IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO IN BANKRUPTCY

In Re: KAISER STEEL CORPORATION, Debtors.	Case No. 87-B-01522-E (Jointly Administered) (Chapter 11)
THE UTAH DIVISION OF OIL, GAS AND MINING and THE OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, Applicants, v. KAISER STEEL CORPORATION, KAISER COAL CORPORATION, KAISER COAL CORPORATION OF SUNNYSIDE, KAISER COAL CORPORATION OF UTAH, et al., Respondents.	

RESPONDENTS' SUPPLEMENTAL BRIEF

Respondents, the Debtors, by and through their counsel, hereby submit this Supplemental Brief respecting the Applicants' request for Relief From Stay.

I. INTRODUCTION

It is critical that the parties hereto recognize the relief sought by the Applicants. The relief sought is precisely stated at page 6 of their Reply Brief wherein they state:

> "It is essential that the governmental agencies be permitted to exercise their authority to cause Kaiser to cease operations and begin to completely reclaim the Utah properties."

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It is the position of the Debtors in this Brief to suggest that the Applicants' linking of their authority to cause Kaiser to "cease operations" and their authority to require Kaiser to "begin to completely reclaim the Utah properties" is cavalier. This Brief will not address the issue of whether or not the Applicants are free pursuant to Bankruptcy Code 362 (b)(4) to exercise their authority to cause Kaiser to "cease operations" but will rest on the prior authorities submitted to the Court herein.

However, with respect to the Applicants' request to exercise their authority to cause Kaiser to "begin to completely reclaim the Utah properties" the Debtors will suggest that the grant of such authority by this Court is inappropriate under the following three-prong analysis:

1. Any mandatory injunctions sought by the Applicants and received by them requiring Kaiser to "begin to completely reclaim the Utah properties" is in substance a money judgment.

2. The enforcement of any money judgment is an exception from the Bankruptcy Code 362(b)(5) exception to the Automatic Stay. Relief from an exception to an exception under the Automatic Stay requires affirmative court action.

3. This Court should not grant affirmative relief to the Applicants to pursue a mandatory injunction requiring Kaiser to "begin to reclaim all Utah properties" because that injunction would have the affect of elevating a pre-petition claim to an administrative expense claim allowing the

Applicants to achieve by indirection that which the law precludes them from accomplishing directly.

II. A MANDATORY INJUNCTION REQUIRING KAISER TO BEGIN TO COMPLETELY RECLAIM THE UTAH PROPERTIES IS A MONEY JUDGMENT

Applicants cite and rely extensively on Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d 267 (CA3, 1984). Respondents would call to this Courts' attention the recently decided case of United States v. Whizco, Inc. CCH ¶72, 214 (6th Cir. 1988), copy attached. Whizco decided the questions of whether or not the type of injunction apparently sought by the Applicants herein was a claim for money and therefore dischargeable pursuant to the Bankruptcy Code. In Whizco the Court dealing with the issue of whether or not a mandatory injunction to reclaim coal lands was, in fact, a money obligation stated the following:

> "We acknowledge the limited character of *Kovacs* holding. It is clear, however, that the Defendant does not have the physical capacity to reclaim the mine site himself, and that he would have to hire others to preform the work for him. This would require the expenditure of money. Thus, although the terms of the injunction would not require the payment of money, to the extent that any injunction would be effective, it would. The injunction could only be enforced by contempt and then only if Loukin sometime in the future has funds either from future earnings, inheritance or gifts, etc. To hold him in contempt a court would have to find that he had the ability to pay others to perform the reclamation work. To the extent, therefore, that the injunction would have purpose or value it would require the payment of money. Thus, when we look at the substance of what the Plaintiffs' seeks, rather than the form of the relief sought, we see that the Plaintiff is really seeking payment. We hold that to

> the extent that fulfilling his obligation to reclaim the site would force the Defendant to spend money, the obligation was a liability on a claim as defined by the Bankruptcy Code. Therefore, to that extent, we affirm the Bankruptcy Court's judgment that the Defendant's bankruptcy discharged his obligation to reclaim the mine site." (CCH Bankruptcy ¶72, 214 at 92, 657.)

The Applicants' would suggest that Whizco and Penn Terra are simply diametrically opposed but that the reasoning of Whizco should be applied by this Court. Whizco says essentially that real financial impact on the Debtor should be assessed in determining whether or not one seeks money payment rather than clever pleading.

