

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

COMMERCIAL LOGISTICS)
CORPORATION,)
Plaintiff,)
)
vs.) 4:04-cv-0074 B/H
)
ACF INDUSTRIES, INC.,)
Defendant.)

ENTRY DENYING DEFENDANT’S MOTION TO DISMISS

This matter comes before the Court on Defendant’s Motion to Dismiss for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff, Commercial Logistics Corporation (“CLC”), has brought this cause of action against Defendant, American Car and Foundry Industries, Inc. (“ACF”), under the Indiana Environmental Legal Action statute (“ELA”), Ind. Code § 13-30-9-1 *et seq.* Plaintiff seeks compensation for the substantial costs it has incurred and will incur in evaluating, removing, and remediating the alleged petroleum contamination of its property. Defendant urges dismissal of Plaintiff’s complaint on the grounds that the statute giving rise to the complaint, the ELA, may not be applied retroactively. For the reasons explained below, the Court DENIES Defendant’s Motion to Dismiss.

Factual Background

Plaintiff is the current owner of a piece of land located at 400 Missouri Avenue, Jeffersonville, Indiana (the “Property”). Compl. ¶ 1. Plaintiff has owned some part of the land since 1972, acquiring the southern parcel in 1972 and completing the acquisition by 1974. Compl. ¶¶ 7-8. The southern part of the Property was purchased from the Jeff-Clark Corp. and the rest from Falls Cities Transfer and Storage Co., which had, in turn, purchased its parcel from Jeff-Clark. Since the purchase, CLC alleges it has incurred costs in investigating, removing and remedying the release of petroleum at the Property. Id. ¶ 20.

Defendant ACF is a New Jersey corporation which allegedly owned the Property at issue in this case between 1899 and 1955. Compl. ¶ 2. It manufactured rail cars at the Property for many years. Id. ¶¶ 5-7. Plaintiff claims that during ACF’s ownership and occupancy of the Property, it used a petroleum product known as Bunker C fuel oil to fire its boilers located on the premises. The fuel was stored in underground vaults and carried by underground pipes northward across the Property. Id. ¶ 9. Plaintiff alleges the subsurface soil and groundwater at the Property is presently contaminated as a result of Bunker C fuel oil leaking from the underground pipes. Id. ¶ 10.

CLC argues that ACF is liable for all response costs related to the petroleum leaks which CLC has incurred and believes it will incur, as well for attorney’s fees and expert consultant fees. The state court action was removed to this court by the defendant on the basis of diversity jurisdiction and is now before us on ACF’s motion to dismiss on the

ground that liability is unauthorized under the Indiana ELA because the statute cannot be applied retroactively to reach conduct which may have occurred decades before the enactment of the statute.

Legal Analysis

I. Standard of Review

A party moving to dismiss a case pursuant to Rule 12(b)(6) must show that the pleadings themselves fail to provide a basis for any claim for relief under any set of facts. Ed Miniati, Inc. v. Globe Life Ins. Group Inc., 805 F.2d 732, 733 (7th Cir. 1986). As a practical matter, a dismissal under this rule is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, Inc., 161 F. Supp.2d 948, 950-51 (S.D. Ind. 2001) (quoting 5A Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure: Civil § 1357). On such a motion, we treat all well-pleaded factual allegations as true, and we draw all reasonable inferences in a light most favorable to the party opposing the motion, in this case, CLC. Szumny v. Am. Gen. Fin., 246 F.3d 1065, 1067 (7th Cir. 2001); Lankford v. BorgWarner Diversified Transmission Prods., Inc., 2004 WL 540983, *2 (S.D. Ind. 2004) (Barker, J.).

II. Indiana Environmental Legal Action Statute

We are asked to determine whether Indiana's Environmental Legal Action¹ statute

¹P.L.59-1997, § 23; effective February 28, 1998.

(“ELA”) may be applied retroactively, that is, whether liability may be imposed for acts committed before the statute’s effective date. Answering this question requires us to interpret state law. As the Seventh Circuit instructed, our task is to “predict how the Indiana Supreme Court would answer this question if it were presented to it.” United States v. Navistar Int’l Transp. Corp., 142 F.3d 702, (7th Cir. 1998) (citing Konradi v. United States, 919 F.2d 1207, 1213 (7th Cir. 1990)).

