United States v. Apex Oil Co., Inc.: State of the Law Regarding Discharge of Environmental Injunctions

David A. Johnson, Jr.[1]
David Scriven-Young,[2] Peckar & Abramson, P.C.

In August 2009, the Seventh Circuit issued its opinion in *United States v. Apex Oil Co., Inc.*[3] that sent a ripple through the bankruptcy and environmental world. The court ruled that an injunction to clean up a contaminated property is not dischargeable, contrary to a prior ruling by the Sixth Circuit. This ruling highlights the competing policy objectives of environmental regulations and the Bankruptcy Code.

Bankruptcy, which is specifically discussed in the United States Constitution,[4] was created to give a person a fresh start and encourage the risk-taking that has contributed to this nation's growth. On the other hand, environmental regulations were created to protect the environment and the health and safety of the individual. Both of these objectives are important; however, problems arise when you try to reconcile the two. Put simply, "[b]ankruptcy does not insulate a debtor from environmental regulatory statutes."[5] Furthermore, the filing of a bankruptcy petition does not operate as a stay against "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power."[6] However, in application this rule has become more complicated. The *Apex Oil* ruling thrusts this complicated topic back into the spotlight and creates a circuit split. Thus, the treatment of environmental injunctions in bankruptcy is an issue that may end up before the Supreme Court.

"Under the Bankruptcy Code, . . . except for debts saved from dischargeability under the Code, specifically, 11 U.S.C.S. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy."[7] A debt, under the Bankruptcy Code, is a "liability on a claim."[8] A claim is

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
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> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.[9]

Therefore, the key for determining whether an environmental obligation is dischargeable in bankruptcy is whether the obligation is a liability on a claim. Courts take different approaches to assess whether an injunction meets this standard. Various environmental statutes authorize courts to issue mandatory injunctions requiring specific performance. This type of situation typically occurs when a property owner has violated an environmental regulation and the government obtains an order for the property owner to clean the property. The other typical situation occurs when a property owner is ordered not to partake in an activity that would cause environmental damage. The law is well settled in this second scenario that bankruptcy does not relieve a debtor of a prohibitive injunction.

Any analysis regarding the discharge of environmental injunctions must start with the U.S. Supreme Court case *Ohio v. Kovacs*.[10] In *Kovacs*, the defendant was the CEO of a chemical corporation. The state of Ohio obtained an injunction against the defendant requiring him to clean up a hazardous waste site. The defendant failed to comply with the injunction causing an Ohio state court to appoint a receiver to take possession of all of the defendant's property and comply with the order. After the court appointed the receiver, but before the cleanup began, the defendant filed for bankruptcy protection. The Supreme Court held that the appointment of the receiver divested the defendant of the assets or ability to clean up the property, which left the defendant with a financial requirement under the injunction. The Court noted that Ohio's counsel admitted that the only remedy sought was a monetary payment by the defendant. As a result, the Court held the monetary payment that Ohio was seeking to be a claim under Section 101(4) of the Bankruptcy Code and was dischargeable. As part of a list of caveats, the Court stated that "we do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable."[11]

In *Penn Terra, Ltd. v. Department of Environmental Resources,*[12] a Pennsylvania mine company was found to have been operating in violation of state environmental laws. The Third Circuit held that the automatic stay did not apply stating, "the suit . . . to compel Penn Terra to remedy environmental hazards was properly brought as an equitable action to prevent future harm, and did not constitute an action to enforce a money judgment."[13] Although *Penn Terra* was decided before *Kovacs,* the Supreme Court in *Kovacs* stated in a footnote that "[t]he automatic stay provision does not apply to suits to enforce the regulatory statutes of the State, but the enforcement of such a judgment by seeking money from the bankrupt . . . is another matter."[14]

Kovacs and *Penn Terra* set the stage for the Sixth Circuit's decision in *United States v. Whizco*.[15] In *Whizco*, the defendant was the owner of a bankrupt coal company that mined portions of Tennessee. Under the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), the government obtained an injunction requiring the defendant to "perform specific acts of reclamation which would abate the environmental damage at the defendants' surface mining site."[16] Despite the fact that the SMCRA does not allow for the payment of money in lieu of performance, the court made special note that the defendant was elderly and without the means to personally perform under the injunction. Therefore, the defendant would be required to spend money to hire others to reclaim the mine. As a result, the court held that the circumstances indicated that the government was essentially seeking the payment of money, which was a dischargeable claim under the Bankruptcy Code.