III. THE ENFORCEMENT OF A MONEY JUDGMENT IS AN EXCEPTION TO THE 362(b)(5) EXCEPTION TO THE AUTOMATIC STAY

362(b)(5) provides in relevant part that:

> The filing of a petition ... does not operate as a stay/
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental units, police or regulatory power;" (emphasis added).

Even the cases cited by the Applicants draw the above distinction. Particularly, Judge Carrigan in United States v. Standard Metals Corporation, 49 B.R. 623 (D. Colo. 1985) pointed out:

> "The legislative history also illuminates the distinction between *entry* of a money judgment and *enforcement* of a money judgment entry." See Penn Terra 733 F.2d at 274-279. United States seeks *entry* in this action. It will seek enforcement of any judgment entered, along with other creditors, in the bankruptcy court proceedings." (Emphasis in original) 49 B.R. at 625.

The Respondents herein respectfully suggest that while the Applicants desire for Kaiser to "cease operations" may be in line with the exercise of the police powers, the entry of an mandatory injunction to "begin to completely reclaim the Utah properties" is an injunction that could be satisfied by the Defendants only by the expenditure of large sums of money. The enforcement of such an injunction requiring the expenditure of such sums of money would be contrary to Whizco supra, Standard Metals, supra, and to Bankruptcy Code § 362(b)(5) unless specific permission were granted by this Court under §362. For the reasons cited below the Bankruptcy Court should not grant the Applicants the ability to enforce a mandatory injunction to reclaim. Indeed, to even allow the Applicants to seek the entry of such an injunction while holding that the Court issuing the injunction would be powerless to enforce it would create unnecessary litigation and unnecessary crowding on the dockets of another court and thus, Respondents would respectfully request that this Court not grant permission to Applicants' to seek a mandatory injunction requiring reclamation as opposed to requiring cessation of operations.

IV. THIS COURT SHOULD NOT GRANT RELIEF FROM THE AUTOMATIC STAY BECAUSE TO DO SO WILL ELEVATE A PRE-PETITION CLAIM TO ADMINISTRATIVE EXPENSE STATUS

The law seems rather clear that the Applicants are not entitled to administrative expense status for reclamation required to correct pre-petition activities. In re Pierce Coal

& Construction, Inc., 65 B.R. 521 (B. N. D. W.Va. 1986), In re Dant & Russell, Inc. 61 B.R. 668 (B. Or. 1985), aff'd, 67 B.R. 360 (D. Oregon 1986). See also Southern Railway Company v. Johnson Bronze Company, 758 F.2d 137 (3rd Cir. 1985). Indeed Southern Railway Company which was decided after Penn Terra points out that Penn Terra did not deal with the priority to be afforded against an estate for cost of cleanup and thereafter specifically rejected the notion of any priority, holding that the cleanup costs would be general unsecured claims.

To give the Applicants permission to seek a mandatory injunction for reclamation and to further allow them to enforce such an injunction by requiring the Debtor to spend the necessary funds (assuming the Debtor even had them) to accomplish the reclamation would be to indirectly elevate the reclamation claim to an administrative expense and pay it before all other claims. This goal is denied by even the Applicants when they seek it directly. Indeed, their own Reply Brief notes the correctness of the Debtors' position on this issue and withdraws any requests for allowance of administrative claim. Having withdrawn their request for administrative claim the Applicants cannot now be allowed to achieve that goal indirectly through the enforcement of a reclamation injunction granted in another court.

It is undeniable that the claim for cleanup sought by the Applicants herein is a pre-petition claim. While the Court rejected the Debtors' proffered testimony with respect to the

fact that post-petition reclamation has been kept current and that the only reclamation sought by the Applicants is for pre-petition obligations, that same admission can be found in the Applicants' Reply Brief at page 4 where they state:

> "The reality is that a total of approximately 690 acres are currently disturbed at the three Utah properties which translates into spreading top soil over coal waste piles, dismantling buildings, grading sedimentation ponds and drainage ditches, reseeding, and similar operations designed to protect and stabilize the sites."

It is apparent from the above quote that the Applicants are talking about dismantling buildings that have for years been on the premises, spreading top soil over waste piles that have existed for a similar period of time and regrading all the ponds and drainage ditches which have been there for sometime.

