

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

GREENE ENVIRONMENTAL  
COALITION, INC.,

Plaintiff,

vs.

Case No. c-3-93-270

SOUTHDOWN, INC.,

Defendant and  
Third-Party Plaintiff,

Judge Walter H. Rice

vs.

USX CORPORATION,  
Third-Party Defendant.

MEMORANDUM OF SOUTHDOWN, INC., IN OPPOSITION  
TO MOTION OF THIRD-PARTY DEFENDANT USX TO DISMISS  
THIRD-PARTY COMPLAINT

I. INTRODUCTION

Plaintiff, Greene Environmental Coalition, Inc. ("Plaintiff"), filed a Complaint against Defendant, Southdown, Inc. ("Southdown"), pursuant to the citizen's suit provision under Section 505 of the Federal Water Pollution Control Act (a.k.a. the Clean Water Act), 33 U.S.C. §1365, in the United States District Court for the Southern District of Ohio. The Complaint alleges that Southdown is illegally discharging pollutants from Landfill No. 1 into Mud Run Creek without a National Pollutant Discharge Elimination System ("NPDES") permit. The citizen's suit requests relief in the form of civil penalties, a permanent injunction, a declaration that Southdown

is in violation of the Clean Water Act, and the award of Plaintiff's attorneys' fees and costs.

Southdown filed a third-party complaint against USX seeking contribution and indemnity from USX in the event Southdown is found to be responsible for the alleged violations of the Clean Water Act. Southdown's action against USX arises out of USX's long-term operation of Landfill No. 1.

In the third-party complaint, Southdown alleges that the relationship between Southdown and USX arises out of Southdown's purchase of real property from USX pursuant to an Agreement for the Sale of Real Estate dated November 12, 1976 ("Purchase Agreement"), attached thereto as Exhibit A. USX acquired the subject property, which included a cement manufacturing operation, from Wabash Portland Cement Co. in or about 1945. usx conducted its cement operations on property that includes an area now known as "Landfill No. 1". Southdown further alleges that from approximately 1945 until 1975, USX used Landfill No. 1 for waste disposal purposes. It is alleged that USX disposed of waste cement kiln dust ("CKD"), kiln brick, scrap metal, tires, trash, and other materials owned by it in Landfill No. 1 from approximately 1945 until 1975.

Since Southdown's purchase of the subject property, Southdown has not operated the kilns at the USX plant and conditions at Landfill No. 1 have remained virtually unchanged from the conditions left by USX.

Violations of section 304(a) of the Clean Water Act as alleged by Plaintiff, if any, have occurred as a direct and proximate result of the disposal practices of USX in Landfill No. 1. Specifically, Plaintiff alleges that the leachate which was discharged into Mud Run Creek was "produced by water percolating through the waste deposited in the landfill." Thus, any contamination that may be present in the leachate is a direct consequence of substances deposited in Landfill No. 1 through which the water passed before leaving the landfill. Any contamination present in the leachate emanating from Landfill No. 1 is the direct and proximate result of USX's acts and omissions regarding disposal of CKD and other substances. The only basis for imputing liability to Southdown for investigation and remediation of Landfill No. 1 is by virtue of its current ownership of the property that constitutes Landfill No. 1. As a consequence of USX's conduct, Southdown's potential liability, if any, will derive wholly from the acts and/or omissions of USX.

Because liability, if any, is wholly the responsibility of USX, Southdown filed a Third-Party Complaint against USX seeking contribution and indemnification from USX for all sums that may be adjudged against Southdown in favor of Plaintiff, Greene Environmental Coalition.

## II. STANDARD OF **REVIEW**

A district court may not dismiss a claim under Rule 12(b) for failure to state a claim unless it is apparent beyond a doubt

to the Court that the plaintiff can prove no set of facts to support a claim which would entitle him to relief. Conlev v. Gibson, 355 U.S. 41, 45-46 (1957). In determining whether the facts presented in a complaint support a claim upon which relief can be granted, the district court is to liberally construe the facts in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); 5 C. C. Wright & A. Miller, Federal Practice and Procedure § 1357, at 594 (1969). The essence of the Court's inquiry is to determine whether the allegations contained in the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

### III. DISCUSSION OF LAW

#### A. FEDERAL LAW DOES NOT PREEMPT SOUTHDOWN'S STATE COMMON-LAW CLAIMS.

USX seeks dismissal of Southdown's claim for contribution and indemnity on the grounds USX is not liable under the Clean Water Act. USX argues that "Southdown should not be allowed to accomplish under state law contribution and indemnity theories what it plainly cannot do under the Clean Water Act." (Motion to Dismiss at p. 10.) This argument incorrectly suggests that Federal law, the Clean Water Act, preempts state common-law claims, like the contribution and indemnity claims asserted here.

The United States Supreme Court established procedures for common-law state actions in areas covered by Federal statutes. International Paper Co. v. Ouellette, 479 U.S. 481 (1987). In

Ouellette, the Supreme Court allowed a nuisance cause of action for water pollution to be brought under New York law if the point source of pollution was also in New York. The Ouellette court held that preemption may be presumed when "the Federal legislation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary legislation." The court nevertheless determined that there was no preemption of state law by virtue of the "savings clause" of the Clean Water Act citizen's suit section, which states:

"Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief."

