Free Speech, Toxic Tort, and the Battle of Sugar Creek

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The environmental movement owes much of its success to democracy's most prized silver bullet: the right to organize and speak freely. Since the late 1960s, political activists have used speech to prod, shape and enforce thousands of environmental statutes and regulations. [FN1] Today the relatively new environmental justice movement owes much of its success to the tireless organizing of workingclass mothers, church leaders and others determined to "speak truth to power." [FN2] And, of course, the internet has propelled environmental advocacy to dizzying heights.

Along with the power of environmental speech inevitably come efforts by some to impede that power. The notorious SLAPP suits (strategic lawsuits against public participation) seek to intimidate citizens from bringing statutory claims against corporate polluters. [FN3] In the 1990s, so-called "food libel laws" popped up in some agricultural states, including Texas, where Oprah Winfrey was hauled into court for bad-mouthing a hamburger. [FN4]

This essay alerts readers to yet another mechanism that can be used to curtail environmental speech rights, which I discovered in the context of a toxic-torts class-action settlement: the overly restrictive "covenant not to sue." Ordinarily, a "covenant not to sue" poses no special threat. It is nearly axiomatic that a settling defendant deserves from the plaintiff a promise to bury her claim for good. But what if a "covenant not to sue" requires the plaintiff to bury more than that, such as related claims, related grievances against the government or related speech? *246 And what if a federal court explicitly approves that settlement and promises to enforce it using the court's own contempt powers?

These questions arose in a much publicized environmental dispute involving a former oil refinery in Sugar Creek, Missouri. I tell the story here to show how easily an oppressive "gag rule" can be smuggled within the hollow of a common settlement provision. Given the apparent ease of this strategy, one should assume that some defendants will try similar measures against future environmental plaintiffs. For this reason, I then provide the legal arguments that I believe may, given certain circumstances, limit the effects of future "gag rules" on citizens' environmental speech.

A. The Battle of Sugar Creek

Sugar Creek, Missouri is a small town of fewer than 5,000 residents in a picturesque valley in western Missouri. It is bordered on the West and South by the city of Independence, Harry Truman's home town. The Missouri River slides along the town's northern border. Sugar Creek, for which the town is named, cuts through the valley and eventually feeds into the Missouri River. [FN5] Years ago Sugar Creek was a refinery town: in 1904 Standard Oil opened an oil refinery there and recruited scores of workers to operate the plant and live in the valley. [FN6] Sugar Creek ran through the refinery site. [FN7] The refinery operated for 78 years, first under the control of Standard Oil, then under the control of American Oil Co., a spin-off of the Standard Oil monopoly, which changed its name to Amoco Oil Co. in 1977. [FN8] Amoco merged with British Petroleum in 1998, becoming BP Amoco Corp., one of the largest oil producers in the world. [FN9]
Refining petroleum has always been dirty work. Chemical fires, explosions and sulfur clouds were as common as sparrows during much of the refinery's life. [FN10] In addition, thousands of gallons of gasoline leaked into the soil from faulty storage tanks, pipes and sewers. [FN11] In the early 1950s, the refinery lost an average of 7,000 gallons of refined gasoline per day for nearly a decade. [FN12] Much of this contamination now saturates the soil on the site and in surrounding neighborhoods. [FN13] The property values, of course, have tanked in these neighborhoods. A few blocks south of the refinery, a rainbow sheen colors Sugar Creek's surface waters while layers of orange bacterial residue (often associated with petroleum *247 contamination) line the creek's bed. [FN14] The creek smells like a gas station. Residents also express concern over health threats. At the time of litigation, federal, state and local researchers began investigating high rates of brain cancer near the refinery, initiating the first high-level cancer-cluster study in the state of Missouri. [FN15]

This story shows themes common to many accounts of contaminated communities. There is the employer-turned-contaminator, the escalation of fear and uncertainty in the community, economic depression in the housing market and a pool of legal claims based on common law and statute.

