South Road Associates v. International Business Machines Corp.: The Second Circuit Dumps Tenant Corporation's Hazardous Waste on Property Owner

I. INTRODUCTION

Beginning in the 1950s and ending in the spring of 1994, International Business Machines Corporation (IBM) leased a tract of land in Poughkeepsie, New York, for its manufacturing operations.[1] During its occupancy of the property, IBM stored both solid and hazardous wastes in underground storage tanks (USTs) on the premises.[2] In the early 1980s, IBM discovered, and an internal investigation confirmed, that the storage tanks were "leaking the wastes into the surrounding soil, bedrock and groundwater."[3] In 1987, the New York State Department of Environmental Conservation (NYSDEC) declared the site a Class 2 environmental hazard, based on the property's poor condition.[4] After IBM's discovery of the leakage, but prior to NYSDEC's classification, IBM began a remediation program to reduce waste contamination on the property.[5]

In the spring of 1993, IBM applied to the NYSDEC to change the property classification from Class 2 to Class 4.[6] The NYSDEC approved the new classification for the property, exempting IBM from all state-imposed environmental responsibilities, except for monitoring the premises.[7]

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1. S. Rd. Assocs. v. Int'l Bus. Machs. Corp., 216 F.3d 251, 252 (2d Cir. 2000).
2. *Id.*
3. *Id.* at 252-53.
4. *Id.* at 253. A Class 2 environmental hazard is defined as a "[s]ignificant threat to the public health and environment," requiring action. N.Y. ENVTL. CONSERV. § 27-1305(4)(b) (McKinney 1997).
5. *S. Rd. Assocs.*, 216 F.3d at 253.
6. *Id.* (discussing property classification from class 2 to class 4. A class 4 designation means that site has been closed properly, but requires continued management. N.Y. ENVTL. CONSERV. § 27-1301 (McKinney 1997)).
7. *Id.*

In 1981, South Road Associates (SRA), having acquired this property two years earlier, entered into the lease with IBM, which terminated on February 28, 1994.[8] SRA reacquired possession of the property after the lease was allowed to expire.[9]

In 1998, SRA brought this lawsuit against IBM, alleging unjust enrichment, breach of contract, and a violation of the Resource Conservation and Recovery Act's (RCRA) "open dumping" provisions.[10] In its complaint, SRA alleged that IBM's remediation program:

> (1) failed to discover (or remedy) all of the contamination, so that contamination levels continued at the time of the suit to exceed the maximum contaminant levels ("MCLs") allowable under 40 C.F.R. § 257.3-4(a),(c)(2)(i)-(ii); and
> (2) used contaminated soil as fill in a soil excavation project that was part of the remediation program, thereby worsening rather than fixing the contamination.[11]

The United States District Court for the Southern District of New York dismissed the case, finding that RCRA requires the plaintiff to allege "current acts of contamination" to maintain a cause of action under the citizen suit provision of RCRA.[12]

The Second Circuit Court of Appeals affirmed the district court's decision that SRA did not establish the requisite elements to maintain an action under the citizen suit provision of RCRA.[13] Specifically, the court held that a complaint must allege that the defendant's current introduction of a substance caused the MCL exceedances.[14] According to the Second Circuit, the allegation of continued MCL exceedances alone is not enough to establish jurisdiction under RCRA.[15] The court also determined that the process of moving contaminated soil from one area to another as part of IBM's remediation program did not constitute a current act of introducing waste.[16] The court found that SRA did not meet the required elements for a cause of action, therefore it was unnecessary for the court to resolve the breach of contract and unjust enrichment claims.[17] *South*

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 257.
14. *Id.*
15. *See id.*
16. *Id.*
17. *Id.* at 257-58.

Road Associates v. International Business Machines Corp., 216 F.3d 251 (2d Cir. 2000).

