

**Description of an  
Ingress/Egress Easement  
State Route 444 and Sandhill Roads  
Greene County, Ohio**

**September 26, 1997  
Page 2**

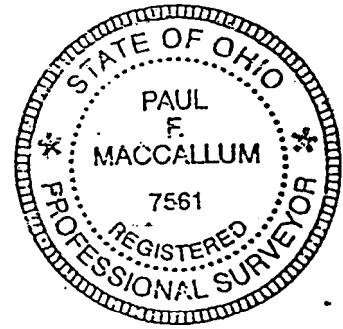
thence along the centerline of said State Route 444 and the northwesterly line of said Southdown land, North fifty-five degrees sixteen minutes thirty-eight seconds East ( $N55^{\circ}16'38''E$ ) for eighteen and 01/100 feet (18.01') to the point of beginning.

This description was prepared from record information, with bearings based upon The Ohio State Plane Coordinate System (South Zone).

**WOOLPERT LLP**

*Paul F. MacCallum*

Paul F. MacCallum  
Ohio Professional Surveyor #7561



1997 OCT -7 PM 3:58  
LARRY D. THORNTON  
GREENE CO. RECORDER  
XENIA, OH



Citation

KeyCite History

Rank 1 of 1

Database

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ELR

1989 WL 206380 (D.N.J.), 30 ERC 1353, 20 Env'tl. L. Rep. 20,394

(Cite as: 20 Env'tl. L. Rep. 20394)

Environmental Law Reporter  
Volume Year XX  
Litigation

INTERNATIONAL UNION

v.

AMERACE CORP.

No. 86 - 1833

(D.N.J. October 4, 1989)

ELR Digest

\*20394 The court dismisses a union's Federal Water Pollution Control Act (FWPCA) citizen suit against predecessor and successor electroplating and metal finishing plant owners for wholly past FWPCA violations. The court first holds that the union failed to demonstrate the predecessor's FWPCA liability because the predecessor ceased being the plant's owner or operator when it sold the plant 13 months before suit, and thus could not have been in violation of any FWPCA effluent standard or limit when the union commenced suit. The predecessor extinguished its liability for FWPCA violations when it transferred ownership and control of the plant to the successor. Moreover, the union's citizen suit can have no prospective effect on the predecessor, a wholly past violator. The court observes in a footnote that although deterrence would be served in holding past owners and operators responsible for continuous or intermittent violations that began when the plant was under their control, the FWPCA's citizen suit provision does not recognize a general deterrence purpose. The court also holds moot the action against the predecessor because it could not reasonably be expected to repeat its past FWPCA violations. The court next holds that the successor cannot be held liable for the same wholly past violations. To hold successor liable for the predecessor's violations when the predecessor itself cannot be held liable is anomalous. The successor did not contractually assume the predecessor's FWPCA liability because none existed at the time of purchase. Moreover, the union's FWPCA citizen suit against the predecessor is penal, and thus not a survivable action, because it involves a wrong to the public for which civil penalties would be paid to the government. The union does not allege that the successor is merely a continuation of the predecessor; nor that the successor's purchase of the predecessor's assets amounts to a consolidation, merger, or a fraudulent scheme to escape liability. For the court to impose a per se rule of successor liability to encourage abatement of ongoing violations

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would usurp the legislative function. Had Congress intended to impose successor liability under the FWPCA, it would clearly have stated so. Finally, the court declines to impose sanctions against the union under Federal Rule of Civil Procedure 11. Given the predecessor's continuous violations while it owned and operated the plant and after it sold the plant, the union did not act unreasonably, frivolously, or in a harassing manner in suing both owners.

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Debevoise, J.: [FN\*]

FN\* The court designated this decision as not for publication.  
Opinion

In lieu of an answer, defendant Amerace Corporation, Inc. ("Amerace") moves to dismiss plaintiffs' second amended complaint under Rules 12 (b)(1) and 12A(b)(6) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). Amerace also moves for sanctions under Rule 11. Defendant Harvard Industries, Inc. ("Harvard") moves to dismiss all claims in plaintiffs' second amended complaint for alleged violations of the Clean Water Act (the "Act") that occurred prior to April 12, 1985. Plaintiffs International Union et al. cross-move for partial summary judgment as to counts I through IV of the second amended complaint.

At oral argument, on September 25, 1989, plaintiffs' counsel stated that plaintiffs were requesting summary judgment only with respect to violations occurring before April 12, 1985.

Background

After timely filing the requisite 60 day notice, plaintiffs commenced this citizen suit on May 12, 1985 pursuant to section 505(a) of the Clean Water Act [FN1] 33 U.S.C. sec. 1365(a). Since then, the complaint has been amended twice. It was last amended in January 1989. The second amended complaint added new allegations of violations by Harvard and named Amerace as a defendant. On

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February 10, 1988, plaintiffs notified Amerace of their intention to name it as an additional defendant. In response, Amerace informed plaintiffs that it no longer owned the Elastic Stop Nut of America ("ESNA") plant and advised them of the Supreme Court's recent decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 98 L. Ed. 2d 306 [18 ELR 209411 (1987)]. Memorandum on Behalf of Defendant Amerace Corp., Inc. In Support of Its Motion to Dismiss and for Sanctions Under Rule 11 of the Federal Rules of Civil Procedure ("Amerace Brief"), Exhibit A.