There is also an unsettling image of economic and perhaps ethnic injustice. Many residents living near the Amoco site are of modest means and of Serbo-Croatian descent. [FN16] Their fore-parents were recruited by Standard Oil because, as poor immigrants from an unpopular ethnic group, they would have had few other opportunities in the United States. [FN17] The opportunities that Standard Oil afforded immigrant workers were, perhaps in many cases, more promising than what such immigrants could have secured in their home countries. But that does not discount the role that classism and racism played in shaping their fortunes. The hard work and hazardous exposures endured by Serbo-Croatian workers helped pay for the cheap and plentiful gasoline of the region's past. Today, the descendants of many of these workers are still paying.

In 1995, surrounding residents filed a class-action lawsuit against Amoco Oil Co. on behalf of homeowners seeking investigation and cleanup of contamination from the Amoco Sugar Creek Refinery under the Comprehensive Environmental Response, Compensation, and Liability Act [FN18] and injunctive relief and damages based on common law claims of negligence, nuisance, trespass, strict liability and unjust enrichment. [FN19] This complaint closely followed an independent lawsuit against Amoco brought by the nearby city of Independence, Missouri, to be later joined by the city of Sugar Creek. [FN20] The lawsuits were consolidated for discovery purposes. [FN21] Six weeks before trial, counsel for Independence and Sugar Creek took over representation of the class plaintiffs because of a last-minute dismissal of class counsel on a conflict of interest. [FN22] This reorganization caused much consternation among class members and resulted in a settlement agreement that many class members believed was insufficient to protect their interests. I will not dwell on these events, other than to note that the two cities' strong desire *248 to settle may have contributed to its acceptance of Amoco's settlement and the "covenant not to sue" that it contained.

On the brink of trial in May 1999, Amoco Oil and the lawyers that now represented Independence, Sugar Creek, and the class plaintiffs, announced that they had reached a settlement and sought the federal trial court's approval. [FN23] Representatives for the class immediately objected; they believed that politics and expediency drove class counsel to accept a remedy that was insufficient to compensate pollution victims and to protect public health. [FN24] Nonetheless, the district court approved the settlement and adopted Amoco's proposed final judgment and order verbatim, including even the typographical errors. [FN25] The order placed all plaintiffs benefiting from the settlement's injunctive relief into a mandatory class from which they could not withdraw. [FN26] The objecting class members then challenged the district court's approval of the settlement before the Eighth Circuit Court of Appeals. [FN27] Under my representation, the Thomas Hart Benton Group of the Sierra Club supported the appeal as amici curiae.

B. The Covenant Not to Sue

Amoco's lawyers in Chicago had drafted the document that eventually became the court-approved settlement agreement. Its heavily upholstered language insured that no Sugar Creeker without a law degree could understand it, but there is nothing unusual about that. What was unusual was the way in which Amoco sought to address res judicata concerns. Settling plaintiffs, of course, normally give up their right to re-litigate their settled claims and legal issues in court. Without this concession a defendant has no incentive to lay down the shield. But Amoco's recommended concession of plaintiffs' claims was far from "boiler plate." Under its proposal, class members
promised "not to commence or prosecute any civil judicial, administrative, regulatory or other suit, action, claim, complaint, demand or proceeding whatsoever in any jurisdiction, whether judicial, regulatory, administrative, federal, state or municipal, based in whole or in part on the Claims released." [FN28] A later section defined "Claims released" as "any and all Claims that arise out of or have any connection to the Contamination." [FN29] (The prohibition properly did not extend to claims seeking only to enforce the settlement agreement itself. [FN30])

Put together, the provisions quite literally barred class members from ever making any administrative or judicial complaint based in any way on the site's contamination. This bar was much broader than protections offered by the doctrines *249 of claim preclusion (res judicata) or issue preclusion (collateral estoppel). These doctrines, for instance, bar only claims or issues presented in future law suits, not grievances made in less formal administrative settings. In addition, claims in a law suit are only precluded if they represent the same causes of action brought against the same party, [fn31] WHILE ISSUES in a law suit (whether or not brought against the same defendant) are precluded only if "identical" to previously litigated issues. [FN32] Amoco's proposed language barred related "complaints" of all kinds against anyone. Its reference to "administrative" complaints, for instance, could only mean complaints to state or federal agencies, neither of whom were parties in the law suit. Underlying issues of such complaints would be barred even if not "identical," as long as they had "any connection to" Amoco's contamination.

