UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DISMISSED FOR LACK OF STANDING: January 11, 2012

CBCA 2058

USCS CHEMICAL CHARTERING LLC,

Appellant,

v.

AGENCY FOR INTERNATIONAL DEVELOPMENT,

Respondent.

Alfredo R. Pérez of Weil, Gotshal & Manges LLP, New York, NY, and Houston, TX, counsel for Appellant.

Natalie Thingelstad, Office of General Counsel, Agency for International Development, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **McCANN**.

DANIELS, Board Judge.

Statute mandates that an entity seeking protection under the bankruptcy laws "shall . . . file . . . unless the court orders otherwise . . . a schedule of assets and liabilities [and] a statement of the debtor's financial affairs." 11 U.S.C. § 521(a)(1)(B) (2006). With narrow exceptions, the debtor's estate includes "all legal or equitable interests of the debtor in property," "wherever located and by whomever held." *Id.* § 541(a)(1). All causes of action that can be brought by the debtor are encompassed by the term "legal or equitable interest in property." *Chartschlaa v. Nationwide Mutual Insurance Co.*, 538 F.3d 116, 122 (2d Cir. 2008); *In re Coastal Plains, Inc.*, 179 F.3d 197, 207-08 (5th Cir. 1999); *Rosenshein v.*

Kleban, 918 F. Supp. 98, 102 (S.D.N.Y. 1996); *Pako Corp. v. Citytrust*, 109 B.R. 368, 372 (D. Minn. 1989). Here, a government contractor, upon entering into chapter 11 bankruptcy, failed to list a claim against an agency among its assets. Its successor, having emerged from that bankruptcy, seeks to prosecute the claim. Should we permit the case to proceed? That is the question posed to us by a motion to dismiss filed by the agency in this case, the Agency for International Development (USAID).

Background

In September 2008, USAID (through its broker, Pacific Cargoes, Inc.) issued a request for proposals for the shipment of bulk grain to Mekele and Dessie, Ethiopia, via discharge at the port of Djibouti, Djibouti. USCS Chemical Chartering LLC (through its broker, Phoenix Chartering, Inc.) responded, offering to carry the grain to Djibouti on a vessel called the ITB (integrated tug/barge) Philadelphia and to deliver the grain to the specified locations in Ethiopia. USAID accepted the offer, and on September 29, USAID and USCS Chemical Chartering LLC entered into a contract (called a "charter party") for the shipment of the grain. In this decision, we call the contractor in its pre-bankruptcy status "Chemical I."

Among other relevant terms and conditions, the contract stated:

> CARGOES ARE TO BE DELIVERED TO FINAL DESTINATION POINTS . . . AT OWNER'S [Chemical I's] TIME, RISK AND EXPENSE. . . . CARGOES ARE TO BE DELIVERED TO RECEIVERS' WAREHOUSES AT FINAL DESTINATION POINT(S) . . . AT OWNER'S TIME, RISK AND EXPENSE.

The contract also contained a provision entitled "Delivery Delay Assessment(s)." This provision stated:

> IN ORDER TO MAINTAIN A DELIVERY SCHEDULE TO MEET THE NEEDS OF THE PROGRAM FOR THESE CARGOES, The following Delivery Delay Assessment(s) will be applicable:
>
> DELIVERY DELAY ASSESSMENT OF USD 1.00 PER TON PER DAY (OR PRO-RATA) WILL BE IMPOSED IF ALL CARGO HAS NOT ARRIVED AT THE FINAL DELIVERY DESTINATION POINT(S) ON OR BEFORE DECEMBER 21, 2008. CHARTERERS [USAID] WILL ASSESS DAMAGES OF USD 1.00 PER METRIC TON ON ENTIRE BILL(S) OF LADING QUANTITY UNTIL ALL CARGO HAS BEEN DELIVERED TO FINAL DELIVERY DESTINATION POINT(S).

On November 25, Chemical I's broker told USAID's broker that Chemical I was concerned that congestion at the port of Djibouti could delay berthing by as much as twenty-one days. The broker asked that Chemical I be permitted to avoid the potential delay by discharging the cargo at another port. The ITB Philadelphia arrived at Djibouti on November 29. On December 10, Chemical I's broker reiterated its request for permission to discharge the cargo at another port. The record does not contain any response from USAID.

The ITB Philadelphia finally berthed at Djibouti and began to discharge its cargo on December 25, 2008. Due to various delays at the port, discharge was not completed until January 17, 2009. The cargo was not delivered to its final destinations, Mekele and Dessie, Ethiopia, until January 26 and January 30, respectively.