Plaintiffs' second amended complaint seeks to enjoin Harvard from discharging pollutants from its ESNA plant in violation of section 307(d) of the Act, 33 U.S.C. sec. 1317(d), and to recover civil penalties from Harvard for Harvard's and Amerace's past violations. Plaintiffs also seek to recover civil penalties from Amerace for its violations of the Act when it owned and operated the ESNA plant.

On April 12, 1985, Harvard purchased the plant from Amerace. The asset purchase agreement between Harvard and Amerace specifically provided that Harvard would acquire only ESNA's physical assets, including its land, buildings, and manufacturing equipment. The collective bargaining agreement between Amerace and plaintiff Union, which had been operative between 1980 and 1985, was specifically excluded from the Amerace-Harvard purchase agreement. Subsequent to the transfer of title to Harvard, Local 726 struck and instituted various unfair labor practice actions. Harvard has not signed a collective bargaining agreement with any union and a substantial number of persons formerly employed by Amerace, including the individual plaintiffs named in the second amended complaint, have not been rehired. Harvard suggests that as the second amended complaint alleges numerous violations of the Clean Water Act since January 1980, but was filed only when the dispute between Harvard and the Union arose, this action is merely an attempt to force Harvard to enter into a collective bargaining agreement.

At all relevant times, the ESNA plant has been engaged in electroplating and metal finishing operations. As part of its electroplating operations, the plant discharges between 7,000 and 27,000 gallons of wastewater per day into the publicly owned treatment work ("POTW") of the Joint Meeting of Essex and Union Counties ("Joint Meeting").

In count I of the second amended complaint, plaintiffs allege \*20395 that pursuant to section 307(b) of the Act, 33 U.S.C. sec. 1317(b), the plant is subject to the Environmental Protection Agency's ("EPA") general pretreatment regulations for existing and new sources since it discharges the wastewater from its electroplating and metal finishing operations into the Joint Meeting POTW. Plaintiffs further allege that as an industrial user, the plant is subject to the Joint Meeting POTW's local pretreatment standards, which are also enforceable under section 307(d) of the Act, 33 U.S.C. sec. 1317(d). Pursuant

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these pretreatment standards, the plant is subject to the provisions of Industrial Wastewater Permit No. JM 7030 issued by the Joint Meeting, and/or the rules and regulations of the Joint Meeting.

According to plaintiffs, specific sampling demonstrates that since January 30, 1980, the wastewater discharges from the plant have regularly exceeded the applicable Joint Meeting discharge limitations for total cyanide ("CN-T"), amenable cyanide ("CN-A"), cadmium ("Cd"), and other metals, and for total toxic organics ("TTO"), pH, and other parameters.

In count III of the second amended complaint, plaintiffs allege that the plant is also subject to the categorical pretreatment standards for electroplating and metal finishing point sources promulgated by EPA pursuant to section 307(b) of the Act, 33 U.S.C. sec. 1317(b), because it discharges electroplating and metal finishing operations wastewater into the Joint Meeting POTW. According to plaintiffs, as a non-integrated facility (i.e., one where wastewater from an electroplating operation is not combined with other industrial wastewater), the plant was required to comply with the categorical pretreatment standards for electroplating by April 27, 1984, an interim TTO standard by June 30, 1984, and the metal finishing pretreatment standard by February 15, 1986.

Plaintiffs allege that specific sampling demonstrates that since April 27, 1984, wastewater discharges from the plant have regularly exceeded the electroplating and metal finishing categorical pretreatment standards for the same pollutants for which the plant has regularly been exceeding the Joint Meeting POTW pretreatment standards.

Also, in count III, plaintiffs allege that Amerace was in violation of section 307(d) of the Act, 33 U.S.C. sec. 1317(d), 40 C.F.R. sec. 403.12, because it failed to submit a baseline monitoring report ("BMR") to the Joint Meeting within 120 days of the effective dates of both the electroplating and metal finishing categorical pretreatment standards. According to plaintiffs, Amerace did not submit the required electroplating BMR until October 22, 1984, or more than 180 days after the electroplating pretreatment standard became effective, and the required metal finishing BMR was not submitted until February 1986. Plaintiffs also note that the October 1984 BMR included a certification that Amerace was not in compliance with the applicable pretreatment standards on a consistent basis.

In counts II and IV of the second amended complaint, plaintiffs allege that Harvard is the legal successor of Amerace and, consequently, assumed legal and financial liability for Amerace's violations of the applicable environmental laws and permits when it purchased the plant.

In counts I through IV, plaintiffs claim that pursuant to sections 309(b), (d) and 505(a), (d) of the Act, 33 U.S.C. secs. 1319(b), (d) and 1365(a), (d), defendants are subject to injunctive relief and civil penalties not to exceed \$25,000 for each day of each violation of section 307 of the Act. 33 U.S.C. se

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1317.

