 361* (internal quotations omitted). KFC, at oral argument and in its briefs, has recited a litany of laws and regulations that Louisiana has enacted in the broad field of hazardous waste. Yet, it has failed to point the Court to a single state law issue that must be decided before adjudication of plaintiff's RCRA claim can proceed. Likewise, as in *NOPSI*, this case presents "no serious threat of conflict between the adjudication [*16] of the federal claim presented . . . and the State's interest" in establishing any particular policy. *See Quackenbush, 517 U.S. at 727.* Again, KFC recites

many details of Louisiana's hazardous waste rules and points out the administrative process that is available to handle multifarious issues relating to hazardous waste. The mere existence of this infrastructure, however, does not bring the case within *Burford*. "While *Burford* is concerned with protecting complex state administrative processes from undue federal influence, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *NOPSI, 491 U.S. at 362*. KFC has cited no policy or proceeding of the LDEQ that would be disrupted or thwarted by this Court's adjudication of plaintiff's claim that contamination exists on its property which presents an imminent and substantial danger to its employees and patrons and that KFC has contributed to it. To the contrary, the evidence shows that in the four years since KFC informed the LDEQ of the PCE on KFC's property, the LDEQ has manifested no [*17] agenda with respect to plaintiff's property. n7 Based on the present record, the Court is unable to find a basis for abstention.

> n7 The deposition testimony of Ned Stevenson (the LDEQ geologist overseeing KFC's efforts) is demonstrative. He testified that he did not know of contamination on plaintiff's property and did not know if or when the LDEQ might develop a remediation plan for plaintiff's property. *See* KFC's Reply Memo, Exh. 1 at pp. 167–173, 178–79. The most that KFC can say with regard to the LDEQ and plaintiff's property is that the LDEQ will not give KFC a "no further action" letter if it knows that contamination had migrated off site. *Id.* at pp. 147–48.

3. Primary Jurisdiction Doctrine:

Finally, movants ask the Court to stay or dismiss plaintiff's claim pursuant to the "primary jurisdiction" doctrine. This doctrine "applies where: (1) the court has original jurisdiction over the claim before it; (2) the adjudication of that claim requires the resolution of predicate issues or the [*18] making of preliminary findings; and (3) the legislature has established a regulatory scheme whereby it has committed the resolution of those issues or the making of those findings to an administrative body." *Northwinds Abatement, Inc. v. Employers Ins. of Wausau, 69 F.3d 1304, 1311 (5th Cir. 1995)*. Where these elements are met, the Court should refer those predicate issues to the agency charged with resolving them. *Id.* In doing so, the Court should prepare an order that "outlines . . . the issues upon which the [agency]'s opinion is sought." *Mississippi Power & Light Co. v. United Gas Pipeline Co., 532 F.2d 412, 421 (5th Cir. 1976), cert. denied, 429 U.S. 1094, 51 L. Ed. 2d 541, 97 S. Ct. 1109 (1977)*.

