

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re)	
)	
Eagle-Picher Industries,)	Case No. 91-10100
Inc., et al)	
)	
)	Chapter 11
Debtor)	
-----)	
)	
Eagle-Picher Industries, Inc.)	Judge Burton Perlman
)	
)	
Movant)	
)	
vs.)	
)	
Blue Tee Corp.)	
Quapaw Tribe)	
)	
)	
Respondents)	

**ORDER ON MOTION FOR ORDER ENFORCING PLAN
AND CONFIRMATION ORDER**

Respondent Blue Tee is an operator now in possession of a certain Newton County Site located in Newton County, Missouri. Blue Tee filed a complaint in the United States District Court for the Western District of Missouri in which defendants are Asarco Inc. and reorganized debtor Eagle-Picher Industries Inc., Movant. The claim asserted in the complaint is for reimbursement of response costs incurred by Blue Tee at the Newton County Site. The first amended complaint in the Missouri case was served June 23, 2003. On January 30, 2004, Movant filed a motion in this court, the objective of which is to prohibit further prosecution of the Missouri suit. The Missouri complaint expressly states that it is based upon §107 and §113 of CERCLA, Comprehensive Environmental Response, Compensation, Liability Act of 1980 as amended.

Respondent Quapaw Tribe asserts that it is a sovereign Indian nation. On December 10, 2003, it filed suit in the United States District Court for the Northern District of Oklahoma seeking compensation for alleged environmental damage caused by the mining operations of Movant. It seeks as well compensation for personal injury to tribal and tribal member's resources. At the time that it appeared in this court, it had not yet done so, but expressed its intention to bring claims

under CERCLA against Movant.

Movant reacted to these initiatives by filing the present motion, contending that the plan and order of confirmation in the Chapter 11 bankruptcy case precluded the actions of both Blue Tee and the Quapaw Tribe, Respondents here. Respondents then filed fulsome responses to the motion.

In addition Gold Fields Mining Corporation, identified as a co-defendant of Movant in the Oklahoma lawsuit filed an objection to the motion filed by the Movant. NL Industries, a co-defendant with Movant in the Oklahoma lawsuit, also filed an opposition to the motion of Movant.

On February 27, 2004 Respondent, the Quapaw Tribe, filed a motion to withdraw the reference, and on April 28, 2004, filed a motion to stay proceedings in this court pending resolution of the motion to withdraw. On May 17, 2004, Respondent Blue Tee joined in the motion to stay.

On May 25, 2004 the District Court denied the motion for withdrawal of reference.

Briefing on Movant's original motion continued through June of 2004. On August 6, 2004, this court issued a Pre-trial Order. That order required preliminary pre-trial statements from the parties, and stated that upon the receipt of such statement, the court would convene a pre-trial conference.

Such a conference was held on November 5, 2004. As a consequence of that conference it was concluded that Blue Tee and the Quapaw Tribe would be made the subjects of separate motions. It was further concluded that the question of when a claim arises for purposes of this litigation should be decided and a hearing on that subject should be held. The hearing was held January 11, 2005.

Just prior to the hearing, a motion was filed by the Burlington Northern and Santa Fe Railway Company (BNSF) to intervene and be heard on the matter before the court. BNSF sought to intervene because it is named as a defendant in various of the litigation involving the parties now before the court, EPI, Blue Tee, and the Quapaw Tribe. The motion of BNSF to intervene was denied.

As requested at the November 5, 2004 pre-trial conference by counsel for Blue Tee, the question of when a claim arises was the subject of memoranda and hearing. Respondent Quapaw Tribe also participated and was heard, as was Gold Field. The position of Movant is that the suits brought by Blue Tee and the Quapaw Tribe are barred by the confirmed plan; Blue Tee and Quapaw Tribe received either actual or constructive notice of the bar date which was established in the Chapter 11 bankruptcy case for the filing of

all non-asbestos related proofs of claim; the pendency of the Chapter 11 case; and confirmation of the plan. Blue Tee, for its part, states that the motion should be denied because the claims which it asserts were not "fairly contemplated" by the parties prior to confirmation of the plan.