II. BACKGROUND

The legislative history of RCRA provides that the statute should be given a broad meaning, because it was intended to "eliminate[] the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes."[18] The jurisdictional provision of RCRA at issue in SRA's claim against IBM states, in part, that one may bring a civil suit "against any person . . . who is alleged to be *in violation of* any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective [under the solid waste disposal provisions] . . . ."[19] SRA alleged that IBM violated the solid waste disposal provision prohibiting "any . . . disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste."[20] An open dump is defined in the RCRA regulations as "any facility . . . where solid waste is disposed of *which is not* a sanitary landfill which meets the criteria promulgated under section 6944 of this title and *which is not* a facility for disposal of hazardous waste."[21] A facility constitutes an open dump, and thereby a RCRA violation, if it violates the regulations set forth in the Code of Federal Regulations, part 40, sections 257.1 through 257.4.[22] In the noted case, SRA claimed that IBM was currently "in violation of" section 257.3-4 of the regulations.[23] This section states in part that, "[a] facility or practice shall not contaminate an underground drinking water source beyond the solid waste boundary . . . ."[24] The term "contaminate" as defined in the regulations means to "introduce a substance that would cause [MCL exceedances]."[25]

The Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* addressed the meaning of the phrase "in violation of."[26] In that case, the Virginia State Water Control Board issued a National Pollutant Discharge Elimination

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18. H.R. REP. NO. 94-1491 at 2, 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241.
19. 42 U.S.C. § 6972(a)(1)(A) (1995) (emphasis added).
20. *S. Rd. Assocs.*, 216 F.3d at 255 (quoting 42 U.S.C. § 6945(a) (1995)).
21. *Id.* (quoting 42 U.S.C. § 6903(14)).
22. Classification of Solid Waste Disposal Facilities and Practices, 40 C.F.R. § 257.1 (2000).
23. *S. Rd. Assocs.*, 216 F.3d at 256.
24. 40 C.F.R. § 257.3-4 (2000).
25. *Id.* § 257.3-4(c)(2)(i)-(ii).
26. 484 U.S. 49 (1987).

System (NPDES) permit to ITT-Gwaltney (Gwaltney) for the discharge of pollutants into an adjacent river.[27] For three years, Gwaltney continually violated the NPDES permit conditions by exceeding its effluent limitations.[28] The violations ceased in 1984 after Gwaltney installed an improved wastewater treatment system.[29] Later that same year, the Chesapeake Bay Foundation (Foundation) filed suit pursuant to section 505 of the Federal Water Pollution Control Act (Clean Water Act, or CWA) against Gwaltney, claiming that they had repeatedly violated their NPDES permit and would continue to violate it.[30] Similar to RCRA's jurisdictional citizen suit provision, section 505 of the CWA allows private citizens to "bring suit against any person 'alleged to be in violation' of the Act . . . ."[31] Gwaltney argued that section 505 allows citizens to bring suit only when the defendant is in violation of the CWA at the time the suit is brought.[32] Since the corporation had not violated its permit for several weeks, Gwaltney contended that the Court lacked jurisdiction to hear the case.[33]

The Court held that plaintiffs could not "maintain an action based on wholly past violations of the [Clean Water Act] . . . ."[34] Further, the Court decided that the most probable meaning of the words "to be in violation" in section 505 was that plaintiffs must allege "a reasonable likelihood that a past polluter will continue to pollute in the future."[35] Although the Foundation's complaint alleged only past violations, the case was remanded back to the appellate court to examine whether the Foundation demonstrated a "good-faith allegation of ongoing violation" of the NPDES permit.[36]

Three justices, lead by Justice Scalia, concurred in all of the *Gwaltney* decision except as to the interpretation of the words "to be in violation" in section 505(a).[37] Scalia believed that the question before the Court of Appeals should not have been whether the complaint alleging an ongoing violation was brought in good faith.[38] Instead, the more appropriate question was whether Gwaltney was "in