In support of plaintiffs' allegations that specific sampling demonstrates that the wastewater discharges from the plant regularly exceeded the applicable Joint Meeting POTW pretreatment standards since January 1989 and the applicable EPA electroplating and metal finishing categorical pretreatment standards since April 1984, plaintiffs filed numerous sampling reports of the ESNA plant's discharges to the Joint Meeting POTW. See Plaintiff's Affidavit. These sampling reports were prepared by the Joint Meeting or by certified laboratories for Amerace and Harvard.

Also, on plaintiffs' behalf, Carpenter Environmental Associates, Inc. ("CEA") prepared a report on the ESNA Plant's discharges into the Joint Meeting POTW based on a review of all documents provided by Harvard including reports on continued compliance, results of Joint Meeting tests, baseline monitoring reports, literature regarding Harvard's wastewater treatment system and correspondence. According to the report:

Over the entire period of records available to CEA, ranging from 1981 through February, 1988, the ESNA facilities ... has failed to comply on a consistent basis with the effluent limits set by the Joint Meeting ... Harvard Industries has not complied on a consistent basis with the federally set metal finishing industry categorical standards. While, on occasion permit compliance has been reported, compliance has never been consistent. Over the entire period in question, including the most recent information available, Harvard Industries has, on a frequent basis, violated both monthly average and maximum daily discharge limitations for Cadmium, Total Cyanide (CN-T), and Cyanide Amenable Chlorination (CN-A). In addition, there have been frequent violations of other metal limitations.

Plaintiff's Affidavit, Exhibit PP at 1-2.

Harvard disputes the facts as to actual violations and the presumption of the validity of the tests performed by the Joint Meeting and the certified laboratories. In support of its argument, Harvard filed an affidavit of Edwin Von Linden, ESNA Vice President of Operations. Defendant Harvard's Appendix to Brief ("Harvard Appendix"), Exhibit 7. According to Von Linden, many of the reported violations from 1981 through 1985 were, in fact, not violations, but the result of inadequate POTW testing procedures. Also, since the plant was contributing less than 10,000 gallons of wastewater per day to the POTW prior May 1985, the plant was subject to limitations for certain contaminants that were higher than those identified by plaintiffs. Therefore, many of the alleged violations in this period did not occur. Also, according to Von Linden, since 1985, other reported violations were the result of equipment malfunction and inadequate POTW and Harvard sampling procedures. Von Linden notes that since Harvard purchased the plant there have been few violations of the chromium, copper, nickel, lead, zinc and silver standards and there were many "good" tes

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results for pH, cadmium, total cyanide and amenable cyanide. Finally, Von Linder notes that according to the Joint Meeting POTW's records, since 1981 no heavy metals or cyanide in amounts approaching ESNA's limits have either entered or been discharged from the Joint Meeting POTW, and the POTW has stated that it has never been in violation of its permit.

## Discussion

### I. Motions to Dismiss

A complaint cannot be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). All that is required is notice pleading, which gives the defendant "fair notice of what plaintiff's claim is and the grounds upon which it rests." *Id.* All facts pleaded by the plaintiff must be taken as true and "all reasonable inferences must be drawn in favor of the plaintiff. *Altemose Construction Co. v. Atlantic*, 493 F. Supp. 1181, 1183 (D.N.J. 1980) (citing *McKnight v. Southeastern Pennsylvania Transportation Authority*, 583 F.2d 1229, 1235-36 (3d Cir. 1978)). To withstand a Rule 12(b)(6) motion to dismiss, "[i]t is not necessary to plead evidence, nor is it necessary to plead facts upon which the claim is based." *Bogosian v. Gulf Oil Co.*, 561 F.2d 434, 446 (3d Cir. 1977). The defendant has the burden of demonstrating that some portion of the complaint should be dismissed. *Johnsrud v. Carter*, 620 F.2d 29, 33 [10 ELR 202851 (3d Cir. 1980)].

#### A. Amerace

Amerace argues that as there is no dispute that Harvard purchased the ESNA Plant on April 12, 1985, or thirteen months before plaintiffs filed their initial complaint, under the Supreme Court's decision in *Gwaltney*, 98 L. Ed. 2d 306 (1987), the court lacks subject matter jurisdiction as to the action against Amerace, and the complaint fails to state a claim against Amerace upon which relief can be granted. I conclude that Amerace's position is correct.

Section 505(a) (1) of the Clean Water Act provides that any citizen may bring citizen suit "against any person ... who is alleged to be in violation of (A) any effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. sec. 1365(a) (1). Under *Gwaltney*, however, this action does not confer federal jurisdiction over citizen suits for "wholly past violations." 98 L. Ed. 2d at 321. Jurisdiction attaches only if plaintiff makes \*20396 a good faith allegation of continuous or intermittent violations. *Id.* In order to prevail, plaintiff must prove this allegation.