Quapaw Tribe joins Blue Tee in urging the "fairly contemplated" standard. Quapaw Tribe argues further that it was not adequately or fairly notified of the bankruptcy filing or of any bar date. Additionally, Quapaw Tribe says that the Environmental Settlement Agreement entered into between the U.S. Environmental Protection Agency and the debtor did not include the Quapaw Tribe as a party and is not binding upon the Quapaw Tribe.¹ Further, Quapaw Tribe says that the actions of the Movant while in possession continue to cause the release of hazardous substances for which Movant should be held liable pursuant to the Resource Conservation and Recovery Act, and Oklahoma law.

Our analysis begins with a statement of the parameters within which we approach decision. The hearing which led to the present decision was held at the behest of Respondent Blue

¹ Prior to confirmation, debtor in possession Eagle Picher Inc. entered into a Settlement Agreement with U.S. Environmental Protection Agency and certain states, which agreement was incorporated into the confirmation order.

Tee. The facts upon which the Blue Tee suit is based are that Blue Tee is presently responsible for remediation of environmental infractions, which remediation Blue Tee has already carried out, and for which it has expended funds. The Blue Tee claim being asserted arises under CERCLA. (While respondent Quapaw Tribe and Gold Fields appeared at the hearing and were heard, the present decision will impact directly only Blue Tee.)

For present purposes the parties have limited the question before the court to the naked one of when does a claim arise: does it arise when the underlying act is committed, or does it arise when "fairly contemplated" by the parties. In dealing with this question there come into play considerations from bankruptcy law, environmental law, and due process. It is a balancing of these considerations which leads the court to its conclusion. It needs no citation of authority to support the statement that the fundamental objective of the bankruptcy law is to provide a debtor with a fresh start. The rationale behind the CERCLA legislation is that parties which have caused environmental disruption should be held accountable for remediating the problem they have caused. In re Chateaugay Corp., 944 F.2d 997,1002 (2nd Cir. 1991). Due process enters the picture because a claimant is entitled to due process

before a liability can be imposed on it:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 70 S.Ct.

652, 657, 94 L.Ed. 865 (1950).

Debtor argues that a claim arises at the time of the "underlying act", based upon the definition of the word "claim" in the Bankruptcy Code. Debtor says that not only has this court previously made a holding to that effect, but as well, the District Court in declining to withdraw the reference held that what is presented in this litigation is strictly a Bankruptcy Code issue. Debtor urges in support of its position In re Chateaugay Corp. supra. The Chateaugay case involved a suit by the United States EPA to recover the cost of remediation from a reorganized debtor. The Court of Appeals affirmed the District Court's holding that claims that might have been asserted by EPA for pre-petition conduct by the debtor were dischargeable in bankruptcy.

Respondent Blue Tee asserts that the "underlying act" standard is flawed because "due process is knowing what your rights are and having a reasonable opportunity to vindicate

them." (Transcript p.25.) Blue Tee argues that the "fairly contemplated" standard is more appropriate because Blue Tee had no knowledge about whether the government would pursue it for cleanup, and until it knew that, it had no reason to believe that it had a claim against the debtor under CERCLA. Indeed, the major contention of Blue Tee is that it would be unfair to bar it from asserting a claim of which it had no knowledge prior to the time that EPA brought it to its attention. Counsel for Blue Tee summarized its position by saying:

"... did Blue Tee and Eagle-Picher have reason to know that those portions of Newton County that have been cleaned up by Blue Tee and partly by Asarco were going to be cases that required clean up that we would be held responsible for." (Transcript p. 32.)