KFC argues that this Court should dismiss or stay the plaintiff's suit because environmental issues such as those at issue here "are unquestionably within the specialized knowledge and expertise of the D.E.Q." KFC's Memo in Support at p. 19. KFC relies on two cases where the courts found the primary jurisdiction doctrine justified in a RCRA suit: *Davies v. National Coop. Refinery Ass'n, 963 F. Supp. 990 (D. Kan. 1997)* [*19] and *Friends of Santa Fe County v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. 1995)*. However, the majority of courts to address the doctrine in the context of a RCRA citizen suit have concluded either that application of the doctrine is inappropriate except in truly extraordinary circumstances or that it is wholly inapplicable in light of RCRA's express delineation of what agency action will preclude a citizen suit. *See, e.g., PMC, Inc. v. Sherwin–Williams Co., 151 F.3d 610, 619 (7th Cir. 1998)* (Posner, J.) ("applying) the doctrine of primary jurisdiction...would be an end run around RCRA. ... [Although] there may be room for applying the doctrine[]...in cases in which a state has a formal administrative proceeding in progress that the citizens' suit would disrupt, there is nothing like that here. The state proceedings (if they can even be called that) are informal... ."), *cert. denied, 525 U.S. 1104, 142 L. Ed. 2d 772, 119 S. Ct. 871 (1999); Craig Lyle, 877 F. Supp. at 483* (finding primary jurisdiction doctrine inapplicable in RCRA suit because "Congress has expressly set forth those situations in which a citizen [*20] suit under section 6972(a)(1)(B) is precluded"); *Williams v. Alabama Dep't of Transp., 119 F. Supp.2d 1249, 1255–58 (M.D. Ala. 2000)* ("In enacting RCRA's citizen suit provisions, Congress has chosen to allocate federal judicial resources to the oversight of this nation's waste disposal problem. The court is reluctant to reallocate those resources through the use of questionable escape valves and procedural devices."); *Wilson v. Amoco Corp., 989 F. Supp. 1159, 1170 (D. Wyo. 1998)* ("There is an additional, overriding reason for courts to hear RCRA and CWA cases despite their supposed unique nature: Congress has told us to. Both RCRA and the CWA explicitly empower citizens to enforce the Acts' provisions except in certain circumstances not present here. This Court could not in good faith unilaterally strip United States citizens of rights given them by their government."); *Sierra Club v. U.S. Dept. of Energy, 734 F. Supp. 946, 951 (D. Colo. 1990)* ("the doctrine of primary jurisdiction does not permit a federal court to defer to a state agency on a matter of federal law" and "RCRA specifically sets forth the narrow circumstances under [*21] which agency action may interfere with citizen enforcement"); *Merry v. Westinghouse*

Elec. Corp., 697 F. Supp. 180, 183 (M.D. Pa. 1988); Maine People's Alliance v. Holtrachem Mfg., 2001 U.S. Dist. LEXIS 11162, 2001 WL 1704911 at *6–9 (D. Me. Jan 08, 2001); *Trident Inv. Mgmt., Inc.–Meyer Inv. Propertiess, Inc. v. Bhambra, 1995 U.S. Dist. LEXIS 18330, 1995 WL 736940* at *2 (N.D. Ill. Dec. 11, 1995) ("the judicial restraint which is required in RCRA cases in the absence of proper notice is compelled not by the common–law concept of primary jurisdiction, but by the specific statutory mandate of Congress").

This Court agrees with the reasoning of these courts. "Congress has specified the conditions under which the pendency of other proceedings bars suit under RCRA and . . . those conditions have not been satisfied here." *PMC, 151 F.3d at 619.* Nor does this case present extraordinary circumstances such as in *Davies* and *Friends*. Plaintiff has not participated in exhaustive hearings before the LDEQ. There have been no such hearings. Nor has the LDEQ issued any orders with respect to plaintiff's property that might conflict with this Court's enforcement of RCRA. As discussed [*22] *supra*, the LDEQ has issued no orders whatsoever with respect to plaintiff's property. Accordingly, even assuming application of the primary jurisdiction doctrine to be permissible in RCRA citizen suits, the facts of this case to do warrant it.

III. CONCLUSION

Accordingly, for the foregoing reasons, **IT IS ORDERED** that: (1) the Motion to Dismiss for Lack of Subject Matter Jurisdiction or, Alternatively, to Dismiss or Stay Pursuant to the *Burford* Abstention and Primary Jurisdiction Doctrines, filed by KFC (Rec.Doc. 82) is **DENIED**; (2) the Motion to Dismiss for Lack of Subject Matter Jurisdiction or, Alternatively, to Dismiss or Stay Pursuant to the *Burford* Abstention and Primary Jurisdiction Doctrines, filed by Martin Franchises, Inc. (Rec.Doc. 84) is **DENIED**; (3) the Motion to Dismiss for Lack of Subject Matter Jurisdiction or, Alternatively, to Dismiss or Stay Pursuant to the *Burford* Abstention and Primary Jurisdiction Doctrines, filed by Cooper Industries and McGraw Edison (Rec.Doc. 91) is **DENIED**; and (4) the Motion to Dismiss or, in the Alternative, to Stay Proceedings, filed by Supervisory Services, Inc. and Cleaners Machinery, Inc. [*23] (Rec.Doc. 86) is **DENIED**.

New Orleans, Louisiana, this 9th day of August 2002.

KURT D. ENGELHARDT

UNITED STATES DISTRICT JUDGE