27. *Id.* at 53.
28. *Id.*
29. *Id.* at 54.
30. *Id.*
31. *Id.* (quoting 33 U.S.C. § 1365(a) (1986)).
32. *Id.* at 54-55.
33. *Id.* at 55.
34. *Id.* at 67.
35. *Id.* at 57.
36. *Id.* at 67.
37. *Id.* at 69 (Scalia, J., concurring in part and concurring in the judgment).
38. *Id.*

violation" on the date the suit commenced.[39] Scalia, however, found the phrase "to be in violation" to mean a state of being, as opposed to an act, as suggested by the majority.[40] He contended, therefore, that one remains "in violation" of a standard under section 505 until one takes the "remedial steps that . . . clearly achieve[] the effect of curing all past violations by the time suit [is] brought."[41] Despite the fact that Scalia's statements are not binding precedent, his interpretation is followed, and even cited, in recent district court decisions.[42]

The Second Circuit Court of Appeals followed the *Gwaltney* majority's holding and reasoning in *Connecticut Coastal Fishermen's Association v. Remington Arms Co.*[43] The Connecticut Coastal Fisherman's Association (Connecticut Coastal) filed a lawsuit against Remington Arms Co. (Remington), a former operator of a trap and skeet shooting club, alleging violations under RCRA and the CWA.[44] Connecticut Coastal contended "that the lead shot and clay targets [were] hazardous wastes under RCRA and pollutants under the Clean Water Act."[45] Remington had never been issued a permit under section 3005 of RCRA for the storage and disposal of hazardous wastes.[46] Additionally, the company had not obtained a NPDES permit for the discharge of pollutants.[47] Therefore, Connecticut Coastal claimed that Remington was required to clean up all lead shot and clay targets on the site and in the adjacent waters of Long Island Sound.[48]

The Second Circuit, however, quoted the language in *Gwaltney* stating that a citizen-plaintiff filing suit under section 505 of the CWA must "allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future."[49] The court further required that the plaintiff demonstrate that its allegations of an ongoing violation were in "good faith."[50] Because Remington ceased all shooting and shut down

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39. *Id.*
40. *Id.*
41. *Id.* at 69-70.
42. *See generally* Dydio v. Hesston Corp., 387 F. Supp. 1037 (N.D. Ill. 1995); Fallowfield Dev. Corp. v. Strunk, 1990 WL 52745 (E.D. Pa. Apr. 23, 1990).
43. 989 F.2d 1305 (2d Cir. 1993).
44. *Id.* at 1308-09.
45. *Id.* at 1309.
46. *Id.*
47. *Id.*
48. *Id.* at 1308-09.
49. *Id.* at 1311 (quoting Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 57 (1987)).
50. *Id.* (citing *Gwaltney*, 484 U.S. at 64).

operations prior to the filing of plaintiff's complaint, and there was no evidence that Remington would recommence operations, Connecticut Coastal's CWA claim was dismissed.[51] For the same reasons, the Second Circuit also dismissed Connecticut Coastal's first RCRA claim.[52] The court additionally found that, although *Gwaltney* did not bar Connecticut Coastal's second RCRA claim, it was nonetheless dismissed because the lead shot and clay targets polluting the Long Island Sound did not fall within the definitions of "storage" provided by RCRA and its regulations.[53]

The following district court decisions, although not binding on the Second Circuit Court of Appeals, present an alternative interpretation of RCRA's section 6972(a)(1)(A) which closely resembles Justice Scalia's reasoning in his *Gwaltney* concurrence. The facts of *Dydio v. Hesston Corp.* are similar to the noted case.[54] Joseph Goder Building Corporation (Goder) owned, operated and maintained underground petroleum storage tanks between the years of 1965 and 1975.[55] In 1975, Goder abandoned the premises and merged with Hesston Corporation (Hesston), the named defendant in this case.[56] In 1994, it was discovered that the USTs were leaking, and contaminating the soil with petroleum, which contains known carcinogens.[57] Hesston contended that under *Gwaltney*, RCRA did not permit a citizen's claim because the company's violations were "wholly past."[58] The United States District Court for the Northern District of Illinois, however, concluded otherwise by finding that although Hesston's conduct was "wholly past," the corporation's current failure to take corrective remedial measures was a present violation within the meaning of RCRA's citizen suit provision.[59] The district court further concluded that RCRA subchapter IX "create[s] a regime under which past owners of USTs have continuing obligations to take corrective action following the confirmed release of a

51. *Id.* at 1311-12.