To the non-lawyer class members, these distinctions meant nothing. But to my student assistants and me, the plain language of this agreement had the effect of prohibiting class members from complaining to the Environmental Protection Agency (EPA) in the future about nearly any pollution-related issues on the site. Should a resident test that provision by squealing to a protective agency, Amoco had planted another land mine: the proposed settlement agreement held that any plaintiff found violating it would be liable for Amoco's attorneys' fees. [FN33] That threat, in itself, seemed enough to keep all but the independently wealthy at bay. Significantly, the agreement provided no reciprocal guarantee to plaintiffs if Amoco ever violated the agreement. [FN34] The expansive settlement provision threatened to block future statutory citizen suits against non-Amoco parties and to chill anti-Amoco speech directed toward environmental agencies. In short, the provision drilled a root canal into the core of federal environmental enforcement.

C. The Arguments against the Covenant Not to Sue

1. A Violation of Statutory Policy

Almost all federal environmental laws adopted since 1970 contain citizen suit provisions designed to enlist citizens as "private attorneys general" in order to compensate for limitations on public enforcement. [FN35] Such laws typically allow plaintiffs to sue in order to force officials to perform their mandatory duties under the law (an "action-forcing suit") or enjoin directly the violators of environmental laws (an "enforcement suit"). [FN36] Federal environmental laws similarly provide formal and informal ways for citizens to contact agencies in order to inform *250 them of ongoing or potential violations of law and hazards to the public health and environment.

Adding private enforcement to public enforcement creates a double-barreled approach that serves many important environmental goals. First, citizen enforcers serve the necessary goal of supplementing the often woefully inadequate resources of public agencies. [FN37] Second, citizen suits place a necessary check on government agencies whose structure may inadvertently foster undue deference to the regulated community. [FN38] Third, citizen enforcement helps dislodge bureaucratic logjams within or among agencies. Finally, action-forcing suits (of the type class members were currently banned from using) support the democratic process by enabling private citizens to direct public environmental resources to the geographic areas most important to the local community. [FN39]

The agency inertia resulting from inadequate resources, deferential staffers and cumbersome bureaucracy troubled Congress throughout the development of today's environmental laws. For instance, Congress provided for citizen suits in the Resource Conservation and Recovery Act (RCRA) [FN40] in order to "put pressure upon a government that was unable or unwilling to enforce such laws itself." [FN41] The Senate Report on the Clean Air Act noted the "restrained" efforts of federal enforcers and hoped that citizen suits would "motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings." [FN42] Similarly, the Senate Report on the Federal Water Pollution Control Act Amendments (the Clean Water Act) suggested that a suffocating bureaucracy had resulted in an "almost total lack of (federal) enforcement." [FN43]
Because of these concerns, Congress not only provided for citizen suits in these and other environmental laws, but it encouraged them by providing attorneys' fees provisions for successful plaintiffs. [FN44] Perhaps more than any other tool, the action-forcing lawsuit is responsible for the strength and vigor of today's federal environmental policy.

A short example shows the contrary effect the settlement's provision would have on federal environmental law. RCRA authorizes individuals to sue the EPA for failing to perform its non-discretionary duties. [FN45] Suppose that a class member found that the EPA further lowered remediation standards for the Amoco site in a manner that violated RCRA's procedures. Without the settlement, that resident would have the right to sue the EPA in federal court to force the agency to act in *251 the required way. This would be so even if the class members had taken their present case against Amoco to trial and had lost. Neither the doctrines of claim preclusion nor issue preclusion would bar the suit against the EPA because it was not a defendant in the first suit. Congress's notion of citizen-inspired enforcement would be realized.