Section 13-30-9-2 of the ELA, Ind. Code § 13-30-9-1 *et. seq.*, provides:

“A person may bring an environmental legal action against a person who caused or contributed to the release of a hazardous substance or petroleum into the surface or subsurface soil or groundwater that poses a risk to human health and the environment to recover reasonable costs of a removal or remedial action involving the hazardous substances or petroleum.”

Ind. Code Ann. § 13-30-9-2 (Michie 2000).

A. *Presumption Against Retroactivity*

It is well-established that statutes apply prospectively; consequently there is a strong presumption against the retroactive application of statutes. Stone v. Hamilton, 308 F.3d 751, 754-55 (7th Cir. 2002). The United States Supreme Court's decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994) clarified this presumption against the retroactive application of federal statutes. Landgraf instructs that, absent an express statement, there must be evidence of clear congressional intent favoring retroactive

application of a statute. Id., 511 U.S. at 280.²

Indiana courts have a longstanding presumption against the retroactive application of statutes as well. The Indiana Court of Appeals has indicated that in the absence of an express indication of retroactivity, new statutes should be presumed to apply prospectively only. Chesnut v. Roof, 665 N.E.2d 7, 9 (Ind. App.1996); Ind. Dep't of Natural Res. v. United Minerals, Inc., 686 N.E.2d 851, 855 (Ind. App. 1997).

Specifically, the determination of a law's retroactivity hinges on whether, at the time of the law's enactment, the legislature intended the statute to have retroactive application. As the Court in United Minerals summarized:

Whether a statute or regulation is to be applied retroactively depends upon the legislature's intent. Absent an express indication otherwise, we presume that the legislature intended that the new statutes or amendments be applied prospectively only. (citation omitted). To ascertain legislative intent, we look at the act as a whole and consider each section with reference to all other sections. (citation omitted). We presume that the legislature would not intend an unreasonable or absurd result. (citation omitted). Also, statutory amendments which impair existing rights cannot be applied retroactively. (citing Chesnut v. Roof, 665 N.E.2d 7, 9-10 (Ind. Ct. App.1996)).

In addition, the legislative history surrounding a law's enactment or the policies that the legislature took into consideration when it decided to enact the law are instructive

² The test for determining whether a statute may be applied retroactively poses the following questions: (1) has Congress expressly prescribed the statute's proper reach; (2) would the application of the statute have a retroactive effect, i.e., would it impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed; and (3) is there clear legislative intent that overcomes the presumption against retroactive application. Landgraf, 511 U.S. at 280; see also Stone v. Hamilton, 308 F.3d 751, 754 (7th Cir. 2002).

in ascertaining the interpretation statutes.

For all practical purposes then, the interpretation of a federal statute and a state statute is based on the same inquiry: we first consider the express statutory language and next determine legislative intent. Significantly, in the cases regarding state environmental law which follow,³ several Indiana courts have been aided in their analysis of legislative intent by analogizing to federal law, specifically, the 1980 Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”).

B. Express Statutory Language

The statutory language of Sections 13-30-9-2 includes no express retroactivity clause directing or authorizing that the ELA should apply to conduct that occurred prior to enactment. We cite the applicable statutory language again here to give clarity to our analysis:

“A person may bring an environmental legal action against a person who caused or contributed to the release of a hazardous substance or petroleum into the surface or subsurface soil or groundwater that poses a risk to human health and the environment to recover reasonable costs of a removal or remedial action involving the hazardous substances or petroleum.”

³See Bourbon Mini-Mart v. Gast Fuel and Services, Inc., 783 N.E.2d 253, 258 (Ind. 2003) (interpreting Indiana’s underground storage tank laws (UST), Ind. Code § 13-7-20-21 and holding they are modeled after CERCLA); Taylor Farm Ltd. Liability Co. v. Viacom, Inc., 234 F.Supp.2d 950, 962 (S. D. Ind. 2002) (McKinney, C.J.) (holding that the ELA, which permits “any person” to sue to “recover the reasonable costs of a removal or remedial action,” most closely resembles a CERCLA section 107(a) cost recovery claim); The Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F.Supp. 713, 720 (S. D. Ind. 1991) (Tinder, J.) (concluding that Indiana’s UST laws may be applied retroactively because “[A]n analogy to interpretations of the federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601 et seq., is apposite because Indiana’s UST statutes follow the same remedial principles established by CERCLA).