52. *Id.* at 1315. The court found that the citizen suit provision requirements in the CWA were identical to those in RCRA section 6972(a)(1)(A). *Id.*

53. *Id.* at 1315-16 (RCRA defines "storage" as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." 42 U.S.C. § 6903(33) (1995)).

54. *See* Dydio v. Hesston Corp., 887 F. Supp. 1037, 1039 (N.D. Ill. 1995).

55. *Id.* at 1039 & n.1.

56. *Id.*

57. *Id.*

58. *Id.* at 1043.

59. *Id.* at 1044-45.

regulated substance, and that Dydio . . . properly alleged a present violation of those regulations."[60]

Fallowfield Development Corporation v. Strunk is a similar district court decision that follows the reasoning of Justice Scalia's *Gwaltney* concurrence.[61] In *Fallowfield*, the defendants were alleged to have been involved in manufacturing and dumping hazardous waste on their property.[62] In that case the defendants argued that RCRA's "to be in violation" language should be interpreted the same way as the Supreme Court interpreted the "to be in violation" language of the CWA in *Gwaltney*.[63] The United States District Court for the Eastern District of Pennsylvania agreed with this linguistic interpretation, but used a different test to determine whether the plaintiff alleged an ongoing violation.[64] To make this determination, the district court compared the harm resulting from CWA violations to the harm resulting from RCRA solid waste disposal violations.[65] The court reasoned that violations of the CWA usually occur on a daily basis.[66] RCRA violations, on the other hand, are commonly one-time occurrences of hazardous waste disposal.[67] Due to this reality, the court found that it was much less reasonable to read RCRA to mean that a citizen could only bring suit against corporations that continually dispose of hazardous waste.[68] Thus, the court followed Justice Scalia's reasoning in his *Gwaltney* concurrence, and concluded that citizen suits are permissible under RCRA when the hazards created by prior illegal disposals can be remedied.[69]

III. THE COURT'S DECISION

In the noted case, the Second Circuit began its analysis with a discussion of the district court's incorrect interpretation of the *Remington* holding.[70] The court clarified that in *Remington*, the Second Circuit held that "the alleged 'violation' would continue as long as the lead shot and clay targets are 'stored' in the waters of

60. *Id.*
61. Fallowfield Dev. Corp. v. Strunk, 1990 WL 52745 (E.D. Pa. Apr. 23, 1990).
62. *Id.* at *1.
63 *Id.* at *6.
64. *See id.* at *10.
65. *See id.* at *6.
66. *Id.*
67. *Id.*
68. *See id.*
69. *Id.* at *11.
70. *See* S. Rd. Assocs. v. Int'l Bus. Machs. Corp., 216 F.3d 251, 254 (2d Cir. 2000).

Long Island Sound."[71] RCRA's definition of "storage," however, did not encompass the permanent abandonment of waste.[72] Therefore, Remington's conduct was outside the scope of RCRA.[73] According to the Second Circuit, the district court erred in its interpretation that a defendant's current conduct is a prerequisite for finding a *current* violation under RCRA's citizen suit provision.[74] Instead, the more accurate test is whether the alleged former or current actions result in a continuing violation of RCRA.[75] Therefore, the court concluded that the outcome of the case relies on the language of the statutory provision purportedly violated.[76]

