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Equilon Enters., L.L.C. v. Consumer Cause, Inc., 102 Cal. Rptr. 2d 371 (Cal. Ct. App. 2000), reh'g granted, 21 P.3d 758 (Cal. 2001)

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NEDC further alleged heat discharges from the mill by BPHC's predecessor, Smurfit Newsprint Corp. ("Smurfit"), violated the terms of a National Pollution Discharge Elimination System permit.

BHPC argued the United States District Court for the District of Oregon lacked subject-matter jurisdiction to hear the claim under the CWA. BHPC claimed NEDC failed to allege constitutional standing requirements, specifically a concrete and particularized injury-in-fact fairly traceable to the challenged actions of BHPC. Further, because NEDC alleged only specific violations by Smurfit in its complaint, NEDC failed to provide BHPC sufficient notice under the CWA. Finally, BHPC argued NEDC had no cause of action under Oregon Revised Statutes section 468.025(1)(b), as no provision created private enforcement of the statute.

The court found NEDC's complaint alleged sufficient injury-in-fact based on the group's professed interest in the health of fish in the Willamette River. The court found NEDC also provided BHPC sufficient notice, as NEDC's complaint specifically alleged BPHC violated the CWA by discharging waste heat into the river. Information regarding Smurfit's prior, identical operation merely clarified NEDC's allegations. BHPC argued NEDC's notice did not allege specific dates on which BPHC violated the CWA, and was therefore insufficient. However, BHPC took possession of the mill on May 9, 2000, and NEDC sued on June 26, 2000. Thus, the court found the notice effectively alleged BPHC's violations within a relatively short time, and was therefore sufficient.

The court dismissed NEDC's claims under Oregon Revised Statute section 468.025(1)(b) because, where a statute is silent on private enforcement rights, a court considers private claims only when necessary to carry out state policies. In this case, Oregon's Department of Environmental Quality enforced the statute, thereby precluding NEDC's claims. The court granted NEDC leave to amend its complaint, and to plead the claim as a common-law tort.

Alan Curtis

STATE COURTS

CALIFORNIA

Equilon Enters., L.L.C. v. Consumer Cause, Inc., 102 Cal. Rptr. 2d 371 (Cal. Ct. App. 2000), *reh'g granted*, 21 P.3d 758 (Cal. 2001) (holding: (1) dismissal of plaintiff oil company's action against consumer group under California's "SLAPP" statute was proper where consumer group's notices of intent to sue under Proposition 65 (formerly known as the Safe Drinking Water and Toxic Enforcement Act of 1986) fell

within the type of speech or right to petition protected by the “SLAPP” statute; and (2) declaratory relief was not appropriate since oil companies were unlikely to prevail on their claims, and Consumer Cause was absolutely privileged).

On October 14, 1998, Consumer Cause gave notice of its intent to sue Shell Pipeline Corp. (“Shell”), Texaco, Inc., the state Attorney General, the Los Angeles County District Attorney, and the Los Angeles City Attorney for alleged violations of Proposition 65, formerly known as the Safe Drinking Water and Toxic Enforcement Act of 1986. The purpose of Proposition 65 was to allow members of the public to sue water polluters because government investigation and prosecution were perceived as ineffectual or inadequate. Consumer Cause’s notice asserted that since October 9, 1994, seventy-eight specified Shell and Texaco gas stations in Los Angeles and Ventura Counties had been polluting local groundwater by discharging benzene, lead, and toluene into the soil beneath their facilities. Rather than seek clarification of the Proposition 65 notice, Equilon Enterprises, L.L.C. (“Equilon”)—the successor-in-interest to Shell and Texaco, Inc.—filed a lawsuit for declaratory and injunctive relief against Consumer Cause on December 17, 1998. Equilon sought a judicial declaration that Consumer Cause’s Proposition 65 notice failed to comply with notice requirements of the California Code of Regulations. Equilon also sought to enjoin Consumer Cause from filing a Proposition 65 enforcement action. Defendant Consumer Cause asked the court to strike Equilon’s complaint because it violated the statutory prohibition on “SLAPP” suits. The trial court dismissed Equilon’s action and Equilon appealed.

The court held that (1) the notice sent by Consumer Cause under Proposition 65 fell squarely within the type of constitutional speech or right to petition protected by the SLAPP statute; and (2) a reasonable probability that Equilon would prevail on its claims did not exist.

The applicable California law states a lawsuit that effectively curtails a person’s right to petition or free speech is subject to a special motion to strike. The court acknowledged that the moving party must meet two requirements, if it files a special motion to strike. First, the court must determine whether the moving party satisfied its burden of showing the lawsuit fell within the class of suits covered by California Civil Procedure laws. Second, the court must determine whether the party bringing the suit established a likely probability that it would prevail on its claim.

Regarding the first requirement for a special motion to strike, the court stated that a party invoking SLAPP statute protection must show that it made a statement against its opponent either (a) in connection with an issue of public interest; or (b) in connection with a legislative, executive, judicial proceeding, or any other official proceeding authorized by law, regardless of whether the statement concerned an issue of public interest. The court held Consumer Cause satisfied the

threshold requirements. First, the court determined Consumer Cause's notice addressed a health issue that constituted a matter of indisputable public interest and significance because the Safe Drinking Water and Toxic Enforcement Act concerned the quality and safety of the state's drinking water supply. Second, the court found the notice was part of a proceeding, as authorized by law, because the mandated sixty-day notice was generated in connection with the proposed lawsuit, which constituted an official proceeding.

The court held Consumer Cause satisfied the second requirement to secure a dismissal under the special motion to strike. The court determined Equilon had not established a probability that it would prevail on its claim. Equilon claimed Consumer Cause did not serve notice on the proper parties and the notice did not provide sufficient specific information for each gas station regarding the nature of the alleged discharge and the identification of the alleged drinking water sources. The court, however, concluded declaratory and injunctive relief were not proper remedies for a party who received a Proposition 65 notice of intent to sue. The court found Equilon could have raised a deficient notice defense to an enforcement action, and the Proposition 65 notice was absolutely privileged. The court asserted that allowing Proposition 65 private enforcers to be sued before they, themselves, decide to bring suit would seriously undermine the goals of the state initiative. The court noted that such "chilling effect" would thwart the goal of public participation and prevent some citizen and environmental groups from alerting government officials of water pollution violations.

The court affirmed the lower court's decision because (1) Consumer Cause established a prima facie case that it was sued by Equilon after exercising its First Amendment right to petition the government in connection with a public issue—conduct protected by both California law and the SLAPP statute; and (2) the oil companies were unlikely to prevail on their claims. Additionally, the court stated that Consumer Cause could bring a motion in the trial court to recover the attorney fees and costs incurred while appealing this case.

Sommer Poole

CONNECTICUT

McNee v. Town of Newton Conservation Comm'n, No. CV000338817S, 2000 Conn. Super. LEXIS 3178 (Conn. Super. Ct. Nov. 27, 2000) (holding an inland wetlands agency has discretion to determine whether to conduct a public hearing before issuing a permit, and a decision to issue a permit is not rendered void by the agency's failure to provide notice to nearby landowners nor by applicant's failure to obtain a discharge permit prior to the agency's decision).