On March 9, 2009, Chemical I's broker submitted to USAID's contracting officer, on behalf of the contractor, a certified claim in the amount of $1,505,833.33. The claim asserted that the contractor had suffered damages in the amount of $40,000 per day for 37.6458 days while "on detention" at Djibouti. The broker stated, "Owners contend it was the lack of proper planning by the US Government that caused, in part, the congestion leading to the extraordinary delays."

On April 29, 2009, U.S. Shipping Partners, L.P. and its affiliates, including Chemical I, petitioned for chapter 11 bankruptcy reorganization with the United States Bankruptcy Court for the Southern District of New York. Thus, at that time, the petitioners became "debtors in possession." *See* 11 U.S.C. §§ 1101(1), 1107(a), 1108. In this decision, we refer to USCS Chemical Chartering LLC while under the supervision of the bankruptcy court as "Chemical II."

On June 5 and July 9, 2009, the debtors submitted to the bankruptcy court certified schedules and amended schedules, allegedly listing all assets belonging to the bankruptcy estate. Each filing included a declaration under penalty of perjury, signed by Chemical II's chief executive officer, that the schedules were "true and correct to the best of [his] knowledge, information, and belief." The claim against USAID is not listed on those schedules or any other filing made with the bankruptcy court.

The schedules do include the following paragraph:

> Causes of Action. Despite reasonable efforts, the Debtors might not have identified and/or set forth all of their causes of action against third parties as assets in their Schedules and SOFAs [statements of financial affairs]. The Debtors reserve any and all of their rights with respect to any causes of action

> they may have, and neither these General Notes nor the Schedules and SOFAs shall be deemed a waiver of any such causes of action.

According to declarations by individuals who assisted in the preparation of the schedules, the preparation was performed diligently though under difficult circumstances; the lack of inclusion of the claim in question was inadvertent and probably due to the fact that the claim was submitted by a broker, rather than by Chemical I itself.

On July 13, 2009, the bankruptcy court established dates for the filing by others of proofs of claims against the debtors that arose prior to the date on which the debtors initiated their bankruptcy proceedings. The deadlines were August 13, 2009, for each entity other than a "governmental unit" (a term defined at 11 U.S.C. § 101(27), which includes United States Government agencies) and October 26, 2009, for governmental units. The order establishing these dates (called a "bar date order") provided that –

> any holder of a claim against the Debtors that is required to file a proof of such claim in accordance with this Order, but fails to do so on or before the applicable Bar Date shall be forever barred, estopped, and enjoined from asserting such claim against the Debtors (or filing a Proof of Claim with respect thereto), [and] the Debtors and their property shall be forever discharged from any and all indebtedness or liability with respect to such claim.

Chemical II served notice of the bar date on the agent for USAID. USAID did not file a proof of claim.

On October 9, 2009, the bankruptcy court issued an order confirming the debtors' Third Amended Joint Plan of Reorganization under Chapter 11. This order contained a paragraph entitled "Injunction," which provided that –

> except with respect to enforcement of parties' rights under the Plan . . . , all Persons or entities who have held, hold or may hold Claims against . . . the Debtors are permanently enjoined, from and after the Effective Date, from (a) commencing or continuing in any manner any action or other proceeding of any kind on any such Claim . . . against any of the Reorganized Debtors, (b) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree or order against any Reorganized Debtor with respect to such Claim . . . , [and] (d) asserting any right of setoff, subrogation or recoupment of any kind against any obligation due to any Reorganized

> Debtor or against the property or interests in property of any Reorganized Debtor with respect to such Claim.

On March 31, 2010, the bankruptcy court issued its Final Decree Closing the Debtors' Chapter 11 Cases. At that time, U.S. Shipping Partners, L.P. and its affiliates emerged from bankruptcy. In this decision, we refer to one of those affiliates, USCS Chemical Chartering LLC, as "Chemical III," as it has been constituted from this date forward. The contractor characterizes the result of the plan as the creditors becoming equity holders.

The bankruptcy court's March 31, 2010, order states that "the Court shall retain such jurisdiction as is provided in Article XII (Retention of Jurisdiction) of the Plan, and the entry of this Final Decree is without prejudice to the rights of the Debtors or any party in interest to seek to reopen these chapter 11 cases for good cause shown."

On April 15, 2010, the USAID contracting officer issued her decision on the March 9, 2009, claim to USCS Chemical Chartering LLC's broker, which had submitted the claim. She held the "claim to be unfounded as the very nature of this emergency cargo going into a region with known infrastructure challenges is an understood risk accepted by experienced transportation providers servicing the region." She said that USAID has "limited or no control over port operations at a foreign port and cannot be held responsible for events outside [its] control." On June 24, 2010, an appeal of her decision denying the claim was filed with the Board.