With the settlement agreement, however, a class member could not initiate the secondlaw suit. Although not barred by issue or claim preclusion, the suit against the EPA would be barred by the settlement as a "civil judicial . . . . action . . . based in whole or in part on the Claims released," which included all those having "any connection to the contamination," the refinery or the remedial activity. [FN46]

Effectively, this means that no resident living within the Rule 23(b)(2) class boundaries could bring that suit, since the district court conscripted all such residents into the class for injunctive relief and permitted no one to opt out. [FN47] What is more, Amoco's threat to extract attorneys' fees from any resident who violated the settlement would likely discourage residents from bringing any environmental suit of any kind against the government out of fear that it might somehow be "connected to" the original claims at bar. Congress's guarantee of citizen participation in environmental enforcement would be shattered--its promise denied to a community of more than 5,000 households.

This troubling example can be replayed several times over using different federal environmental laws that, absent the settlement, could plausibly support action-forcing lawsuits "connected to" the Petrovic case. One can imagine the settlement barring citizen suits provided for in the Clean Water Act (perhaps involving Amoco's discharge permits), the Clean Air Act (perhaps involving air violations) or the Emergency Planning and Community Right-to-Know Act (perhaps involving the production and public availability of environmental records) to name but a few.

Court approval of the settlement provision, we argued, would flash a green light to other polluters seeking to shield themselves from citizen suits. Amoco, whose refineries span the continent, might push for similar provisions in future class-action settlements. The result could be class action communities throughout the country deprived of the right to use the nation's environmental laws to enforce governmental compliance as Congress explicitly intended.

2. Violations of the Constitution

Sierra Club next argued that the settlement provision was, in fact, unconstitutional. The argument is more difficult to make than the previous "statutory policy" argument, namely because the required element of state action [FN48] has *252 proved so difficult for courts to define. This is particularly true where the enforcement of private-party agreements are concerned. But because a class-action settlement must be approved by a court, state complicity should arguably be easier to establish. Surprisingly, there is very little case law that directly involves the question of state action in court-approved class action settlements.

Because there exists no "precise formula" for identifying state action, courts employ a case-by-case analysis, "sifting facts and weighing circumstances" in each particular dispute. [FN49] The goal is always to determine if the challenged conduct--whether initiated by a private or public entity--is "fairly attributable to the State." [FN50] Independent court orders easily constitute state action. [FN51] State action similarly exists where government places its "imprimatur" on private conduct; [FN52] or positions its "power, property and prestige" behind a private activity; [FN53] or produces the impact of a citizen's loss of rights. [FN54] Even a court's enforcement of a purely private agreement can constitute state action where important rights are at stake. [FN55]

Under the principles expressed above, the district court's approval of the settlement appeared directly "attributable
to the state." First, the court stamped its "imprimatur" on the settlement by issuing its official approval. This is, after all, the whole purpose behind the Rule 23(e) requirement: to protect class members' interests by insisting that a public official (a judge) place the government's imprimatur on the settlement. [FN56] Second, the court's order squarely positioned its "power" and "prestige" (it had no relevant "property") behind the agreement. After stating its official approval, the court, in fact, had volunteered to maintain jurisdiction over the case, insuring that anyone violating the settlement's provisions in the future would be subject to federal enforcement powers. Finally, the court's official approval created an "impact" on the class members that could only be described as imposed government action because the settlement was not a private agreement in the traditional sense. Hardly any individual class members played a role in crafting it and none were given the right to accept or reject it. [FN57] For the thousands of individual class members in the case, this "agreement" was not agreed upon at all. The impact on them was of an involuntary, court-imposed injunction that defines their rights and obligations without possibility of escape. No private actor--not even Amoco--was capable of such control. Only the government was.  