Blue Tee places primary reliance upon Signature Combs Inc. v. USA 253 F. Supp. 2d 1028 (D.C. W.D. Tenn. 2003.). In that case the question was presented whether a CERCLA claim could be asserted against a reorganized debtor or whether it had been discharged upon confirmation of the debtor's Chapter 11 plan. On debtor's motion for judgment on the pleadings, the court denied the motion holding that in resolving the litigation before it, the court would apply a "fair contemplation" standard in determining whether the claim asserted against the debtor had been discharged in its bankruptcy. In reaching the conclusion that the "fair contemplation" standard was the proper one, the

court said:

This "fair contemplation" or "foreseeability" standard posits that a contingent CERCLA claim arises pre-petition only if it is "based upon pre-petition conduct that can fairly be contemplated by the parties at the time of the debtors' bankruptcy." *Jensen*, 995 F. 2d at 930 (quoting *In re Nat'l Gypsum Co.*, 139 B.R. 397, 404 (N.D. Tex.1992)). Thus, a claim accrues when the potential CERCLA claimant, at the time of bankruptcy, "could have ascertained through the exercise of reasonable diligence that it had a claim" against the debtor for a hazardous release. *In re Crystal Oil Co.*, 158 F. 3d 291, 296 (5th Cir. 1998).

Blue Tee then argued that as a matter of fairness, and since this is a court of equity, it should not be held that its claim is barred.

We do not here address the matters raised at the hearing by respondent Gold Field because those arguments do not bear on the question presented to us for resolution here.

As we stated at the outset, resolution of the standard here to be applied involves a consideration of bankruptcy law, environmental law, and due process law. After considering the arguments of the parties, and weighing the foregoing considerations, we conclude that the "underlying act" standard is the proper standard here to be applied. We see no reason why, because a claim is an environmental claim, where a putative claimant has had its due process rights observed, such a claim should not be discharged in bankruptcy. This holding does not

mean that under any and all circumstances a claim arising from a pre-petition act will be discharged; it is only where the due process rights of the claimant are protected, that this result will occur. See §523(a)(3). Where a claimant has notice of a bankruptcy, it is not unreasonable to expect that it will perform appropriate due diligence, and uncover the possibility of an environmental claim which it should assert against the debtor. Those who are concerned that a party which has caused environmental damage might not have to pay to remedy it, must accept the fact that to effect the purposes of the bankruptcy law the rights of some claimants are lost.

While Blue Tee contends that the "fair contemplation" standard better accommodates the intersection of bankruptcy and environmental concerns, we find this to be illusory. As stated by the court in Signature Combs, supra, this standard is described:

This "fair contemplation" or "foreseeability" standard posits that a contingent CERCLA claim arises pre-petition only if it is "based upon pre-petition conduct that can fairly be contemplated by the parties at the time of the debtors' bankruptcy." (Citations omitted)

Blue Tee in argument in the present case formulates the "fair contemplation" standard as giving rise to a claim by Blue Tee against movant only when EPA tells the occupant of premises that it must remediate an environmental fault. If this formulation

were to be adopted it would mean that a creditor with notice of bankruptcy would have no obligation whatever to perform due diligence. The duty to make inquiry is recognized by the court in Signature Combs itself, for the court there (at p.1037) requires that a claimant "exercise...reasonable diligence" before it can assert a claim. The "fair contemplated" formulation in addition totally obviates the possibility of a fresh start, a bankruptcy bed rock. Indeed, it would mean that a debtor could never return to economic viability because there would be no end to post- petition claims.

Further, a "fair contemplation" standard will encourage claimants to defer claims until after reorganization in the hopes that full payment can be obtained, rather than the partial payment usually available under a reorganization plan. In Chateaugay, the court dealt with the question of defining "claim" in deciding when a claim arose. In support of its thesis that EPI had a pre-petition claim, the court said (at p.1005):

Accepting EPA's argument in this Chapter 11 reorganization case would leave EPA without any possibility of even partial recovery against a dissolving corporation in a Chapter 7 liquidation case. Indeed, while EPA obviously prefers in this case to keep its CERCLA claim outside of bankruptcy so that it may present it, without reduction, against the reorganized company that it anticipates will emerge

from bankruptcy, one may well speculate whether, if unincurred CERCLA response costs are not claims, some corporations facing substantial environmental claims will be able to reorganize at all.

The same considerations apply here, and lead to the conclusion that "underlying act" is the proper standard to apply in this case.

For the forgoing reasons, this court adopts for purposes of adjudicating the Blue Tee claim, the "underlying act" standard.

So Ordered.

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