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Third Cir. Found Exclusive Fed. Jurisdiction Under RCRA

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If you were like me, at about the time you graduated from law school, you discarded essentially all of your casebooks; if you were like some of my more disaffected friends, you did more than discard them.

However, if you kept a few, one of them was probably Hart and Wechsler's The Federal Courts and the Federal System. Unlike most of the books you used in law school, that one had a theme: the state courts are the primary forums for the vindication of federal rights.

A recent decision by the U.S. Court of Appeals for the Third Circuit suggests that authors Henry M. Hart Jr. and Herbert Wechsler were not correct, at least as to rights under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-99i, the federal solid and hazardous waste regulatory law.

In *Litgo New Jersey v. Commissioner New Jersey Department of Environmental Protection*, No. 12-1288 (3d Cir. Aug. 6, 2013), a Third Circuit panel held, over Judge Leonard I. Garth's strong dissent, that the federal district courts have exclusive original jurisdiction over citizen suits under the RCRA.

Litgo is mostly an allocation case under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75. Litgo acquired property that had been more significantly contaminated than Litgo anticipated. Moreover, some of that contamination had been caused by the state's failure to manage a cleanup.

The *Litgo* parties sought cost recovery under CERCLA, but also an injunction under the RCRA to require implementation of the cleanup plan developed under New Jersey state law. The RCRA claim would have allowed recovery of Litgo's attorney fees.

The district court dismissed Litgo's RCRA claim on the ground that it should have been brought when Litgo first asserted state law claims in New Jersey court in the 1990s. New Jersey has a particularly stringent view of the entire controversy doctrine.

Thus, a holding that a New Jersey state court could have entertained Litgo's RCRA citizen suit — a citizen

suit that it did not bring at the time — would have had the result of putting Litgo out of federal court on that claim.

The Third Circuit reversed the district court, holding that Section 7002 of the RCRA, 42 U.S.C. § 6972, vests exclusive jurisdiction in the federal courts. As a consequence, it reversed and remanded for consideration of the attorney fees claim.

CERCLA vests exclusive original jurisdiction in the federal courts. Section 113(b) states that, subject to certain exceptions, "the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter." Thus, we know that sometimes Congress wants all adjudication of disputes under the hazardous waste laws to be in federal court, and that Congress knows how to be very clear about that exclusive jurisdiction.

CERCLA is often described as poorly drafted, and yet this provision is not. Section 113(b) was added in 1986, not long after the Hazardous and Solid Waste Amendments of 1984 that rewrote RCRA.

Nevertheless, the statutory language that the Third Circuit found to strip state courts of jurisdiction over RCRA claims is less clear. After setting out the right of "any person" to commence an action against (a)(1)(A) any other person violating the RCRA, (a)(1)(B) any other person responsible for a hazardous waste violation that causes an imminent or substantial endangerment, or (a)(2) the U.S. Environmental Protection Agency for failure to fulfill a nondiscretionary duty, Section 7002(a) goes on to provide that: "any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia."

This differs from the language in most federal citizen suit provisions. For example, Section 505(c) of the Clean Water Act, 33 U.S.C. § 1365(c), and Section 304(c) of the Clean Air Act, 42 U.S.C. § 7604(c), use "may be brought."

Moreover, those other statutes include that language in a separate venue provision. While the quoted language looks like venue language, the Third Circuit regarded it as a jurisdictional grant.

The Third Circuit cites a number of cases for the proposition that the RCRA only allows citizen suits to be brought in the federal courts. Garth, meanwhile, deconstructs those citations.

However, research has not uncovered a reported decision in an RCRA citizen suit by the Pennsylvania state courts. Indeed, the Pennsylvania Environmental Hearing Board at one time held, in *City of Scranton v. Department of Environmental Protection*, No. 94-060-C (Pa. Envtl. Hearing Bd. Nov. 4, 1997), that it did not have jurisdiction under Section 7002 to consider an RCRA issue in an appeal.

Nevertheless, *Litgo* may create some anomalies.

In Pennsylvania, as in many states, the state acts as the primary regulator of solid waste management activities. The RCRA imposes a regulatory floor for both hazardous and non-hazardous waste management. Pennsylvania has a much more elaborated regulatory scheme for non-hazardous waste than the RCRA "subchapter D" minimum. However, for hazardous waste, Pennsylvania by and large adopts the federal standards.

The Pennsylvania Solid Waste Management Act, Pa. Stat. Ann. tit. 35, §§ 6018.101 to .1001, does not include a citizen suit provision. There are no private rights of action under the SWMA, as in *Fleck v. Timmons*, 543 A.2d 148 (Pa. Super. Ct. 1988).

However, the federal statute appears to give private parties the ability to enforce federal standards. Those federal standards will involve compliance with permits and other approvals issued by the state. One might

think it odd to have to go to federal court to enforce a state-issued, federally enforceable permit.

Further, exclusive jurisdiction raises the prospect of parallel proceedings. Plaintiffs may want to bring tort claims, for example, in state court. Their citizen suit for injunctive relief may end up in federal court.

On the issue of parallel proceedings, one should note the decision rendered one day after *Litgo* in *Ackerman v. ExxonMobil*, No. 12-1103 (4th Cir. Aug. 7, 2013), another groundwater contamination case. Litgo allocated the costs of cleaning up solvent contamination under state statutory law. Ackerman involved tort claims arising from MTBE (methyl tertiary butyl ether) contamination from a gasoline storage tank leak. In Ackerman, the Fourth Circuit affirmed a Maryland district judge's decision to abstain in favor of a parallel state court case.

Even though the defendants appeared to have the right to remove the tort claims of at least some of the plaintiffs, all of the plaintiffs had state tort claims pending in state court, and that case was permitted to proceed first. To be sure, Ackerman is in a neighboring circuit, it involves state claims not federal claims and it involves tort claims, not statutory ones.

Even so, Ackerman seems to stand for the proposition that state courts may fairly vindicate defendants' rights even though Congress has given defendants a right to remove. Litgo stands for the proposition that only a federal court can vindicate rights under RCRA. We will just have to wait to see how the confusion is resolved.

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