If the federal court was a lever in the machinery of this agreement, a constitutional violation surely followed. The First Amendment guarantees that the government will "make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." [FN58] The First Amendment's right to free expression unambiguously protected the "constitutionally protected right to seek redress in the courts or . . . before an agency." [FN59] As Laurence Tribe has explained, the ability to prod government action through speech is "central to the workings of a tolerably responsive and responsible democracy." [FN60]  

For nearly one hundred years, the Supreme Court has also recognized a substantive speech-related right in the Privileges and Immunities Clause of Article IV: "the right to inform the United States authorities of violation of its laws." [FN61] The settlement's involuntary bar on "any . . . suit, action, claim, complaint, demand or proceeding whatsoever" if based on claims "connected to the Contamination" targeted a variety of communicative acts, including official and unofficial complaints to public agencies and lawsuits against public agencies to enforce environmental statutes. [FN62] The bar discriminated on the basis of content by silencing only expression connected to Amoco's pollution. By encompassing lawsuits and "judicial" or "administrative" "proceeding(s)," the provision restricted a citizen's right both to bring grievances to the government (protected by the First Amendment) and to notify the government of legal violations (protected by the Privileges and Immunities Clause).  

Where government conduct restricts the First Amendment right of expression based on its content, the restriction must meet a strict-scrutiny standard; that is, it must prove to be "a precisely drawn means of serving a compelling state interest." [FN63] As a fundamental guarantee of national citizenship under Article IV, the right to inform federal authorities of legal violations also demands the strictest protection. [FN64]  

*254 Under these tests, the settlement provision could not survive strict scrutiny. There was no compelling interest in preventing an entire community from using a statutory process to notify agencies and courts about the hazards of local contamination. Indeed, the whole purpose of the "covenant not to sue" was apparently to shield Amoco from the citizen enforcement of environmental laws. That purpose was illegitimate, we argued, against the public interest and contrary to the basic concepts of liberty.  

**EPILOGUE**  

In the end, the Eight Circuit Court of Appeals upheld the district court's judgment approving the settlement. [FN65] Regarding the class members' argument that the settlement was substantively too weak, the court found that the substance of the settlement fell within the wide discretion of the trial judge. [FN66] On the subject of the "covenant not to sue," the court side-stepped the issue. Rather than confront the issues of statutory policy or free speech, the court instead interpreted the covenant as being limited only to future claims against Amoco. [FN67] Writing for the court, Judge Morris Arnold wrote  

(T)he "(c)laims released" referred to in the covenant not to sue must necessarily be only those claims held by class members against Amoco. We do not believe that a suit against a third-party governmental agency relating to that agency's failure to enforce environmental regulations in the affected area would be "based in whole or in part" on the claims of the class members against Amoco. [FN68]
In addition, the court noted that the covenant explicitly allowed class members to seek enforcement of the settlement (which included Amoco's promise to follow agency orders) in the district court. [FN69] Even if the covenant's scope was ambiguous, the court found that its text could be limited by oral statements made later by counsel that this provision was never intended to be read so broadly (or as I would say, so literally). [FN70]

The court's dodge is unpersuasive. First, the covenant quite literally encompasses claims against other parties including government agencies. What else could be meant by a proscription against all "administrative" or "regulatory" "complaints . . . whatsoever?" Second, that the covenant allows class members to seek court enforcement of the agreement does not guarantee a right for class members to petition agencies for relief mandated by the law, but not by the settlement. Finally, the court's backstop effort to use extrinsic evidence to illuminate the text sends it's argument into a Catch Twenty-Two: extrinsic evidence is only admissible in the Eighth Circuit if an agreement's provision is ambiguous; [FN71] but any settlement agreement that is ambiguous cannot be approved by a court in the Eighth Circuit. [FN72]

Nonetheless, the court's opinion will have the apparent result of excising the broad gag rule from the covenant not to sue, an event that gives class members some assurance of speech protection. The broader lesson is that in the future, plaintiff's lawyers should pay close attention to the phrasing of covenants not to sue. Where environmental protection is at stake, surrendering one's re-litigation rights should not mean surrendering one's voice.

