



STATE INQUIRY REPORT - 199

November 1991

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TOPIC: INCREASING BOND FOR OPERATOR IN BANKRUPTCY (EXCEPTION FROM AUTOMATIC STAY PROVISIONS OF SECTION 362 OF BANKRUPTCY CODE)

INQUIRY: Does an action by the regulatory agency requesting an operator in bankruptcy to post more bond violate the automatic stay provision of 11 USC secs. 362(a)(1) and (6) when the higher bond is necessary to meet reclamation costs? Please locate any material which discusses the automatic stay provision and the need to uphold state environmental laws.

SEARCH RESULTS: Does an action by the regulatory agency requesting an operator in bankruptcy to post more bond violate the automatic stay provision of 11 USC secs. 362(a)(1) and (6) when the higher bond is necessary to meet reclamation costs? Please locate any material which discusses the automatic stay provision and the need to uphold state environmental laws.

MINING-RELATED DECISIONS

COMMONWEALTH OF PA, DEPT. OF ENVIRON. RESOURCES (DER) v PEGGS RUN COAL CO., 55 Pa Commw 312, 423 A 2d 765 (Pa Commw Ct 1980).

In this case involving violations of Pennsylvania's Clean Streams Law, the court concluded that DER's "complaint, charging the corporation with violations of the cited statutes and regulations and asking for affirmative relief and the posting of bonds, is a proceeding by a governmental unit to enforce its police or regulatory power and as such is exempted from the stay provisions of Section 362 of the Bankruptcy Code".

IN RE PENN TERRA, LTD., 24 Bankr 427, 9 BCD 1123 (BC WD Pa 1982).

Prior to Penn Terra's filing of a bankruptcy petition, DER and Penn Terra executed a consent order and agreement arising out of Penn Terra's violation of PA-SMCRA. After the commencement of the bankruptcy proceedings, DER filed a complaint seeking debtor's expenditure of funds for correction of its violations. The court concluded that DER's action was not "a governmental action in the exercise of its police or regulatory powers" but rather "the



attempted enforcement of a money judgment. As such, it is subject to the automatic stay by virtue of Sec. 362 (b)(5)."

In reaching its conclusion, the court cited to the legislative history of Sec. 362(b)(4):

"Where a governmental unit is suing a debtor to prevent or stop violation of a fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." House Report No. 95-595, 95th Cong., 2nd Sess. at 343 (1977)."

"Although Congress has provided an exemption from the automatic stay for governmental proceedings in the exercise of policy or regulatory power, the legislative history indicates that the exception must be narrowly construed."

See below.

PENN TERRA, LTD. V DEPT. OF ENVIRON. RESOURCES, 733 F 2d 267 (3rd Cir 1984).

The Third Circuit reversed the district court ruling. The court held that DER's actions to require Penn Terra to rectify "harmful environmental hazards" fell within the state's police and regulatory powers. The court also recognized that "exercise of a State's police powers may, depending on the circumstances, take the form of an execution on a money judgment." Finding that the bankruptcy court's definition of money judgment was too broad, the Circuit Court ruled that DER's suit to remedy future harm, rather than past damages, was "properly brought" and "did not constitute an action to enforce a money judgment".

These mining-related cases cite to PENN TERRA and/or OHIO v KOVACS, below:

U.S. v F. E. GREGORY & SONS, INC., 58 Bankr 590, 24 ERC (BNA) 1110 (WD Pa 1986).

The injunction ordering Gregory to perform reclamation work at the abandoned mine site was held to fall within the exception to the automatic stay in Sec. 362.

U.S. v WHIZCO, INC., 841 F 2d 147 (6th Cir 1988).

Although the plaintiff was not seeking an order requiring the payment of money to defray cleanup costs, the court found that the substance, as opposed to the form, of the plaintiff's request would result in a "money judgment": the defendant did not have the physical capacity to reclaim the mine site himself and would have to hire others to perform the work, requiring the expenditure of money. "Our holding is very narrow, however, To the extent that the defendant can comply with the Secretary's orders without spending money, his bankruptcy did not discharge his obligation to comply with the orders." Cites to KOVACS.

IN RE KAISER STEEL CORP., 87 Bankr 662, 5 BCR 285 (BC Colo 1988).