Next, the Second Circuit carefully analyzed the relevant provisions of RCRA and its regulations to determine whether IBM was in fact in violation of the Act at the time the suit was filed.[77] First, the court determined that the hazardous chemicals alleged to have been leaking on the property were "solid waste" within the RCRA definition.[78] Second, the court found that RCRA's "open dumping" prohibition under section 6945(a) did not clarify whether a violation of the provision requires present conduct by the defendant.[79] Consequently, the court turned to RCRA's regulatory criteria to determine whether IBM's actions constituted an "open dump."[80]

SRA's complaint alleged that IBM was in violation of the regulatory criteria by contaminating the underground drinking water source in excess of the MCL limits.[81] The court, however, determined that "contaminate," as defined in the criteria, "'mean[t] [to] *introduce* a substance that would cause' M.C.L exceedances."[82] Accordingly, since the complaint failed to allege that IBM was still in the process of introducing waste that resulted in MCL exceedances, IBM was not in violation of RCRA's open dumping provision.[83] Finally, the court found that the relocation of soil from one area to another on the

71. *Id.* (quoting Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1309 (2d Cir. 1993)).
72. *Id.*
73. *Id.*
74. *See id.*
75. *Id.* at 255.
76. *See id.*
77. *See id.* (examining the relevant provision of RCRA, 42 U.S.C. § 6945(a) (1995), and corresponding regulation, 40 C.F.R. § 257.3-4(a) (1995)).
78. *Id.* (referring to 42 U.S.C. § 6903(27) (1994)).
79. *Id.* at 256.
80. *See id.*
81. *Id.*
82. *Id.* (quoting 40 C.F.R. 257.3-4(c)(2) (2000)).
83. *Id.* at 256-57.

premises as part of IBM's remediation steps was not an "introduction" of waste within the scope of RCRA.[84]

IV. ANALYSIS

The court in the noted case based its decision on the language of section 6945(a) in combination with section 6903(14) of RCRA, to reach the conclusion that SRA's complaint should be dismissed.[85] The court relied on its own *Remington* decision, which failed to set forth a blanket test, but did afford guidance in determining whether an alleged "ongoing violation" was required in a particular complaint.[86] The Second Circuit in *Remington* looked to the RCRA criteria set forth in section 6903 for a definition of "storage," and concluded that leaving the lead shot and clay targets in the water did not fall within the definition provided.[87] The Second Circuit in the noted case closely followed the *Remington* analysis by thoroughly examining the pertinent provisions and definitions set forth in RCRA.[88]

There are, however, problems with the Second Circuit's test and analysis that led to this disturbing conclusion. First, the legislative history specifically indicates that RCRA should be read broadly, as it was intended to "eliminate[] the last . . . loophole in environmental law."[89] Further, RCRA's citizen suit provision contains a long and comprehensive list of when an alleged violation can trigger a cause of action.[90] Thus, it does not appear that Congress intended to limit the circumstances under which a private citizen could maintain a cause of action under RCRA.

Keeping this historical background in mind, one must turn to the reading of the term "to be in violation." The Second Circuit found this term to be ambiguous and therefore expressed that it was necessary to look to the definitions found in the RCRA regulations.[91] It appears that the court in the noted case gave the language a very narrow interpretation; one that is not consistent with its plain everyday usage, or its legislative intent. SRA alleged that IBM was at that time in violation of the MCLs permitted under the solid waste

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84. *Id.* at 257.
85. *See id.* at 256.
86. Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1316 (2d Cir. 1993).
87. *Id.*
88. *Id.*; *S. Rd. Assocs.*, 216 F.3d at 254.
89. H.R. REP. NO. 94-1491 at 2, 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241.
90. *See* 42 U.S.C. § 6972(a)(1)(A) (1995). The list includes a "violation of any permit, standard, regulation, condition, requirement, prohibition, or order." *Id.*
91. *S. Rd. Assocs.*, 216 F.3d at 256.

regulations.[92] If true, it seems reasonable to find that there is an ongoing violation, even though it does not require any further action by IBM to continue the violation. Analogously, a court should not dismiss a case in which a driver violated the speed limit, simply because the activation of the cruise control, at a speed above the legal limit, was completed when the state trooper caught the driver on his radar. The driver would still be "in violation" of the state law as long as he was above the speed limit. Accordingly, SRA's allegation that IBM was exceeding the MCL limits in violation of a federal statute should fall within the meaning of "to be in violation" as required by RCRA.

