

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CIVIL ACTION
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AMERICAN PREMIER UNDERWRITERS, : :
INC. : NO. 06-cv-03167-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

April 4, 2007

The United States filed this lawsuit in the United States District Court for the District of Massachusetts seeking to recover from American Premier Underwriters, Inc. ("APU") (the present name of the entity which emerged from the reorganization of the Penn Central Transportation Company and related companies), the cost of cleaning up environmental pollution at a site located in Wellesley, Massachusetts, known as the "Morses Pond Culvert Site"). APU sought dismissal of the action on the ground that it was barred by the provisions of the October 24, 1978 final consummation order in the Penn Central bankruptcy. Since this court retains exclusive jurisdiction to interpret and enforce the terms of the consummation order, the action has been transferred to this court for disposition.

It is undisputed that the materials which have resulted in pollution were first deposited at the site in question in the 1890's, and have presumably been leaching into the ground and surrounding waterways since that time. It is also undisputed that Penn Central Transportation Company ("PCTC") owned and

operated a rail line at the property between October 1, 1969 and January 17, 1973, and that predecessor railroad companies conducted rail operations at the site more or less continuously since 1833.

Having determined that the placement of fill material at the site constituted a "release" or "threat of release" of hazardous substances, as those terms are used in §§ 101(14), 101(22), and 107(a) of CERCLA, 42 U.S.C. §§ 9601(14), 9601(22) and 9607(a), the United States government proceeded to clean up the site, between 2000 and 2002, at a cost of approximately \$4 million.

Under the terms of the Final Consummation Order in the PCTC reorganization proceedings, APU became the absolute owner of all of the property of the debtor "free and clear of all claims, rights, demands, interest, liens, and encumbrances of every kind and character, whether or not properly or timely filed and whether or not approved, acknowledged or allowed in these proceedings" [¶ 3.03(a)]. The Consummation Order included the following injunctive provisions:

7.02. Injunction. All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suits or proceedings, at law or in equity or otherwise, against the Reorganized Company ... or against any of the assets or property of the Reorganized Company ... on account of or based upon any right, claim or interest of

any kind or nature whatsoever which any such person, firm, governmental entity or corporation may have in, to or against any of the debtors, the trustees of the properties of the Debtors, the Trustees of the Properties of the Debtors or any of their assets or properties [except for the valuation proceedings before the Special Court, then pending].

Although the clear intent of this language was to establish that the reorganized company emerging from bankruptcy would not be faced with liability for the pre-consummation activities of the debtor, it is now clear that, under the law of this Circuit, claims arising under CERCLA are not barred by the consummation order. In re Penn Central Transportation Co., 944 F.2d 164 (3d Cir. 1991) ("Paoli Yard" Litigation). The CERCLA statute was not enacted until after the consummation order was entered, hence "claims" under that statute were not in existence or even contingent at the time of the consummation order, hence could not be affected by it.

APU does not challenge the ruling in Paoli Yard, but seeks to distinguish the present case because the pollution involved in the present case affected "waters of the United States," and gave rise to clean-up claims under the provisions of the Clean Water Act. It is argued that, since § 311 of that statute, 33 U.S.C. § 1321, provided a virtually identical remedy available to the government, and since the Clean Water Act was enacted in 1972, the claims now being asserted did in fact exist prior to the date of the consummation order and are barred by

that order. APU relies upon the decision of the Seventh Circuit Court of Appeals in In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 3 F.3d 200 (7th Cir. 1993) ("Milwaukee Road II"), which held that CERCLA claims arising post-consummation would nevertheless be barred by a consummation order if sufficiently similar to claims which could have been raised under other statutes enacted earlier.

Although the government argues, among other things, that this court should not follow the Seventh Circuit precedent, I find the Milwaukee Road II reasoning persuasive. The critical issue, therefore, is whether the government did in fact have a pre-consummation claim which it could have asserted under the Clean Water Act. If so, then the claims now being asserted under CERCLA would be barred by the consummation order.

Unfortunately for APU, although the Clean Water Act was passed in 1972, its implementation was not immediate. The statute authorized the Environmental Protection Agency to determine which pollutants were sufficiently hazardous to require removal from the environment, and the levels of each such pollutant necessary to mandate corrective action. The final regulations did not become effective until after the date of the consummation order in this case. In short, the government did not have a "claim" under the Clean Water Act which could have been barred by the consummation order.

It is true, as APU argues, that the government itself is largely responsible for the delays in implementing the Clean Water Act. Thus, it can be argued that the only reason the government's "claim" under the Clean Water Act did not arise pre-consummation is because the government chose to delay implementation of the statute. But I am not persuaded that this circumstance affects the applicability of the Paoli Yard decision. Presumably, the government could have enacted CERCLA itself pre-consummation, but did not choose to do so. There is nothing in the law of bankruptcy which enables a federal court to control the legislative activities of Congress.

For the foregoing reasons, APU's motion to dismiss must be denied.

An order follows.

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ORDER

AND NOW, this 4th day of April 2007, upon consideration of the motion of defendant American Premier Underwriters, Inc. to dismiss plaintiff's complaint, and plaintiff's opposition, IT IS ORDERED:

That the defendant's motion is DENIED.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.