

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

OAKVILLE COMMUNITY ACTION
GROUP and LOUISIANA
ENVIRONMENTAL ACTION

VERSUS

INDUSTRIAL PIPE, INC.

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 OCT -8 PM 1:13
CIVIL ACTION
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02-1258

SECTION "T"(4)

Before the Court is a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), or, in the alternative, Rule 12(b)(6) or, in the alternative, for abstention. The Court entertained oral argument on September 18, 2002. The Court having heard the arguments of counsel, reviewed the memoranda filed, considered the law and applicable jurisprudence, is fully advised in the premises and ready to rule.

ORDER AND REASONS

I. BACKGROUND:

Oakville Community Action Group (Oakville) and Louisiana Environmental Action Network (LEAN) seek declaratory and injunctive relief and the award of civil penalties for Industrial Pipe's alleged failures in compliance with federal and state regulations in the operations of landfill facilities located in Belle Chasse. Oakville and LEAN assert that Industrial Pipe has not restricted the type of waste that it accepts, and it therefore both violates its state permit from the Department of Environmental Quality (DEQ) and subjects itself to classification as a municipal solid waste

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landfill (MSWL) under the federal Resource Conservation and Recovery Act (RCRA). The Plaintiffs claim that federal question jurisdiction exists under the RCRA and that this Court has supplemental jurisdiction over the state claims

Industrial Pipe operates two separate facilities at the Belle Chasse site, each under a separate permit from the Louisiana DEQ. The first is a landfill for construction and demolition debris, and the second is a transfer station where trash is separated for recycling or disposal, and then transferred offsite. The Plaintiffs claim that the landfill site accepts household waste in violation of its permit and in violation of Congress' prohibition of "open dumping." They seek declaratory and injunctive relief under both the RCRA and Louisiana law for closure and post-closure financial assurances. The Plaintiffs also allege that Industrial Pipe has violated the state buffer zone requirement, and they are entitled to relief under that theory as well.

II. ARGUMENTS OF THE RESPECTIVE PARTIES:

A. ARGUMENTS of INDUSTRIAL PIPE in SUPPORT OF MOTION TO DISMISS

Industrial Pipe argues that the Plaintiffs' claims should be dismissed under both the Burford and the Colorado River abstention doctrines because exercise of this Court's jurisdiction will interfere with the Louisiana DEQ's regulatory scheme. They allege that their permits are currently under review by the DEQ, and interference by a federal court in this matter would amount to a rejection of the permits issued by the DEQ and of the DEQ's classification of the facility. Industrial Pipe also alleges that there is a current proceeding before the Louisiana DEQ that makes abstention proper.

Industrial Pipe also moves for dismissal under Rule 12(b)(1), or, in the alternative, Rule

12(b)(6), because the Plaintiffs do not assert that a federal regulation or rule provides the basis for the enforcement of state-based claims. Industrial Pipe claims that the Plaintiffs rely on state criteria that are more stringent than federal in their Counts for Relief (specifically Counts III through IX which seek relief for DEQ permitting violations). The movant also claims that Oakville and LEAN lack standing to assert their Ninth Claim for Relief, which argues a violation of a state-imposed buffer zone. Industrial Pipe contends that neither Oakville nor LEAN owns or occupies the property adjoining the landfill facility which is the subject of the claim, therefore neither party has standing. The Plaintiffs have misrepresented their intentions and “seek a judicially-ordered, *de facto* rejection of DEQ’s permit and DEQ’s classification of Industrial Pipe’s facilities.”

B. ARGUMENTS of OAKVILLE and LEAN in OPPOSITION to DEFENDANT’S MOTION TO DISMISS

The Plaintiffs’ allege that Industrial Pipe has not complied with its permits issued by the DEQ, and as a result of that noncompliance, Industrial Pipe has subjected itself to the RCRA as an MSWL. The landfill qualifies as an MSWL not only because it accepts restricted items in violation of its permit, but also because it has contracted with Plaquemines Parish to accept household waste. Respondents claim that they in no way invoke or involve the regulating and permitting scheme of the DEQ in this action, rather, they feel that the actions of Industrial Pipe, regardless of their classification by and compliance with the DEQ, have caused them to avail themselves of the restrictions and regulations of the RCRA.

The Plaintiffs also assert that they have properly stated a claim for relief because they have brought forward a question of fact in alleging that Industrial Pipe accepts household waste and

therefore meets the definition of an MSWL.

In addition, the respondents claim that the "pending state actions" alleged by Industrial Pipe do not conflict with the present action and do not merit abstention.

III. LAW AND ANALYSIS:

A. Law on Abstention Doctrine

1. Colorado River

A federal court may decline to exercise jurisdiction if there is a pending action in state court involving the same parties and there are exceptional circumstances involving wise judicial administration and conservation of judicial resources. Colorado River, supra. However, the United States Supreme Court stated that abstention is "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it" and that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given to them." Colorado River, 424 U.S. at 813, 817, 96 S.Ct. at 1244, 1246; Falcon Operators v. P.M.P. Wireline Services, Inc., 1997 WL 313417 (E.D.La. 6/9/97). A party requesting a district court to abstain must demonstrate "exceptional circumstances and the clearest of justifications" to justify the surrender of a federal court's jurisdiction. Colorado River, 424 U.S. at 824, 96 S.Ct. at 1250.

The United States Supreme Court articulated the following factors a district court should consider when deciding whether or not to decline jurisdiction:

1. Whether the federal court has assumed jurisdiction over the res;
2. Inconvenience of the federal forum;
3. Desirability of avoiding piecemeal litigation;
4. The order in which jurisdiction was obtained;

5. Whether federal law provides the basis of decision; and,
6. Whether state court proceedings are inadequate to protect federal court's plaintiff's rights.