Nor is there a separate provision anywhere else in Chapter Nine which specifies retroactive application. Defendant argues that the analysis should end here, maintaining that Landgraf instructs that the absence of an express mandate from the General Assembly ordering retroactivity should be determinative. Yet that view was not followed by the Landgraf Court itself, which proceeded to analyze the language and the legislative history of the statute, as we shall as well. See Landgraf, 511 U.S. at 280.

C. Use of Past Tense Verbs

In analyzing the language of the statute, CLC contends that the use of past tense verbs in Section 13-30-9-2 demonstrates an intention by the Indiana legislature for the statute to reach conduct that predates its enactment. The ELA, for example, provides that a person who has “*caused or contributed*” to the release of a hazardous substance or petroleum may be liable for the “reasonable costs of a removal or remedial action” involving those substances. A few courts have considered the use of past tense verbs as significant in determining legislative intent but many others have dismissed the verb tense argument as doing little to advance a retroactivity analysis. See U.S. v. N.E. Pharm. & Chem. Co., Inc., 810 F.2d 726, 733 (8th Cir. 1986); U.S. v. Alcan Aluminum Corp., 1996 WL 637559, *4 (N. D. N.Y. 1996). But see Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 658 (N. D. Ind. 1996); State of Nev. ex rel. Dept. of Transp. v. U.S., 925 F. Supp. 691, 699 (D. Nev. 1996). Without some additional evidence in the legislative record, *e.g.*, perhaps an earlier draft version of the statute adopting the present tense with a subsequent revision to the past tense, the use of past tense verbs is in our

judgment insufficient to establish a legislative intent of retroactivity. As one court said with reference to the retroactivity of CERCLA, “[A]t best, the use of past tense verbs ... does not conflict with retroactive application.” Ninth Ave. Remedial Group., 946 F. Supp. at 65. We agree that while the use of past tense verbs in the ELA is not determinative of intent, it does not conflict with the view that the law was intended to apply retroactively.

D. Analogy to CERCLA

Plaintiff also cites the similarities between the ELA and CERCLA, commonly referred to as the "SuperFund Act," noting that the latter has widely been found to apply retroactively, despite the lack of an express retroactivity clause.⁴

This argument does not rest on a claim that Sec. 13-30-9-2 adopts verbatim an existing CERCLA provision; clearly, it does not. Instead, the argument rests more on the fact that several Indiana courts have explicitly drawn this analogy themselves, allowing many plaintiffs to avail themselves of that comparison since the enactment of the ELA.

⁴The following courts have found that CERCLA applies retroactively, and that such construction does not violate the Constitution: U.S. v. Alcan Aluminum Corp. 315 F.3d 179, 188 (2nd Cir. 2003); United States v. Olin Corp., 107 F.3d 1506, 1511- 15 (11th Cir.1997); O'Neil v. Picillo, 883 F.2d 176, 182, 183 n. 12 (1st Cir. 1989); U.S. v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988); U.S. v. N.E. Pharm. and Chem. Co., 810 F.2d 726 (8th Cir. 1986); Raytheon Co. v. McGraw-Edison Co., 979 F.Supp. 858, 863-64 (E.D. Wis.1997); Cont'l Title Co. v. Peoples Gas Light & Coke Co., 959 F.Supp. 893, 893-901 (N.D. Ill.1997); Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 651-64 (N.D. Ind.1996); Nova Chems., Inc. v. GAF Corp., 945 F.Supp. 1098, 1100-05 (E.D. Tenn. 1996); U.S. v. Kramer, 757 F.Supp. 397, 428-31 (D.N.J. 1991); Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1442-45 (W.D. Mich.1989).

For example, plaintiff in a PCB clean-up case, Taylor Farm Ltd. Liab. Co. v. Viacom, Inc., 234 F.Supp.2d 950, 962 (S.D. Ind. 2002), filed its claim under the ELA (Ind. Code § 13-30-9-1 *et seq.*) and the defendant, in seeking its dismissal, asserted an argument that applied only to actions brought under CERCLA. Chief Judge McKinney recounted the facts, which essentially involved the release of hazardous substances into the ground in the 1960s by the defendant's predecessor, and characterized the complaint as well-pleaded and clearly falling within the scope of the ELA. Moreover, he responded to the defendant's contention that the Section 13-30-9-2 claim was the state law equivalent of a CERCLA claim by accepting that premise and analyzing whether it was equivalent to a CERCLA contribution or cost recovery claim, an analysis we need not delve into today as the question is not before us. The Court in Taylor Farm held that because the ELA permits "any person" to sue to recover the "reasonable costs of a removal or remedial action" involving hazardous waste and petroleum, it most closely resembles a CERCLA cost recovery claim. Equally significant for our analysis here is the fact that the ELA was accepted as applicable despite the fact that the release of PCBs had occurred decades before the enactment of the ELA.