It is also clear the only way Kaiser could comply with such a mandatory injunction is by spending money. Kaiser has no arms and no legs but as a corporation must spend money and hire human beings to do its work. Moreover, the Respondents' would respectfully ask this Court to draw a clear distinction between Kaiser Steel Corporation and the Kaiser Coal companies herein. Kaiser Steel Corporation has never operated any coal mining facility or undertaken any coal mining operations with respect to its properties but only assumed certain pre-existing obligations as a result of a pre-petition purchase agreement with U.S. Steel Corporation. See page 4 of the Applicants' original Brief. Because there is nothing left for Kaiser Steel

to "cease" the Respondents respectfully request that no relief be granted against Kaiser Steel Corporation.

V. CONCLUSION

The Respondents do not argue in this Brief the ability of the State of Utah to require the coal companies to "cease operations" under the exercise of their regulatory and police powers. The Respondents do suggest however, that granting relief to allow the entry of a mandatory injunction requiring reclamation of the properties would be absolutely inappropriate since it would indirectly elevate the Applicants' pre-petition claim to administrative expense status in violation of applicable law, its own withdrawal of any requests for administrative claim and in violation of Southern Railway Company which was decided by the Third Circuit subsequent to the Penn Terra case upon which Applicants so heavily rely. The Debtors may be required to comply with certain State regulatory and police powers to continue operations but they cannot be compelled to spend money to reclaim disturbances which occurred pre-petition. To hold otherwise is to elevate form over substance and to allow the Applicants by clever pleading to elevate a pre-petition unsecured claim to administrative status. That result was never intended by the Third Circuit in Penn Terra, was never allowed by Judge Carrigan in Standard Metals and should not be allowed by this Court.

Court denying the plaintiff an injunction against defendant-appellee Donovan Lueking ("defendant"). The plaintiff sought to enjoin defendants Whizco, Inc. ("Whizco"), a coal company, and Lueking, it operator, to obey orders of the Secretary of the Interior requiring the defendants to satisfy their statutory obligation to reclaim their abandoned coal mine. The District Court granted the injunction with respect to defendant Whizco, but denied it as to defendant Lueking.[1] This case presents the question of whether the discharge provisions of the Bankruptcy Code apply to mandatory injunctive relief that cannot be performed personally and would require a debtor in a chapter 7 liquidation bankruptcy to spend money.

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (the "Act") [illegible] It creates a program for [illegible] mined for coal. The Act creates [illegible] of Surface Mining Reclamation and Enforcement ("OSM") within the Department of the Interior. The Secretary of the Interior, acting through OSM, has the primary responsibility for administering the Act.

Defendant Lueking was the vice-president and sole stockholder of defendant Whizco, which mined a [illegible] area in Tennessee. The terms of the permit and the statute and regulations, 30 U.S.C. §§ 1251-1279, 30 C.F.R. §§ 710-725, obliged Whizco to reclaim the surface area disturbed by the mining. Whizco failed economically and abandoned its mining sites without adequately reclaiming them. The Department of the Interior, through OSM, issued three cessation orders against Whizco for its failure to abate a total of four violations, commanding Whizco to remedy the violations.

When Whizco failed to comply with the orders, the plaintiff brought suit pursuant to 30 U.S.C. § 1271, which provides that where the permittee or his agents fail or refuse to comply with the Secretary's orders, the Secretary "may request the Attorney General to institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States." The plaintiff amended its complaint on October 8, 1985 to join Lueking as Whizco's agent and to add the third cessation order. Lueking, d/b/a Lueking Coal Co., Whizco, and Hi Tenn Coal, Inc., had filed for reorganization under Chapter 11 of the Bankruptcy Code on April 8, 1985. On August 23, 1985, the day after the plaintiff filed its complaint, the proceeding was converted to a Chapter 7 liquidation.

In its suit the plaintiff sought a permanent injunction against the defendants from mining coal anywhere in the United States until they remedy the violations. It also sought affirmative remedial action on the part of defendants to perform specific acts of reclamation which would abate the environmental damage at the defendants' surface mining site in Tennessee. The plaintiff claims that the Act does not allow the Secretary the alternative remedy of reclaiming the site and demanding payment for the costs incurred, and the defendants do not dispute this. On September 24, 1986 the District Court entered judgment against defendant Whizco granting the requested injunctive relief. The parties subsequently stipulated that defendant Lueking was the agent of Whizco, that he was potentially subject to the same injunctive relief, that he was unable to perform the affirmative reclamation action personally, and that his debts had been discharged in a chapter 7 bankruptcy proceeding on December 19, 1985. The District Court then addressed the issue of "[w]hether any affirmative order of relief, that would require the expenditure of money on Mr. Leuking's [sic] part, had been discharged by his bankruptcy." *Joint Appendix* at 23.

