UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
New Waterbury, Ltd., A California Limited Partnership,	)	**Docket No. TSCA-I-88-1069**
	)	
	)	
Respondent	)	

ORDER DENYING MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Under date of October 19, 1992, Complainant moved for certification of an interlocutory appeal from the Order Granting Motion To Reopen Hearing, dated October 8, 1992. The motion alleges that the Order departs dramatically from established case law and policy by placing the burden of presenting evidence of Respondent's ability to pay as part of Complainant's prima facie case. Additionally, it is alleged that reopening the hearing contravenes the principle of procedural finality.

Opposing the motion for certification, New Waterbury argues that the basis of the Order was simply that New Waterbury was misled as to the relevance of certain information and consequently had good cause for not adducing it (Motion In Opposition To Complainant's Motion For Certification Of Interlocutory Appeal, dated October 23, 1992).

D I S C U S S I O N

For the reasons hereinafter appearing, the Order Granting Motion to Reopen Hearing is affirmed and the Motion For Certification Of Interlocutory Appeal will be denied.

Firstly, Complainant's basic argument, namely, that New Waterbury hadn't shown an inability to pay the penalty imposed because evidence as to the financial status of the general partner, Vanta, Inc., wasn't adduced at the hearing, although accepted by the Initial Decision, is simply wrong. This is because a judgment against a partnership is not a judgment against the partners. See Words and Phrases "Partnership." Indeed, the general rule is that resort to assets of individual partners may only be had after partnership assets have been exhausted. 68 C.J.S. Partnership § 195. Accordingly, action to collect the penalty from Vanta, Inc. would involve a separate proceeding, which makes all the more compelling the propriety of the Order at issue here.[1/]

Secondly, if Complainant intended to rely on the assets of Vanta, Inc. to satisfy its statutory obligation to consider New Waterbury's ability to pay and the effect of the penalty on New Waterbury's ability to continue in business, then due process and the Administrative procedure Act required that notice of such intention be given. See, e.g., Yellow Freight System, Inc. v. Martin, 954 F.2d 353 (6th Cir. 1992).

[1/] In its present posture, the ruling in the Initial Decision that evidence of Vanta, Inc.'s financial status is relevant and crucial to New Waterbury's ability to pay is considered the law of the case.

Thirdly, once a respondent has presented its case, it is no longer relevant whether complainant has established a prima facie case. See Kay Dee Veterinary, Division of Kay Dee Feed Company, FIFRA Appeal No. 86-1 (CJO, October 27, 1988).

Fourthly, the conclusion in the Initial Decision that Complainant's prima facie case must include some showing of ability to pay flows directly from the statutory requirement that a firm's ability to pay be considered in determining the amount of the penalty and from the Rules of Practice and is neither novel nor unprecedented. Under Consolidated Rule 22.24 (40 CFR Part 22), Complainant's initial burden includes not only a showing that the violation or violations occurred as alleged in the complaint, but also the appropriateness of the proposed penalty. In the face of the mentioned requirement of the statute and the quoted provision of Rule 22.24, Complainant's assertion that it has no obligation to present any evidence on ability to pay is not accepted.[2/]

The Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA (45 Fed. Reg. 59770 et seq., September 10, 1980) provide at 59775 that the firm shall be presumed to have the ability to pay at the time the complaint is issued. The 1990 PCB Penalty Policy is to the same effect (Id. at 16, 17). It is, however, one thing to make this presumption in the context of issuing a complaint and quite another to apply such a presumption

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[2/] Kay Dee, supra ("EPA regulations impose the burden of persuasion on the complainant in a civil penalty proceeding, both with regard to the occurrence of the violation and the magnitude of the penalty").

in the course of evaluating evidence after an adjudicatory hearing in accordance with the Consolidated Rules of Practice. To apply the presumption in the latter situation appears to be elevating the Guideline or the Penalty Policy, as the case may be, over the Rules of Practice, which is at least questionable, because only the Rules of Practice have the benefit of having been promulgated in accordance with the APA. Moreover, applying such a presumption in the face of Consolidated Rule 22.24 appears to be confusing the burden of persuasion with the burden of production. In accordance with well settled principles, the burden of persuasion never shifts.