This clause of the citizen's suit statute also applies to Southdown's Third-Party Complaint. In this case, as in Ouellette, the clause demonstrates that Congress left room for state common-law action when drafting the Clean Water Act. Ouellette also noted that Federal law may invalidate state law if the state law "stands as an obstacle to the full purposes and objectives of Congress." In the present case, however, Southdown's contribution and indemnity suit will not impede Congress' intent. Rather, it will align the statute in closer conformity with the will of Congress.

For example, USX cited Friends of Sakonnet v. Dutra, 738 F. Supp. 623 (D.R.I. 1990) for the proposition that former owners

---

Ouellette, 107 S.Ct. at 815. The language is quoted directly from part (e) of the citizen's suit section of the CWA, 33 U.S.C. §1365.

responsible for past and ongoing acts of pollution may evade liability under the citizen suit provision of the Clean Water Act, even though their previous actions contributed to the present violation. (Motion to Dismiss at p. 8.) The Sakonnet court stressed that it did "not believe that Congress contemplated [this] specific situation or outcome when drafting [the] law." Id. at 633. It added that:

[F]reeing [the] defendants from liability for their violations simply because they have ceased controlling the pollution source impedes the Clean Water Act's purpose. This result encourages violators to transfer control of their property to avoid liability....[In this case,] the violation of the Clean Water Act has continued unabated. Thus, simply because of the present-tense wording of the statute, these defendants are able to avoid responsibility for their violations of the law because they sold their property, not because they stopped violating the law.

Id. at 633, n. 11. The Sakonnet court ultimately referred to the above situation and outcome as a "defect" in the law, and it concluded that a suit against the former owners based upon a nuisance theory was available to the Plaintiffs in order to mitigate this "defect" as applied to the Plaintiff. Id.

Likewise, Southdown's suit would do much to correct Congress' "defect" and, therefore, the Third-Party Complaint should not be subject to Federal preemption. Similarly, Southdown's suit will not thwart the Clean Water Act's objective of deterrence, as argued by USX. Rather, it will transfer

responsibility for the wrongdoing to the person who caused the pollution, USX.<sup>2</sup>

B. SOUTHDOWN'S RIGHT TO INDEMNITY IS IMPLIED FROM THE NATURE OF ITS RELATIONSHIP WITH USX.

USX also seeks dismissal of Southdown's indemnity claim on the grounds that USX does not share common liability with Southdown under the Clean Water Act. Southdown submits, however, that its common law claim for indemnity need not be pinned to USX's liability arising out of the Clean Water Act.

Indemnity "arises from contract, express or implied, and is the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement." Travelers Indemnity Co. v. Trowbridge, 41 Ohio St. 2d 11, 13 (1975). This right of indemnity is based on the principle that everyone is responsible for his own wrongdoing, and if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer then the entire loss should be shifted to the party who should bear the loss so as to prevent an unjust result at the expense of the who is free from fault. 42 C.J.S. Indemnity § 32 (1969) (updated 1994).<sup>3</sup>

A right to indemnity, may be claimed on the basis of an implied contract, which can arise either from the conduct of the parties or be implied from the nature of their relationship. See

---

<sup>2</sup>The third-party complaint alleges that during its ownership of Landfill 1, USX dumped nearly 200 tons of cement kiln dust and other pollutants daily into Landfill 1. This type of repeated dumping is almost certainly a major cause of the current CWA violations.

e.g. 18 Ohio Jur. 3d, Contribution, Indemnity, and Subrogation § 45 (1980). For example, implied contracts of indemnity arise from employer-employee relationships. Fireman's Ins. Co. v. Antol, 14 Ohio App. 3d 428 (Franklin Cty. 1984) (employer's right to indemnification from employee who embezzled funds implied from employment agreement). There is implied from the relationship of principal and surety a promise of the principal to indemnify and protect his surety, and such promise is as valid as if made in express terms. See 52 Ohio Jur. 3d, Guaranty and Suretyship § 167 (1984). Likewise, a guarantor paying a debt is deemed to have a right of indemnity against the principal debtor. Id. Similarly, a trustee who has advanced money from his own property to pay expenses, properly incurred in his administration of the trust, has a right to be indemnified from the trust estate. See 91 Ohio Jur. 3d, Trusts § 354 (1989).

Implied indemnity may be claimed by a lessor from a lessee with respect to a liability which the former incurs due to environmental conditions existing at the leased premises. Caldwell v. Gurlev Refining Co., 755 F.2d 645 (8th Cir. 1985). In Gurlev, the lessor filed a declaratory judgment action against the lessee to determine his right of indemnity resulting from liability to the U.S. EPA for cleanup operations. The lessor's potential environmental liability arose out of the lessee's activities, which involved the unlawful disposal of waste materials on the leasehold property. At the conclusion of the lease agreement, the lessee represented to the lessor "that it