In Northstar Partners v. S&S Consultants, 2004 WL 963706 (S.D. Ind. 2004), the Court dismissed a state law environmental cleanup claim not because Section 13-30-9-2 was inapplicable to the parties, but because the Court characterized the claim as a contribution claim and noted that the "intended use" of the ELA "is to provide a supplemental state law cause of action closely resembling the cost recovery provision

enumerated in CERCLA Section 107.” *Id.* at *8.

We conclude this analysis with the following two cases which deal with a different environmental statute, the Underground Storage Tanks statute, Ind. Code §§ 13-23-1-1 *et seq.* (“UST”), regarding them also as instructive with respect to the analogy argument advanced by Plaintiff.

In The Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F. Supp. 713, 720 (S. D. Ind. 1991), Judge Tinder summarized the relationship between Indiana’s environmental statute and CERCLA:

An analogy to interpretations of the federal Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.*, is apposite because Indiana’s UST statutes follow the same remedial principles established by CERCLA. Although CERCLA provisions contain no explicit statement providing retroactive application, it clearly is the rule in federal courts that Congress intended CERCLA to apply retroactively. [citation omitted] ... Indiana’s UST laws, drafted in the same language and spirit of CERCLA, were intended to provide a mechanism for effectively administering remediation of sites contaminated by petroleum releases.

The UST statute authorizes a person who undertakes cleanup of a petroleum-contaminated site to seek a contribution from the person who owned or operated the leaking underground storage tank at the time the release occurred. In comparing the scope of the ELA with the UST statute, we note that it encompasses this same type of claim: (1) section 13-30-9-2 authorizes a claim against “a person who caused or contributed to the release of a hazardous substance or petroleum ...”; and (2) section 13-30-9-6 instructs a person bringing an action “to recover costs associated with a release from an underground storage tank” to choose either the ELA or the UST, but not both.

We can think of no principled reason not to apply the same analysis which allows the retroactive application of UST - analogy to federal environmental law - not to be similarly applicable to the complementary environmental cause of action authorized by the ELA, adopted one year later.

In Bourbon Mini-Mart, Justice Sullivan, writing for the Indiana Supreme Court, noted:

Indiana's laws to correct petroleum contamination from leaking USTs are similar to the provisions of the federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 to § 9675, designed to clean up hazardous substances. [. . .] The UST laws were "drafted in the same language and spirit" as CERCLA and "follow the same remedial principles established by CERCLA." Western Ohio Pizza, Inc. v. Clark Oil & Refining Corp., 704 N.E.2d 1086, 1090 (Ind. Ct. App. 1999), *trans. denied*; see also The Pantry v. Stop-N-Go Foods, Inc., 777 F. Supp. 713, 720 (S. D. Ind.1991).

Comm'r, Ind. Dep't of Env't Mgmt v. Bourbon Mini-Mart, Inc., 741 N.E.2d 361, 370 (Ind. App. 2000).

Defendant rejects this argument-by-analogy by pointing out the ways in which the ELA is dissimilar to CERCLA. Def.'s Mot. at 6. We agree there are differences, but they are mostly in the details. The liability schemes differ - liability under CERCLA is strict, joint and several, whereas it is fault-based under the ELA - and the scope of the ELA is broader because it includes petroleum releases in addition to hazardous substance releases. Yet, we are drawn to the strong judicial recognition expressed in other cases that the Indiana environmental statutes closely resemble CERCLA in language, spirit and purpose. This view causes us to conclude here that the ELA applies to the litigants in this

case. Indeed, the lack of an express retroactivity clause in the ELA has not prevented retroactive applications of that law to redress and remedy pre-enactment pollution, as has been true with CERCLA actions. We believe the Indiana Supreme Court would conclude that the ELA, like the rest of Indiana environmental statutes that were enacted at about the same time, may be applied retroactively without violating the intent of the Indiana General Assembly, despite the absence of an express provision that the statute apply to conduct predating its enactment. Thus, Defendant's Motion to Dismiss must be denied.

Conclusion

For the reasons outlined above, Defendant's Motion to Dismiss for failure to state a claim upon which relief can be granted is hereby DENIED..

It is so ORDERED this 10th day of November 2004.



SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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