

United States v. Apex Oil Co.

The Seventh Circuit Holds that RCRA Provides Remedies that Cannot Be Discharged in Bankruptcy

By Shata L. Stucky

Courts have long struggled with the issue of whether a debtor's liability for the remediation of contaminated property is a debt that can be discharged in bankruptcy. In a relatively recent case, *United States v. Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009), the Seventh Circuit provided more clarity on the issue of whether an obligation to comply with a cleanup order under the Resource Conservation and Recovery Act ("RCRA") is a "claim" that can be discharged in bankruptcy.

Factual Background. In *Apex Oil*, the issue arose following Chapter 11 bankruptcy proceedings—proceedings in which the debtor is relieved of any debt that arose before the date of the bankruptcy confirmation. 11 U.S.C. § 1141(d)(1)(A). The bankruptcy code defines "debt" simply as "liability on a claim." *Id.* § 101(12). And "claim" is defined as either a "right to payment" or a "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." *Id.* § 101(5).

Apex Oil argued that the government's order requiring cleanup of a contaminated site was a dischargeable claim because it constituted a right to an equitable remedy for breach of performance that gives rise to a right to payment. Brief of Defendant-Appellant at 18, *Apex Oil*, 579 F.3d 734 (No. 08-3433). Apex Oil emphasized that it neither owned nor controlled the contaminated site, that it did not have the technical expertise to carry out the cleanup, and that it therefore would be practically compelled to pay money to a third party to comply with the cleanup order. *Id.* at 21. For support, Apex Oil cited *Ohio v. Kovacs*, 469 U.S. 274 (1985), in which the Supreme Court held that a debtor's obligation under a similar order was dischargeable where, after the debtor failed to comply with the cleanup order, the State of Ohio had appointed a receiver to carry out the cleanup. *Id.* at 282-83. Because the debtor in *Kovacs* could only pay money to the receiver to comply with the order, the Supreme Court held that the cleanup obligation gave rise to a right to payment and thus was dischargeable. *Id.*

The Seventh Circuit Rejected Apex Oil's Argument. The court noted that "[a]lmost every equitable decree imposes a cost on the defendant, whether the decree requires him to do something, as in this case, or, as is more common, to refrain from doing something." *Apex Oil*, 579 F.3d at 737. The court distinguished the case from *Kovacs* on the basis that, unlike the debtor in *Kovacs* who was specifically required to **pay money** to comply with the cleanup order, Apex Oil's specific obligation was to **comply with the cleanup order**: "The 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." *Id.*

In reaching its conclusion, the Seventh Circuit closely examined the bankruptcy code's definition of "claim" and declared that the natural reading of the language is that an equitable claim is dischargeable only when the holder of the claim "can, in the event that the equitable remedy turns out to be unobtainable, obtain a money judgment

instead.” *Apex Oil*, 579 F.3d at 736. The court then examined the enforcement provisions of RCRA and emphasized that RCRA does not authorize any form of monetary relief. *Id.* The court cited several cases holding that the RCRA “provision authorizing private suits, 42 U.S.C. § 6972(a)(2), has been held not to authorize monetary relief” and emphasized that the relevant language in the private-suit provision is identical to the provision that authorized the government to seek an injunction against Apex Oil. *Apex Oil*, 579 F.3d at 736. Because RCRA does not entitle the government to obtain a money judgment or demand payment of cleanup costs, the Seventh Circuit concluded that the cleanup order was not a dischargeable claim.

Implications of *Apex Oil*. Although the Seventh Circuit’s holding in *Apex Oil* is not controlling in other circuits, it gives insights into how courts are likely to approach the issue of whether an obligation to comply with a cleanup order is a claim that is dischargeable in bankruptcy. Courts are unlikely to be interested in whether the debtor owns or controls the contaminated site, or whether the debtor will be required to hire a third party to conduct the cleanup. Instead, courts are likely to closely examine whether the holder of the equitable claim could have sought monetary relief instead.

In *Apex Oil*, the court found that RCRA provided a relatively simple answer to the relevant inquiry—because RCRA does not authorize any form of monetary relief, the RCRA cleanup order was not dischargeable. The analysis, however, is more complicated under other environmental laws, including the federal Superfund law, that provide different enforcement mechanisms. See, e.g., *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991) (conducting complex analysis of CERCLA remedies and determining that—although CERCLA entitles the government to seek payment if it elects to incur cleanup costs itself—a CERCLA cleanup order that accomplishes the dual objectives of requiring cleanup *and* stopping ongoing pollution is not a dischargeable claim because the government “has no authority to accept a payment from a responsible party as an alternative to continued pollution”). Because of the relative simplicity of RCRA’s enforcement provisions and the importance the Seventh Circuit placed on these provisions in *Apex Oil*, the government is likely to utilize RCRA when it seeks to hold accountable a party that has been, is, or will likely be involved in bankruptcy proceedings.

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