Utah's enforcement of its environmental laws constituted "an exercise of its police and regulatory powers pursuant to 11 USC Sec. 362(b)(4) which is excepted from the automatic stay of 11 USC Sec. 362(a)...." Utah's initial enforcement included a notice to Kaiser Steel, when Kaiser no longer met the criteria for self-bonding, to either post an alternative bond in the full pre-petition amount or cease coal extraction and commence reclamation. Kaiser continued to conduct mining operations, did not post bond and did not initiate reclamation of the affected areas.

U.S. v HAROLD R. HUBLER AND LEON G. TAYLOR, 117 Bankr 160, 1990 US Dist LEXIS 14480 (WD PA 1990), aff'd without op, US v Hubler, 928 F 2d 1131 (CA3 Pa 1991).

"As plaintiff has not converted defendant's obligations [to reclaim the unpermitted mining area] into a monetary liability, nor may plaintiff do so, defendant's obligations are not 'claims' under the Bankruptcy Code" and are, therefore, not discharged by defendant's bankruptcy.

Initially, plaintiff requested a performance bond. The court found that this request did "not constitute an attempt to convert defendants' obligations into a monetary payment...but was intended as a means of motivating defendants to comply with their obligations -- failure to comply with the CO might have resulted in forfeiture of the bond but would not have relieved defendants of their obligations under the CO." The request for the performance bond was withdrawn as defendants' permit was obtained prior to the applicability of the performance bond provision of SMCRA.

IN RE N.P. MINING CO., 124 Bankr 846, 24 Collier Bankr Cas 2d (MB) 1603 (BC ND Ala 1990), aff'd, ALABAMA SURFACE MINING COM. v N.P. MINING CO., 142 BR 457, 1991 US Dist LEXIS 20318 (N.D. Ala 1991).

The court found that the civil penalties sought by the Alabama Surface Mining Commission could not receive priority as an 11 USC Sec. 503(b)(1)(A) administrative expense of the bankruptcy estate. "Payment of these civil penalties is neither factually nor legally an 'actual and necessary cost of preserving the bankruptcy estate' as required by the statute."

DECISIONS INVOLVING OTHER ENVIRONMENTAL LAWS

OHIO v KOVACS, dba B & W Enterprises et al., 469 US 274, 105 S Ct 705 (1985).
[Hazardous waste disposal]

The Court determined that where a state attempts to recover clean-up costs from a polluter, this type of debt is dischargeable in bankruptcy. The Court emphasized that this is limited to situations where a clean-up order is "converted into an obligation to pay money" and implied that equitable orders which demand performance and which cannot be satisfied merely by making a monetary payment to the governmental body that issued the order are not dischargeable in bankruptcy. In effect, the Court approved PENN TERRA.

MIDLANTIC NATIONAL BANK v NJ DEPT. OF ENVIRON. PROTECTION, 474 US 494, 106 S Ct 755 (1986). [Hazardous waste disposal]



The Court found that a Chapter 7 trustee (in a case converted from Chapter 11) could not abandon property found to be contaminated with PCBs because of the cost of cleanup to the estate. The Court said: "Neither the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety."

IN RE COMMONWEALTH OIL REFINING CO., INC., 805 F 2d 1175 (5th Cir 1986), cert. denied 483 US 1005 (1987). [RCRA]

In affirming the district court's and bankruptcy court's decisions, the Court of Appeals found that "a debtor can be forced to comply with federal and state environmental laws designed to protect the public health and safety, before that debtor has filed its plan of reorganization." EPA has the authority to enforce its regulatory power and EPA's actions were not an attempt to enforce a money judgment notwithstanding the fact that Commonwealth Oil was forced to expend funds in order to comply.

Cites to PENN TERRA, OHIO v KOVACS and MIDLANTIC.

IN RE SECURITY GAS & OIL, INC., 70 Bankr 786, 15 Bankr Ct Dec (CRR) 762 (BC ND Ca 1988). [Abandoned oil and gas wells]

Following PENN TERRA, the court held that West Virginia was not precluded, under the automatic stay, from requiring Security Gas to reclaim its abandoned wells ("West Virginia's action also is primarily intended to prevent future harm rather than compensate for past harm.") or from ordering the company to cease its current operations ("Thus, an environmental clean-up order should not be enjoined under section 105 where that order is designed to bring a debtor's continuing operations into compliance with state law.").

