CLIENT ALERT

CITIZEN SUIT WATCH: Federal Court Rejects Citizen Suit Against EPA for Alleged Role in RINs Fraud

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In *Vinmar Overseas, Ltd. v. OceanConnect*, -- F. Supp. 2d --, 2012 WL 3599486 (Aug. 20, 2012), the U.S. District Court for the Southern District of Texas dismissed a third-party complaint against the U.S. Environmental Protection Agency (EPA) in which a purchaser and seller of Renewable Identification Numbers (RINs) that were later found to be fraudulent sought to impose civil penalties on EPA for its alleged negligent administration of the Clean Air Act – namely, by allowing invalid RINs to enter the renewable fuel credit trading marketplace. The *Vinmar* court became the first district court to join the U.S. Court of Appeals for the Sixth Circuit in holding that the Clean Air Act's citizen suit provision (42 U.S.C. § 7604(a)(1)) does not provide for citizen plaintiff enforcement actions against government agencies.

Background

In 2005, Congress amended Section 211 of the Clean Air Act to authorize EPA to regulate fuels and fuel additives and to establish the Renewable Fuel Standard (RFS) program.[1] Under that program, refiners, importers, and certain blenders of transportation fuels are required to demonstrate that they have satisfied annual Renewable Volume Obligations (RVOs) by introducing a required volume of renewable fuel into the domestic pool.[2] To facilitate compliance with the RFS program, EPA adopted a RIN system that assigns unique numbers to batches of renewable fuel produced or imported into the country and allows obligated parties to demonstrate their compliance with their annual RVOs by acquiring RINs for each gallon of renewable fuel.[3] RINs represent proof of both production and consumption, and an obligated party demonstrates compliance with the applicable renewable fuel standard by accumulating sufficient RINs to cover their obligation, regardless of whether the obligated party uses the RINs itself or sells them to a third party.[4] An active secondary market has developed for the purchase and sale of RINs, but EPA imposes a "buyer beware" rule on those transactions, holding companies responsible if they unwittingly purchase invalid RINs and fail to satisfy their RVOs as a result.

Invalid RINs have penetrated the market in recent years, prompting the government to bring fraud enforcement actions against three companies that allegedly produced and sold invalid RINs. Most recently, in a case against an officer of Clean Green Fuels, a third-party defendant in *Vinmar Overseas, Ltd. v. OceanConnect*, the United States obtained a conviction on forty-two counts of wire fraud, money laundering, and Clean Air Act violations for Clean Green Fuel's fraudulent manufacture and sale of invalid RINs.[5]

This civil action relates to that finding of fraud. OceanConnect bought and sold RINs from Clean Green Fuels that were later revealed to be invalid. After OceanConnect was sued for breach of contract by two of its purchasers, it filed a third-party complaint against Clean Green Fuels and other entities, including EPA. OceanConnect's suit against EPA arose under the Clean Air Act's citizen suit provision[6] and sought civil penalties for EPA's allegedly wrongful registration of certain companies as renewable fuels producers and failure to advise participants in the RINs market regarding the fraud upon discovery. OceanConnect claimed that those failures caused excessive greenhouse gas emissions to enter the atmosphere in violation of the Clean Air Act.

The District Court Decision

The district court, following the Sixth Circuit's decision in *Sierra Club v. Korleski*, dismissed the third-party complaint against EPA for lack of subject matter jurisdiction, holding that "citizen suit provisions [like 42 U.S.C. § 7604(a)(1) in the Clean Air Act] only authorize claims that a regulated entity, and not a regulating agency, violated an emissions standard or limitation."[7]

The *Vinmar* court first examined *Bennett v. Spear*, the Supreme Court decision upon which *Korleski* principally relied. In *Bennett*, the Court held that Congress did not intend the Secretary of the Interior's conduct in implementing or enforcing the Endangered Species Act (ESA) to be a "violation" within the meaning of the ESA's citizen suit provision.[8] The *Vinmar* court then reached the same conclusion as the Sixth Circuit in *Korleski*, *i.e.*, that the Clean Air Act does not authorize citizen suits against environmental regulators because the citizen suit provision in that Act is only a means by which parties may enforce against regulated parties, not the regulators themselves.[9] But the *Vinmar* court extended the Sixth Circuit's reasoning to *federal*, not just state, regulators. Finally, the *Vinmar* court bolstered its restrictive interpretation of the Clean Air Act citizen suit provision by referencing other cases interpreting similar provisions, including the citizen suit provisions in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Toxic Substances Control Act (TSCA), and the Clean Water Act (CWA).[10]

Implications

Like the Sixth Circuit in *Korleski*, the Southern District of Texas rejected citizen plaintiff attacks on administrative decisions alleging that an agency acted contrary to its obligations under the Clean Air Act. But the *Vinmar* decision went a step further by expanding the Sixth Circuit's holding to *federal* agencies and to situations that do not raise the same federalism concerns as those emphasized in *Korleski*. The *Vinmar* court's reliance on other environmental citizen suit provisions also demonstrates that its (and the *Korleski* court's) restrictive interpretation of the Clean Air Act's citizen suit provision could, by analogy, strengthen governmental immunity from suits brought pursuant to similar citizen suit provisions in other statutes.

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[1] *See* Pub. L. No. 109-58, § 1501, 119 Stat. 594 (codified at 42 U.S.C. § 7545(o)).

[2] 42 U.S.C. § 7545(o)(3)(B)(ii); *see also id.* § 7545(o)(1)(L); *id.*§ 7545(o)(2)(A)(i).

[3] 72 Fed. Reg. 23,900, 23,908-10 (May 1, 2007); *see also* 40 C.F.R. part 80, subpart M.

[4] *See* 72 Fed. Reg. at 23,909.

[5] Theo Emery, *Fraud Case Shows Holes in Exchange of Fuel Credits*, N.Y. Times July 4, 2012, *available at* http://www.nytimes.com/2012/07/05/us/biofuel-fraud-case-shows-weak-spots-in-energy-credit-program.html.

[6] 42 U.S.C. § 7604(a)(1).

[7] *Vinmar Overseas*, 2012 WL 3599786, at *9.

[8] *See Bennett v. Spear*, 520 U.S. 154, 173-74 (1997) (interpreting 16 U.S.C. § 1540(g)(1)).

[9] *Sierra Club v. Korleski*, 681 F.3d 342, 344-53 (6th Cir. 2012).

[10] *See Benzman v. Whitman*, 523 F.3d 119, 133-34 (2d Cir. 2008) (CERCLA); *Physicians Comm. for Responsible Med. v. Johnson*, 436 F.3d 326, 334-35 (2d Cir. 2006) (TSCA); *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 566-68 (N.D. Tex. 1997) (CWA); *Stewart v. Potts*, 983 F. Supp. 678, 681-83 (S.D. Tex. 1997) (same).

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