According to a declaration submitted by USAID's contracting officer, the following events have occurred since the filing of the appeal: USAID issued an invoice dated August 20, 2010, to USCS Chemical Chartering LLC for $1,218,800 in delay damage assessment. On August 25, 2010, the company repudiated the claim. On September 14, 2010, the contracting officer issued a final decision that the amount is due to USAID. On April 1, 2011, USAID received a notice from the company's attorney asserting that the delay damage assessment was discharged in the bankruptcy proceeding and that USAID is enjoined from pursuing collection of the alleged debt.

Discussion

USAID maintains in its motion that because the claim was made before USCS Chemical Chartering LLC entered into bankruptcy and was not listed on the debtor's schedules of assets or otherwise revealed to the bankruptcy court, the case must be dismissed. The agency offers two theories in support of its position. First, it contends that the doctrine of judicial estoppel bars the contractor from pursuing the matter before us. Second, USAID says that the appellant lacks standing to pursue the case.

The appellant urges us to deny the motion. According to the company, granting the motion would result in an inequitable windfall for USAID to the detriment of the company's former creditors (who are now its equity holders). The appellant notes the distinctions among Chemical I, Chemical II, and Chemical III, and says that Chemical III should not be penalized for whatever mistakes Chemical I or Chemical II may have made. Application of judicial estoppel would be inappropriate, the appellant asserts, because the debtor reserved its rights with respect to causes of action not listed on the schedules and because any misstatement was inadvertent.

In replying to the appellant, USAID maintains that if the claim had been asserted in bankruptcy, USAID and other creditors would have preserved rights related to it. Among those rights, according to USAID, was the right of the agency to pursue damages under the Delivery Delay Assessment(s) clause of the contract. The appellant responds by asserting that USAID's right to pursue damages was independent of any filing by the debtors. The contractor contends that the agency had an opportunity to file a proof of claim by the bar date specified in the bankruptcy court's July 13, 2009, order, and because it did not do so, it is precluded by both that order and the court's October 9, 2009, order from pursuing its claim now.[1]

The parties have devoted most of their briefs to the matter of judicial estoppel. This doctrine was discussed fully by the Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742 (2001). As the Court explained, the doctrine prevents a party from asserting in a legal proceeding a claim that is inconsistent with a position taken by that party in a previous proceeding. Its purpose is to protect the integrity of the judicial process. Judicial estoppel is an equitable doctrine invoked by a court at its discretion. *Id.* at 749-50.

The Court noted that –

> several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. . . . A third consideration is whether the party seeking to assert an inconsistent

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[1] The appellant also, in its surreply, requests that the Board permit oral argument on the motion. Because the briefing has been extensive, the Board sees no need for oral argument and denies the request.

> position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. . . . Additional considerations may inform the doctrine's application in specific factual contexts.

532 U.S. at 750-51 (citations and quotations omitted). "[I]t may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *Id.* at 753 (citations and quotation omitted); *see also Trustees in Bankruptcy of North American Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353-54 (Fed. Cir. 2010) (noting, at 1354, that "[j]udicial estoppel applies just as much when one of the tribunals is an administrative agency as it does when both tribunals are courts").

The parties attempt to fit the facts of this case into, or out of, the requirements for judicial estoppel, depending on their respective positions. Because we are able to grant the motion on the alternate ground advanced by USAID, standing, we need not address the arguments regarding judicial estoppel.

To have standing to bring a case in federal court, a plaintiff "must have suffered an 'injury in fact' – an invasion of a legally protected interest." *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436, 1442 (2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Similarly, the Contract Disputes Act restricts access to boards of contract appeals, for dispute resolution, to contractors with federal agencies who have received decisions from agency contracting officers. 41 U.S.C.A. § 7104(a) (West Supp. 2011).

The contractor to USAID – the only party which may have suffered an injury to a legally protected interest, as a consequence of the contracting officer's decision – was Chemical I. Chemical I no longer exists; whatever assets and liabilities it had, and informed the bankruptcy court about, have now been assumed, through reorganization sanctioned by that court, by Chemical III. Chemical III may proceed with this case only if one of the Chemical I assets it holds is the right to proceed with the Chemical I claim which was presented to the contracting officer.

It is clear that Chemical III does not own that right. Under 11 U.S.C. § 554, property of a bankruptcy estate may be abandoned by the trustee in bankruptcy or by order of the bankruptcy court. Unless the court orders otherwise, property which is listed on a debtor's schedule of assets, and the disposition of which is not provided for by the order ending the proceedings, is considered to have been abandoned to the debtor. However, property which is not listed on a schedule remains property of the bankruptcy estate. Because Chemical I's claim against USAID was not listed on the schedule of assets the debtor presented to the bankruptcy court, it did not pass to Chemical III when that court approved reorganization of

USCS Chemical Chartering LLC. Instead, ownership of the claim remained with Chemical II. Chemical III consequently has no right to pursue it.

