

9-1-2000

Ormet Primary Aluminium Corp. v. Employers Ins. of Wausau, 725 N.E.2d 646 (Ohio 2000)

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Sarah E. McCutcheon, Court Report, Ormet Primary Aluminium Corp. v. Employers Ins. of Wausau, 725 N.E.2d 646 (Ohio 2000), 4 U. Denv. Water L. Rev. 255 (2000).

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landowners sought relief beyond a mere flowage easement upon the downstream landowners. Rather, the landowners asserted the right to keep dikes constructed in violation of the law in place. The court concluded the landowners could not acquire a prescriptive right to stop the state from regulating and controlling the use of public waters for public benefit. The court found prescriptive rights cannot be acquired to public nuisances or interests that violate state law. Because the landowners' construction of dikes violated state law, the court determined they could not acquire prescriptive easements to use such dikes.

Willow Morrow

OHIO

Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau, 725 N.E.2d 646 (Ohio 2000) (holding aluminum manufacturing corporation failed to provide insurance carriers with timely notice of groundwater contamination).

Ormet Primary Aluminum Corporation ("Ormet") owned and operated an aluminum manufacturing facility ("Site"). The Site included two wells that provided drinking and processing water. Ormet dumped its manufacturing wastes into ponds located at the Site. In 1956, a hydrogeological study of the Site warned of potential groundwater contamination from the disposal ponds. The study suggested sealing the ponds' bottoms and installing an interceptor well to pump out contaminated groundwater before it contaminated the drinking water wells. Ormet did not institute either remedial measure.

In 1966, Ormet became aware that liquid waste leakage, specifically fluorides and cyanides, from the unlined disposal pond bottoms had contaminated the Site's well water. Ormet constructed an interceptor well in 1972, but did not treat the inceptor well water. Instead, Ormet funneled the water into the Ohio River. Ormet obtained a National Pollution Discharge Elimination System permit ("NPDES permit") in 1975 for the contaminated interceptor well water discharge.

A May 1977 report confirmed underground aquifer contamination continued at the Site. In July 1977, a groundwater consultant hired by Ormet found impermissibly high cyanide and fluoride levels in the Site's groundwater due to disposal pond runoff. The groundwater consultant also suggested Ormet cover the disposal ponds with clay lids and recommended general cleanup. Ormet followed neither of these suggestions.

In 1980, due to a classification of the Site as a "major discharger" into the Ohio River under the Clean Water Act ("CWA"), an independent laboratory tested Ormet's wastewater discharges. The laboratory issued a report revealing that Ormet was discharging high

cyanide concentrations into the Ohio River. In 1981, after the Ohio Environmental Protection Agency ("Ohio EPA") received a copy of the laboratory's report, it sent Ormet notice of its awareness of the discharges. Accordingly, Ormet began developing an underground water treatment process. Ormet informed Ohio EPA of its plans, but argued against the water treatment plant construction due to its estimated \$2,500,000 cost.

In 1985, the United States Environmental Protection Agency ("USEPA") placed the Site on the National Priorities List ("NPL"). USEPA sent a letter to Ormet in April 1986, informing Ormet that it was potentially responsible for the contamination of the Site and possibly liable for all removal and remediation costs.

In September 1986, Ormet's C.E.O., Emmett Boyle, and a former Ormet board member and shareholder, Charles Bradley, bought Ormet. Boyle and Bradley purchased Ormet fully aware of the groundwater contamination problem. In March 1987, Boyle signed a settlement agreement with USEPA on behalf of Ormet without notifying or obtaining Ormet's insurers' consent. In the settlement, Ormet agreed to perform a CERCLA-mandated site study, provide USEPA with a work statement, and reimburse government agencies for costs incurred while overseeing the CERCLA-mandated site study preparation.

In late 1988, Ormet's insurance broker advised Ormet's vice-president that Ormet should notify all insurance providers of the Site's contamination problems. However, Ormet did not send a potential claims notice involving the CERCLA remediation to any of its insurance carriers until March 1992.

In July 1995, Ormet filed suit for declaratory judgment, damages, and other relief against its primary and excess insurance carriers (collectively, "Insurers"). Insurers filed a joint summary judgment motion. Insurers claimed Ormet's insurance policies required timely notification of events or incidents that might lead to claims. Specifically, Insurers alleged Ormet failed to give timely notice of the Site's environmental problems and USEPA's demands. The trial court granted Insurers' summary judgment motion. Ormet appealed. The appellate court affirmed. The Supreme Court of Ohio heard the case on discretionary appeal.

The court first stated that, while notice requirement fulfillment is usually a question of fact for a jury, an unexcused and significant delay might be equally unreasonable as a matter of law. The court considered the various notice requirements included in Ormet's insurance policies. The court looked to the undisputed facts to determine whether or not Ormet complied with the insurance policies' notice requirements, noting Ormet was aware of a contamination problem as early as 1966.

Ormet advanced three arguments to support its contention that it provided timely notice. First, Ormet argued that although it was aware

of Site contamination, it was not aware of governmental regulatory action until much later. In addition, Ormet saw no need to notify Insurers of any problems until after CERCLA's enactment. In rejecting this argument, the court determined both that awareness of regulatory action did not pertain to the notice of an "occurrence" and water pollution laws existed in Ohio prior to the passage of CERCLA.

Ormet next argued a genuine issue of material fact existed as to whether or not Ormet provided notice "as soon as practicable" after an accident or suit. The court considered a 1989 memo from Ormet's insurance administrator to Ormet's vice-president. The memo acknowledged the vice-president's awareness of Site contamination and his subsequent discussion of the problem with Ormet's insurance broker. The court concluded that no material fact existed because Ormet's insurance administrator sent the memo three years before Ormet's first notice of potential claims.

Finally, Ormet argued it handled the remediation in the most efficient and cost-effective manner possible. Therefore, its insurers were not prejudiced by a notification delay. The court concluded Insurers were actually prejudiced by the notification delay as several potential witnesses had died, and, as a result, Insurers had no opportunity to question them. Moreover, potential witnesses' memories had faded and documents were lost.

The court concluded reasonable minds could not differ. Ormet had failed to provide timely notice in violation of its insurance policies, and Insurers were therefore entitled to summary judgment.

Sarah E. McCutcheon

OKLAHOMA

Messer-Bowers Co. v. State, 8 P.3d 877 (Okla. 2000) (holding that, in a groundwater use permit proceeding, the Oklahoma Resources Water Board must look at the ultimate use of the groundwater to determine whether waste by pollution will occur).

In 1996, Kronseder Farms, Inc. ("Kronseder") applied to the Oklahoma Water Resources Board ("Water Board") for a groundwater use permit for land on which Kronseder planned to construct a concentrated swine feeding operation. Surrounding landowners ("Landowners") opposed the application. They asserted Kronseder's use of the requested groundwater would diminish and contaminate their supply of groundwater from wells and springs. The Water Board approved the application in 1996. The District Court on review remanded the matter to the Water Board. In 1997, the Water Board again approved the application. The district court upheld the order and the court of appeals affirmed.