Even if this conclusion was not reached in the interpretation of "to be in violation," a similar result could have been reached by the reading of the language in the regulations. The regulations state that "[a] facility or practice shall not contaminate an underground drinking water source beyond the solid waste boundary."[93] It is possible that this language could be read to mean that the plaintiff was required to allege that on or close to the day the suit was brought, IBM was placing leaky USTs into the ground, causing a violation of the solid waste disposal limitations. A more realistic interpretation, considering the legislative history, is that this language was intended to mean that one would be "in violation" as long as the contamination at the time the suit was filed was alleged to be beyond the solid waste boundary. Allowing IBM to leave the premises without remedying a possible violation of RCRA allows the corporation to slip through a statute that was specifically designed to eliminate such "loopholes."[94]

Finally, there are policy reasons why the term "to be in violation" should be interpreted as Justice Scalia deemed proper in his *Gwaltney* concurrence. The Second Circuit's current interpretation allows, and even encourages, corporations to evacuate the contaminated premises to manufacture and pollute elsewhere as soon as a threat of a lawsuit is upon them. As the court in *Fallowfield* determined, this interpretation would "allow the owner or operator of a hazardous waste facility to have complete control over his liability under [RCRA]."[95] It is contrary to public policy to exempt a responsible party from bringing soil contamination levels within

92. *Id.* at 257.

93. Criteria for Classification of Solid Waste Disposal Facilities and Practices, 40 C.F.R. §§ 257.3-4(a), (c)(2)(i)-(ii) (2000).

94. H.R. REP. No. 94-1491 at 2, 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241.

95. Fallowfield Dev. Corp. v. Strunk, 1990 WL 52745, at *11 (E.D. Pa. Apr. 23, 1990).

acceptable statutory limits solely because they are no longer engaging in the act of open dumping.

Furthermore, according to the Second Circuit's analysis, IBM would only be liable under RCRA's citizen suit provision had they disposed of this waste on or relatively close to the date the suit was filed by SRA.[96] It would have been impossible for SRA to know, however, that IBM's state-ordered remediation program would not bring the site into compliance with RCRA's MCL standards until years later when it was obvious that IBM had no intention of meeting the standards. At this point, however, it was too late, according to the Second Circuit. Therefore, under this court's interpretation of section 6972(a)(1)(A), the loophole in environmental law remains.

V. CONCLUSION

The Second Circuit's holding in *South Road Associates v. International Business Machines Corp.* appears to be in conflict with the purposes of RCRA as well as the overall goals of environmental law. To read RCRA's "to be in violation" language as requiring ongoing conduct of disposal overlooks the problem of environmentally hazardous conditions in soil and groundwater that RCRA was enacted to remedy. The more reasonable interpretation, considering the wording of the statute and its legislative history, is that one would be "in violation" as long as the contamination continues to be above the legal limits provided in RCRA. Furthermore, the Second Circuit's narrow interpretation is contrary to public policy. It allows those parties responsible for hazardous ground conditions to easily escape liability while leaving subsequent property owners or tenants to deal with the difficulties associated with the contaminated site. In the noted case, SRA alleged that IBM's inadequate remedial efforts allowed MCLs to continue to be above RCRA's legal limit. If SRA's contentions are true, then RCRA's goals are clearly not achieved in this case.

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96. *S. Rd. Assocs.*, 216 F.3d at 257.