In view of the foregoing, it is concluded that the Chief Judicial Officer in Kay Dee, supra, correctly placed on complainant the burden of persuasion that a proposed penalty was reasonable taking into account evidence in the record as to its likely financial impact on respondent. Although Helena Chemical Company, FIFRA Appeal No. 87-3 (CJO, October 16, 1989), contains language to the effect that both the burden of production and the burden of persuasion as to the effect of a penalty on a firm's ability to continue in business are on the respondent, this language is difficult to reconcile with Kay Dee, supra.

Helena Chemical is based on the notion that the effect of a penalty on a firm's ability to continue in business is an affirmative defense and that complainant should not be required to prove a negative. An affirmative defense is analogous to confession and avoidance and generally consists of matter which

plaintiff is not required to prove initially. Words and Phrases, "Affirmative Defense." While the proposition that complainant should not be required to prove a negative may readily be accepted, the Civil Penalty Guidelines Under FIFRA (39 Fed. Reg. 27711, July 31, 1974) and the FIFRA Penalty Policy (July 5, 1990) require evidence of the sales category into which respondent is to be placed in order to calculate a proposed penalty. Accordingly, such evidence may hardly be regarded as matter which complainant is not required to prove initially in a FIFRA civil penalty proceeding. Indeed, in Helena Chemical there was evidence that the firm's sales were in excess of $300 million, which on its face showed that a penalty of over $100,000 was within its financial capability.

Edward & Josephine Pivirotto, E & J Used Tool Co., TSCA Appeal No. 88-1 (CJO, February 15, 1990), the principal case cited by Complainant, was a proceeding under the Equal Access To Justice Act, 5 U.S.C. § 504, wherein respondents sought attorneys fees and expenses based on the claim they were prevailing parties after reaching a settlement, wherein the penalty amount the Agency agreed to accept was reduced from $9,900 to $2,000. The settlement was apparently based on evidence of respondent's ability to pay. In the context of establishing that complainant's position was substantially justified, even if respondents were prevailing parties, Pivirotto does state that "[r]espondents have the burden to raise and establish their inability to pay proposed penalties" (slip opinion at 9). The authority cited for this statement is, however, the 1980 Guidelines for the Assessment of Civil Penalties

Under Section 16 of TSCA, and, as noted ante, there are reasons for questioning this conclusion in the face of TSCA section 16 requiring the Administrator to consider in determining the amount of the penalty, inter alia, "ability to pay" and "effect on ability to continue to do business" and Rule 22.24 requiring complainant to prove the violations alleged and the "appropriateness of the penalty." Be that as it may, the propriety of the Order at issue here is demonstrated by the first three reasons recited above and is not dependent on the allocation of the burden of persuasion as to ability to pay.

Complainant's second argument is equally lacking in merit. The Order carefully considered the requirements for reopening a hearing in Rule 22.28 and concluded that New Waterbury's motion satisfied the requirements of the rule. The circumstances are sufficiently unique that the specter raised by Complainant of reopening a hearing whenever there is a change in a respondent's financial condition subsequent to an initial decision simply will not occur. Moreover, changes in New Waterbury's financial condition here, insofar as attributable to costs of PCB removal, are attributable to an action brought by the government. Lastly, the analysis at the beginning of this discussion indicates that the Initial Decision would not withstand an appeal, unless New Waterbury is given an opportunity to present evidence as to the financial condition of the general partner.[3/]

[3/] Because reopening a hearing has the effect of suspending the appeal period until a decision is rendered as to the reopened (continued...)

O R D E R

The Motion For Certification Of Interlocutory Appeal is denied.

Dated this 4th day of November 1992.

Spencer T. Nissen
Administrative Law Judge

3/(...continued)
matters, it goes without saying that Complainant may appeal such a decision.

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL,** dated November 4, 1992, in re: New Waterbury, Ltd., A California Partnership, Dkt. No. TSCA-I-88-1069, was mailed to the Regional Hearing Clerk, Reg. I, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: November 4, 1992

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