[FN1]. Marvin Rich Scholar and Professor of Law, University of Missouri, Kansas City. This Essay is based on a speech delivered at the Public Interest Environmental Law Conference, University of Oregon, March 2000, and draws from my experience representing the Thomas Hart Benton Chapter of the Sierra Club as amicus curiae in Petrovic v. Amoco Oil Co., 200 F.3d 1140 (8th Cir. 1999) (Briefs submitted in the Petrovic case, including Sierra Club's amicus curiae brief, are available from my website at http://www1.law.umkc.edu/faculty/verchick/Petrovic_ALL.html). I would like to thank Elizabeth Smith and Colin Stoner, both of the UMKC Law class of 2001, for their fine work in the appellate litigation described above. The ideas expressed here are my own and do not necessarily reflect those of the Sierra Club or anyone else.


[FN6]. Id.
[FN9] Id. B.P. Amoco generates almost three million barrels of oil and natural gas each day and is ranked third in the world in terms of oil and gas reserves. Energy from Six Continents, http://www.bpamoco.com/about_bp/profile/energy.asp.


[FN12] Id. at 6-7.

[FN13] Id. at 6.

[FN14] Dobson, supra note 5, at 14. In the spring of 1999 my environmental law students and I personally observed such conditions in the described area at various times.


[FN16] Personal interview with Bill Haman, member of CLEANUP, a citizens' environmental organization in Sugar Creek (Oct., 1999).

[FN17] Id.


[FN20] Id.

[FN21] Id.

[FN22] Id. at 3.

[FN23] Id. at 4.


[FN27]. Petrovic, 200 F.3d 1140.


[FN29]. Id. at 122-23.

[FN30]. See id.


[FN32]. Oldham v. Pritchett, 599 F.2d 274, 279 (8th Cir. 1979).

[FN33]. Settlement Agreement, supra note 28, at 124.

[FN34]. See id.


[FN39]. See Boyer & Meidinger, supra note 37, at 842-43.


[FN45] Id. § 6972(a).


[FN48] To establish a violation of a constitutionally protected liberty, one must show that a governmental, or "state" action deprived one of that right. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (discussing rights to free speech and equal protection); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW S18-1, at 1688 (2d ed. 1988).


[FN53] Burton, 365 U.S. at 725 (finding state action where government leased building space to racially discriminatory restaurant operator).  


[FN56]. See FED. R. CIV. P. 23(e).


[FN58]. U.S. CONST., amend. I.


[FN60]. TRIBE, supra note 48, S12-1, at 788.

[FN61]. Twining v. New Jersey, 211 U.S. 78, 97 (1908); see also TRIBE, supra note 48, S7-4, at 557.


[FN64]. Cf. Evans v. Romer, 882 P.2d. 1335, 1354 (Colo. 1994) (noting that the rights defined in Twining "receive absolute protection in the sense that the states never could have a legitimate interest in terminating completely any of these rights") (citing RONALD D. ROTUNDA & JOHN E. NOWACK, CONSTITUTIONAL LAW 351 (2d ed. 1992)), aff'd, 517 U.S. 620 (1996).

[FN65]. Petrovic v. Amoco Oil Co., 200 F.3d 1140, 1157 (8th Cir. 1999).

[FN66]. Id. at 1148-52.

[FN67]. Id. at 1151.

[FN68]. Id.

[FN69]. Id.

[FN70]. Petrovic, 200 F.3d at 1151-52.


[FN72]. Angela R. v. Clinton, 999 F.2d 320, 325 (8th Cir. 1993).

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