

ILLINOIS POLLUTION CONTROL BOARD

December 17, 1992

HERMAN W. PRESCOTT,)
)
 Complainant,)
)
 v.) PCB 90-187
) (Enforcement)
)
 CITY OF SYCAMORE,)
)
 Respondent.)

DISSENTING OPINION (by B. Forcade):

I respectfully dissent from today's action. I believe in this case the complainant has stated sufficient facts to support a cause of action under at least two theories. First, Section 18(a) of the Environmental Protection Act provides:

Section 18

- a. Owners and official custodians of public water supplies shall direct and maintain the continuous operation and maintenance of water-supply facilities so that water shall be assuredly safe in quality, clean, adequate in quantity, and of satisfactory mineral character for ordinary domestic consumption.

Here, I believe the testimony shows that the water is not clean. Second, our regulations used to provide at 35 Ill Adm. Code 604.201 as follows:

SUBPART B: CHEMICAL AND PHYSICAL QUALITY

Section 604.201 Finished Water Quality

- a) The finished water shall contain no impurity in concentrations that may be hazardous to the health of the consumer or excessively corrosive or otherwise deleterious to the water supply. Drinking water shall contain no impurity which could reasonably be expected to cause offense to the sense of sight, taste, or smell.
- b) Substances used in treatment should not remain in the water in concentrations greater than required by good practice. Substances which may have deleterious physiological effect, or for which physiological effects are not known, shall not be used in a manner that would permit them to reach the consumer.

0138-0031

Although inadvertently deleted in a prior regulatory proceeding, this language was replaced in R91-3 (November 19, 1992). I believe the testimony would support a violation of Section 604.201(a).

I believe the majority declines to accept fact pleading as a basis for finding a violation, and will only look to the specific statutory or regulatory provisions cited in the complaint. Since counsel failed to cite to these provisions, the majority did not evaluate them. I disagree for reasons stated in my dissenting opinion in North Oak Chrysler Plymouth, v. Amoco Oil Company, PCB 91-214 (April 9, 1992). A substantial portion of that dissenting opinion is reproduced here for clarity:

First, despite any ruling regarding the UST regulations, I believe North Oak Chrysler (North Oak) has filed a complaint which states sufficient facts to support a cause of action over which this Board has jurisdiction.

For purposes of ruling on a motion to dismiss, all well pleaded facts contained in the complaint must be taken as true and all inferences therefrom must be drawn in favor of the nonmovant. [citations omitted]. A complaint should not be dismissed for failure to state a cause of action unless it clearly appears that no set of facts could be proven under the pleadings which would entitle plaintiff to relief. [citations omitted] ... Illinois requires fact rather than notice pleading. [citations omitted]...[Emphasis Added]

Brumley v. Touche, Ross & Co. (1984), 123 Ill. App. 3d 636, 463 N.E.2d 195.

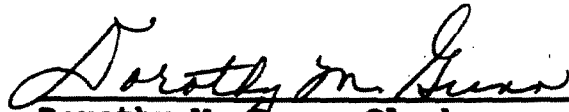
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Since I believe the complaint states sufficient facts to support a viable cause of action, I would not have granted dismissal. I do not yet know whether North Oak can prove those facts and their most favorable inferences. Nor do I know if Amoco might have a perfectly valid defense. The question of what relief is available, if any, is even more complicated. Those matters must be resolved later in the proceeding.

Since the majority focuses only on the regulatory provisions involved, I assume the majority concludes that notice pleading rather than fact pleading controls here. I would disagree. Illinois is a fact pleading state. Ill. Rev. Stat. 1989, ch. 110, para. 2-601. This Board is an administrative agency rather than a court of law. Further, this proceeding is a citizen enforcement action. Under those conditions, I believe the Board should be as lenient as the law will allow in regard to the particulars of formal pleading.

0138-0032

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 28th day of December, 1992



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board