On January 12, 1987 the District Court issued a decision denying in part the plaintiff's request for mandatory injunctive relief against Lueking, holding that his bankruptcy discharged his obligation to reclaim the sites. The court, evaluating Lueking's personal and financial conditions, found that he could not perform the reclamation work ordered "other than by payment of money," and that therefore the injunction was a debt dischargeable in bankruptcy. *Id.* at 24 (citing *Ohio v. Kovacs*, 469 U.S. 274 (1985)). Plaintiff appealed.

Except for debts saved from discharge by 11 U.S.C. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy. 11 U.S.C. § 727(b). As the District Court noted, a debt, for the purposes of the Bankruptcy Code, is a "liability on a claim," *Id.* at § 101(11). The Code further defines a claim as follows:

> (A) [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
>
> (B) [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

[1] The District Court denied the injunction as to Lueking pursuant to cross motions for summary judgment. The District Court granted the plaintiff's motion in part and enjoined defendant Lueking "from mining coal anywhere in the United States until the violations which gave rise to the instant lawsuit are abated to the satisfaction of the Secretary of the Interior." Joint Appendix at 26. This injunction is not appealed.

trast, the petitioner in *Kovacs* had converted its equitable remedy, a right to require the respondent to clean up the waste disposal site, into a right to payment of money by means of receivership.

The defendants argue that since defendant Lueking cannot reclaim the mining sites without spending money, the obligation is dischargeable because the breach of the obligation has in reality given rise to a right to payment. 11 U.S.C. § 101(4)(B). They rely on *In re Robinson*, 46 Bankr. 136 (Bankr. M.D. Fla.), *rev'd on other grounds*, 55 Bankr. 355 (M.D. Fla. 1985). In that case, under facts very similar to those of the case at bar, the Bankruptcy Court held that a judgment entered against a Chapter 7 debtor requiring him to restore marshland was discharged in bankruptcy. *Id.* at 138-39. The court reasoned that even though the duty to restore the marshland was facially nonmonetary, the debtor would be required to spend money in order to restore the marshland was facially nonmonetary, the debtor would be required to spend money [illegible] restore the marshland and that [illegible] United States had a right to payment. *Id.* at 139. The court acknowledged that in *R*[illegible], unlike in *Kovacs*, the obligation had [illegible] been effectively reduced to a money judgment." *Id.* at 138-39. However, the court [illegible] that "Congress intended a broadly [illegible] definition of 'claim,'" and concluded that "extension [of *Kovacs*] will allow greater [illegible] to the principles expressed by the Supreme Court as we understand them, than would finding the factual difference to require a legal distinction." *Id.*

We acknowledge the limited character of the *Kovacs* holding. It is clear, however, that the defendant does not have the physical capacity to reclaim the mine site himself, and that he would have to hire others to perform the work for him. This would require the expenditure of money. Thus, although the terms of the injunction would not require the payment of money, to the extent that the injunction were to be effective, it would. The injunction could only be enforced by contempt and then only if Lueking sometime in the future has funds either from future earnings, inheritance or gifts, etc. To hold him in contempt a court would have to find that he had the ability to pay others to perform the reclamation work. To the extent, therefore, that the injunction would have purpose or value it would require the payment of money. Thus, when we look at the substance of what the plaintiff seeks, rather than the form of the relief sought, we see that the plaintiff is really seeking payment. We hold that to the extent that fulfilling his obligation to reclaim the site would force the defendant to spend money, the obligation was a liability on a claim as defined by the Bankruptcy Code. Therefore, to that extent, we affirm the District Court's judgment that the defendant's bankruptcy discharged his obligation to reclaim the mine site. Our holding is very narrow, however. To the extent that the defendant can comply with the Secretary's orders without spending money, his bankruptcy did not discharge his obligation to comply with the orders. To the extent that the District Court held otherwise, we reverse. The defendant may in the future own equipment which would permit him to personally reclaim some portion of the site. To the extent he can personally act he is not discharged.[5]

Accordingly, we AFFIRM in part and REVERSE in part the judgment of the District Court.