The court voided the forfeiture of the performance bond, finding that West Virginia did violate the automatic stay by causing Security Gas' performance bond to be canceled after the filing of the bankruptcy petition.

IN RE CHATEAUGAY CORP., 944 F 2d 997 (2nd Cir 1991). [CERCLA]

In affirming and explaining the district court ruling, the Court of Appeals stated that an injunction encountered in an environmental case that "does no more than impose an obligation entirely as an alternative to a payment right is dischargeable. Thus, if EPA direct LTV to remove some wastes that are not currently causing pollution, and if EPA could have itself incurred the costs of removing such wastes and then sued LTV to recover the response costs, such an order is a 'claim' under the Code. On the other hand, if the order, no matter how phrased, requires LTV to take any action that ends or ameliorates current pollution, such an order is not a 'claim'." In addition, "all clean-up costs assessed post-petition with respect to sites currently owned by LTV where there has been a pre-petition release or threatened release of hazardous wastes will be entitled to administrative priority."



IN RE TORWICO ELECTRONICS, INC., 1991 Bankr LEXIS 1281 (BC NJ 1991). [Solid Waste Management Act]

In following KOVACS, the court ruled "that where a debtor in bankruptcy cannot clean up environmental contamination himself or itself without paying money, the obligation to clean up pursuant to an injunction is a debt which is dischargeable in bankruptcy."

IN RE NORWESCO DEVELOPMENT CORP., 68 Bankr 123, 16 Collier Bankr Cas 2d (MB) 145 (BC WD Pa 1986). [Pennsylvania Clean Streams Law]

Pennsylvania DER ordered Norwesco, operating pursuant to a Chapter 11 plan, to provide a temporary and permanent water supply to homeowners whose water supply was damaged as a result of Norwesco's drilling operations. The court related aspects of the fact situation to both PENN TERRA and KOVACS then denied Norwesco's request for a stay of DER's order. The court found that Norwesco had not met its "burden" with regard to the factors required for injunctive relief. In addition, the court stated that it "does not believe that Norwesco has exhausted its duties and opportunities under state law."

OTHER MATERIALS

"Regulating Financial Responsibility for Bankrupt Operators", Douglas F. Brennan, July, 1987.

This article address various issues which governmental agencies face in seeking to enforce bonding, insurance and related financial requirements against operators who have entered bankruptcy.

ATTACHMENTS

- A. COMMONWEALTH OF PA, DEPT. OF ENVIRON. RESOURCES (DER) v PEGGS RUN COAL CO., 55 Pa Commw 312, 423 A 2d 765 (Pa Commw Ct 1980).
- B. IN RE PENN TERRA, LTD., 24 Bankr 427, 9 BCD 1123 (BC WD Pa 1982).
- C. PENN TERRA, LTD. v DEPT. OF ENVIRON. RESOURCES, 733 F 2d 267 (3rd Cir 1984).
- D. U.S. v F. E. GREGORY & SONS, INC., 58 Bankr 590, 24 ERC (BNA) 1110 (WD Pa 1986).
- E. U.S. v WHIZCO, INC., 841 F 2d 147 (6th Cir 1988).
- F. IN RE KAISER STEEL CORP., 87 Bankr 662, 5 BCR 285 (BC Colo 1988).
- G. U.S. v HAROLD R. HUBLER AND LEON G. TAYLOR, 117 Bankr 160, 1990 US Dist LEXIS 14480 (WD Pa 1990), aff'd without op, US v Hubler, 928 F 2d 1131 (CA3 Pa 1991).
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OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- J. OHIO v KOVACS, dba B & W ENTERPRISES et al., 469 US 274, 105 S Ct 705 (1985).
- K. MIDLANTIC NATIONAL BANK v NJ DEPT. OF ENVIRON. PROTECTION, 474 US 494, 106 S Ct 755 (1986).
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- O. IN RE TORWICO ELECTRONICS, INC., 1991 Bankr LEXIS 1281 (BC NJ 1991).
- P. IN RE NORWESCO DEVELOPMENT CORP., 68 Bankr 123, 16 Collier Bankr Cas 2d (MB) 145 (BC WD Pa 1986).
- Q. "Regulating Financial Responsibility for Bankrupt Operators", Douglas F. Brennan, July, 1987.