Cases cited to us by the parties amply support this conclusion. *See*, *e.g.*, *Chartschlaa*, 538 F.3d at 122 ("undisclosed assets automatically remain property of the estate after the case is closed"); *Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006) ("All six appellate courts that have considered this question hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends." (citing decisions from the first, third, fifth, eighth, ninth, and eleventh circuits; seventh circuit joined them)); *Rosenshein*, 918 F. Supp. at 102-03 (S.D.N.Y. 1996) ("[P]roperty that is not formally scheduled is not abandoned and therefore remains part of the estate. . . . Courts have held that . . . the debtor lacks standing to pursue the claims after emerging from bankruptcy, and the claims must be dismissed." (citations omitted)); *In re Drexel Burnham Lambert Group, Inc.*, 160 B.R. 508, 514 (S.D.N.Y. 1993) ("Appellant lacks ownership and standing to assert any of the Additional Claims that he seeks to advance. . . . [H]e is precluded from asserting them now, . . . after his discharge from bankruptcy."). The one decision which USCS Chemical Chartering LLC says is to the contrary, *Reciprocal Merchandising Services, Inc. v. All Advertising Associates, Inc.*, 163 B.R. 689 (S.D.N.Y. 1994), merely denied a motion for summary judgment on the ground of judicial estoppel; it did not consider the issue of standing.

The appellant attempts to salvage ownership of the claim for Chemical III by pointing to the Causes of Action paragraph in the debtors' schedules. This paragraph purports to reserve to the debtors "any and all of their rights with respect to any causes of action they may have" which are not identified in the schedules. As USAID comments, if this tactic were successful, the requirement for listing assets in schedules would be rendered useless; creditors and bankruptcy courts would lose the basis, which the schedules provide, for making an informed judgment about an appropriate resolution of the bankruptcy. Consequently, courts have rejected attempts to give vitality to boilerplate language like this paragraph which attempt to reserve unspecified claims. *See*, *e.g.*, *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003) (The language "is simply not adequate to provide the level of notice required. The bankruptcy rules were clearly not intended to encourage this kind of inadequate and misleading disclosure by creating an escape hatch debtors can duck into to avoid sanctions for omitting claims once their lack of candor is discovered."); *In re Bilstat, Inc.*, 314 B.R. 603, 609 (S.D. Tex. 2004) ("The Court finds this disclaimer [that the debtor does not waive undisclosed causes of action] ineffective."). We follow the courts' lead by ascribing no validity to the paragraph.

Many court decisions indicate that the trustee in bankruptcy (or, in chapter 11 proceedings, the debtor-in-possession, such as Chemical II) may petition the bankruptcy court

to reopen proceedings so that the trustee may pursue an unscheduled claim of the debtor. *Reed v. City of Arlington*, 650 F.3d 571 (5th Cir. 2011) (en banc); *Biesek v. Soo Line Railroad Co.*, 440 F.3d 410, 413 (7th Cir. 2006); *Parker v. Wendy's International, Inc.*, 365 F.3d 1268 (11th Cir. 2004); *Hutchins v. Internal Revenue Service*, 67 F.3d 40, 43 (3d Cir. 1995); *Rosenshein*, 918 F. Supp. at 103; *Greenheart Durawoods, Inc. v. PHF International Corp.*, 1994 WL 652434 at *5 (S.D.N.Y. Nov. 18, 1994). We note that the bankruptcy court's March 31, 2010, final decree in the chapter 11 cases in question permits reopening the cases. If Chemical III asks the bankruptcy court to reopen proceedings so that Chemical II may pursue this claim (or so that the right to pursue the claim may be transferred to Chemical III), that court will decide how to respond. The court may wish to take into consideration the appellant's contention that because Chemical II's former secured creditors are now Chemical III's equity owners, there is an identity of interests between the two groups. Similarly, if USAID asks the bankruptcy court to reopen proceedings so that it may pursue its own claim, that court will decide how to respond. In the latter event, the court may wish to consider whether the fact that it enjoined action against the reorganized debtors (on October 9, 2009), prior to the bar date for governmental units like USAID to file proofs of claim (October 26, 2009), is important. All of these matters, however, are not for us to decide. Our charge here is to determine whether this case may proceed before us in its current posture, and we have found that it may not.

Decision

USAID's motion to dismiss is granted. The appeal is **DISMISSED FOR LACK OF STANDING**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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R. ANTHONY McCANN
Board Judge