In *Apex Oil,*[17] the government obtained an injunction under the Resource Conservation and Recovery Act ("RCRA") requiring Apex to clean contaminated property in Illinois that was contaminating groundwater. Similar to *Whizco,* Apex no longer had the ability to perform the cleanup itself and would have to spend a substantial sum of money to do so. Additionally, RCRA, like the SMCRA, does not allow for the payment of money in lieu of performance. However, the Seventh Circuit expressly rejected the holding in *Whizco*. The court held that "discharge must indeed be limited to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than imposing a cost on the defendant, as virtually all equitable decrees do."[18] The Seventh Circuit reconciled this with the *Kovacs*

decision by stating that "[t]he plaintiff in our case (the government) is not seeking a payment of money and the injunction that it has obtained does not entitle it to payment."[19] Thus, the Seventh Circuit implemented a more objective approach than the expenditure-based analysis that the *Whizco* court employed.

Despite the attention that *Apex Oil* is receiving, it is not the first case to conclude that environmental injunctions are not dischargeable. Notably, the Third Circuit in *In re Torwico Electronics*,[20] which is cited in *Apex Oil*, dealt with a very similar situation. Mirroring the holding in *Apex Oil*, the Third Circuit analyzed whether a right to payment was allowed by a New Jersey environmental statute. The Court concluded that because the statute did not contain a provision allowing for the state to obtain a money judgment, the injunction was not a claim within the definition of Section 101 of the Bankruptcy Code.

The result of the split between the Sixth and Seventh Circuits sets the stage for a Supreme Court battle that will determine the fate of the treatment of environmental injunctions in bankruptcy. For now, it seems that the vast majority of cases align with the Seventh Circuit.[21]

[1] David A. Johnson, Jr. is a 2009 Case Western Reserve University School of Law graduate and is licensed to practice in Illinois. David invites comments on this article at DJohns30@Gmail.com.

[2] David Scriven-Young is an attorney at Peckar & Abramson, P.C. in Chicago, Illinois. David practices civil litigation and has expertise in environmental and construction law. He is also the author of the Illinois Environmental Law Blog (www.IllinoisEnvironmentalLaw.Blogspot.com).

[3] 579 F.3d 734 (7th Cir. 2009).

[4] U.S. Const. art. I, § 8, cl. 4.

[5] U.S. v. Hansen, 262 F.3d 1217, 1238 (11th Cir. 2001).

[6] 11 U.S.C. § 362(b)(4) (West 2010).

[7] Phipps v. Kentucky, No. 91-5986, 1992 U.S. App. LEXIS 32590 (6th Cir. Dec. 3, 1992).

[8] 11 U.S.C. § 101(12) (West 2010).

[9] Id. at § 101(5).

[10] Ohio v. Kovacs, 469 U.S. 274 (1985).

[11] Id. at 285.

[12] 733 F.2d 267, 278 (3d Cir. 1984).

[13] Id. at 278.

[14] Kovacs, 469 U.S. at 283 n.11.

[15] 841 F.2d 147 (6th Cir. 1988).

[16] Id. at 148.

[17] 579 F.3d 734 (7th Cir. 2009).

[18] Id. at 738.

[19] Id. at 737.

[20] 8 F.3d 146, 149 (3d Cir. 1993).

[21] Despite the stack of authority cited by the Seventh Circuit, other cases have found an environmental injunction to be a claim under the Bankruptcy Code. For example, in In re Goodwin, 163 B.R. 825 (Bankr. D. Idaho 1994), superseded on other grounds as stated in In re Basinger, No. 01-02386, 2002 Bankr. LEXIS 1925 (Bankr. D. Idaho Jan. 31, 2002), a debtor was being sued in an Idaho state court for leaking underground storage tanks. When the debtor filed for bankruptcy protection, the state court stopped the proceedings and sought guidance from the bankruptcy court on whether the automatic stay prevented the state court proceedings from continuing. As part of its opinion, the bankruptcy court stated that the "permanent mandatory injunction" to force the debtor to clean the contaminated property constituted a claim under Section 101(5)(B) of the Bankruptcy Code. An Idaho Bankruptcy Court found part of the Goodwin analysis superseded by a change to the Bankruptcy Code in In re Basinger. However, the court acknowledged that "[u]nder Goodwin, however, [Idaho Department of Environmental Quality] cannot pursue and enforce the State's police powers through relief which is injunctive in name only, and requires Debtors to fund (or reimburse the State for) the cleanup of this property which they no longer control or use." In re Basinger, 2002 Bankr. LEXIS 1925, at *29. Although Goodwin is an automatic stay case, its classification of the injunction as a claim is significant to the discharge analysis and is contrary to the Seventh Circuit's classification.