Colorado River, 424 U.S. at 818, 96 S.Ct. at 1246-47; Moses H. Cone, 460 U.S. at 16, 103 S.Ct. at 937. No one factor is determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required. Id.

However, there must first exist truly parallel cases. The Fifth Circuit defines parallel actions as those involving the same parties and the same issues. Republicbank Dallas National Association v. McIntosh, 828 F.2d 1120 (5th Cir. 1987) *per curiam*; PPG Industries, Inc. v. Continental Oil Co., 478 F.2d 674, 682 (5th Cir. 1973); Hartford Acc. & Indem. v. Costa Lines Cargo Serv., 903 F.2d 352 (5th Cir. 1990); Doerle's Quarterboats, Inc. v. Been Weeks, Co., 1995 WL 747470 (E.D.La.).¹

2. Burford

The Burford² abstention doctrine applies when federal court involvement would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) (quoting Colorado River, 424 U.S. at 817). Factors relevant in making this decision are (1) whether the cause of action arises under federal or state law, (2) whether the case requires inquiry

¹ See also, Nakash v. Marciano, 882 F.2d 1411 (9th Cir. 1989) (citing Republicbank); Crawley v. Hamilton County Comm'rs, 744 F.2d 28 (6th Cir. 1984).

² Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed 1424 (1943).

into unsettled issues of state law or into local facts, (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).

B. Law on Rule 12(b)(6) motions:

In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), courts have found that dismissal pursuant to this provision "is viewed with disfavor and is rarely granted." Lowery v. Texas A&M University System, 117 F.3d 242, 247 (5th Cir. 1997); Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, 677 F.2d 1045, 1050 (5th Cir. 1982). The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the original complaint must be taken as true. Campbell v. Wells Fargo Bank, 781 F.2d 440, 442 (5th Cir. 1980). A district court may not dismiss a complaint under FRCP 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957); Blackburn v. Marshall, 42 F.3d 925, 931 (5th Cir. 1995). The Fifth Circuit defines this strict standard as, "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Lowrey, 117 F.3d at 247, citing 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, §1357, at 601 (1969).

C. Law on Rule 12(b)(1) dismissal

A motion to dismiss under Rule 12(b)(1) must be granted if the complaint does not properly invoke the court's subject matter jurisdiction. Wright & Miller, *Federal Practice and Procedure: Civil* 2d § 1350 (1990).

"[A]n association has standing to bring a suit on behalf of its members when: (a) its members

would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members." Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977).

B. The Court's Analysis:

This Court agrees with the plaintiffs that this action, brought pursuant to 42 U.S.C. § 6972(a), does not interfere with any present or future action in which the defendants may be involved with the DEQ with regard to their permits. The plaintiffs correctly state that they are simply asserting the Industrial Pipe has subjected itself to RCRA and violated its permit, and a decision by this Court will not impinge on Louisiana's regulatory system. Therefore, abstention under either the Colorado River or the Burford standard is inappropriate.

With regard to the defendants motions to dismiss, this Court believes that by asserting that Industrial Pipe's landfill accepts household trash, white goods and other household wastes, the plaintiffs have made a claim upon which relief can be granted, and dismissal is therefore improper. This Court also disagrees with the defendant's contention that the plaintiffs do not have standing to bring these claims against Industrial Pipe. Again, the plaintiffs were correct when they asserted in their memorandum that all of the claims affect members of the community, citizens of whom the plaintiffs represent, and they then have standing to bring forth their claims as stated before this Court.

Accordingly,

IT IS ORDERED that defendant Industrial Pipe's Motion to Dismiss under Federal Rule

12(b) and for Abstention is hereby **DENIED**.

New Orleans, Louisiana this  day of October, 2002.


G. THOMAS PORTEOUS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
2002 SEP 16 PM 3:26
LORETTA G. WHYTE
CLERK

OAKVILLE COMMUNITY	*	
ACTION GROUP, and LOUISIANA	*	
ENVIRONMENTAL ACTION	*	CIVIL ACTION
NETWORK,	*	NO. 02-1258
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	*	
Plaintiffs,	*	
	*	
versus	*	
	*	SECTION " T "
INDUSTRIAL PIPE, INC.,	*	
	*	
	*	
Defendant.	*	MAGISTRATE (5)
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SUPERVISING ATTORNEYS' INTRODUCTION OF STUDENT PRACTITIONERS PURSUANT TO LOCAL RULE 83.2.13, WITH ATTACHED DEAN'S CERTIFICATION AND CLIENT'S WRITTEN CONSENT

The undersigned counsel respectfully introduces law student practitioner Alison Kirshner to this Court pursuant to Local Rule 83.2.13. This student practitioner is duly enrolled in Tulane Law School, a law school approved by the American Bar Association. The student practitioner has completed four full-time semesters of legal studies and has taken the oath set forth in Local Rule 83.2.13. As the student practitioner's supervising attorney, I approve of the student practitioner's appearance in this case. Further, a Dean's certification relating to the student practitioner and the clients' written consent to the student practitioner's appearance are attached as Exhibits A and B, respectively.

*Case argued
by student attorney
Alison Kirshner*

Fee _____
Process _____
X Filed _____
Clerk/Dep _____
Doc. No. 15

Respectfully submitted this 16 day of September, 2002,

TULANE ENVIRONMENTAL LAW CLINIC

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