[¶ 72,215] In re Wallace

United States Court of Appeals, Tenth Circuit. No. 86-1539. February 29, 1988.

Appeal from the United States District Court for the District of New Mexico.

Collateral Estoppel—Discharge of Debts—Embezzlement.—Collateral estoppel has been applied in a dischargeability proceeding involving an embezzlement claim that a state court in a non-jury trial on the merits had held valid against the debtor. The state trial was binding on the dischargeability issue later posed in bankruptcy court because: 1) the issue to be precluded was the same as that involved in the prior state action, 2) the issue was actually litigated by the parties in the prior action, and 3) the state court's factual determination was necessary to the resulting final and valid judgment.

See Sec. 523(a) at ¶ 9226 and Sec. 523(a)(4) at ¶ 9230.

Anthony F. Avallone and Glenn B. Neumeyer of Law Systems of Las Cruces, P.A., Las Cruces, New Mexico, attorneys for the defendant-appellant.

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[5] We are not unmindful of the policy problems of allowing a mine operator to discharge his obligation to reclaim his mine. However, policy decisions are the responsibility of Congress, which could easily modify the Bankruptcy Code so that a debtor may not discharge his obligations to reclaim the environment. We note also that penalties assessed against a debtor for violation of environmental laws may be nondischargeable so that the state is not entirely without remedies.

Court denying the plaintiff an injunction against defendant-appellee Donovan Lueking ("defendant"). The plaintiff sought to enjoin defendants Whizco, Inc. ("Whizco"), a coal company, and Lueking, it operator, to obey orders of the Secretary of the Interior requiring the defendants to satisfy their statutory obligation to reclaim their abandoned coal mine. The District Court granted the injunction with respect to defendant Whizco, but denied it as to defendant Lueking.[1] This case presents the question of whether the discharge provisions of the Bankruptcy Code apply to mandatory injunctive relief that cannot be performed personally and would require a debtor in a chapter 7 liquidation bankruptcy to spend money.

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When Whizco failed to comply with the orders, the plaintiff brought suit pursuant to 30 U.S.C. § 1271, which provides that where the permittee or his agents fail or refuse to comply with the Secretary's orders, the Secretary "may request the Attorney General to institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States." The plaintiff amended its complaint on October 8, 1985 to join Lueking as Whizco's agent and to add the third cessation order. Lueking, d/b/a Lueking Coal Co., Whizco, and Hi Tenn Coal, Inc., had filed for reorganization under Chapter 11 of the Bankruptcy Code on April 8, 1985. On August 23, 1985, the day after the plaintiff filed its complaint, the proceeding was converted to a Chapter 7 liquidation.

In its suit the plaintiff sought a permanent injunction against the defendants from mining coal anywhere in the United States until they remedy the violations. It also sought affirmative remedial action on the part of defendants to perform specific acts of reclamation which would abate the environmental damage at the defendants' surface mining site in Tennessee. The plaintiff claims that the Act does not allow the Secretary the alternative remedy of reclaiming the site and demanding payment for the costs incurred, and the defendants do not dispute this. On September 24, 1986 the District Court entered judgment against defendant Whizco granting the requested injunctive relief. The parties subsequently stipulated that defendant Lueking was the agent of Whizco, that he was potentially subject to the same injunctive relief, that he was unable to perform the affirmative reclamation action personally, and that his debts had been discharged in a chapter 7 bankruptcy proceeding on December 19, 1985. The District Court then addressed the issue of "[w]hether any affirmative order of relief, that would require the expenditure of money on Mr. Leuking's [sic] part, had been discharged by his bankruptcy." Joint Appendix at 23.

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Except for debts saved from discharge by 11 U.S.C. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy. 11 U.S.C. § 727(b). As the District Court noted, a debt, for the purposes of the Bankruptcy Code, is a "liability on a claim," *Id.* at § 101(11). The Code further defines a claim as follows:

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to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured . . .

Id., § 101(4) (emphasis added).[2] Defendant Lueking testified in an affidavit that he is 63 years old; that he surrendered all his mining equipment and coal leases in his bankruptcy; that he has neither the physical ability to perform the reclamation work himself nor the right to enter upon the reclamation site; and that he lacks the financial ability to post a reclamation bond or to hire anybody to do the reclamation work. Based on this information, the District Court found that the mandatory relief sought by the plaintiff could not be accomplished by anything other than an expenditure of money by the debtor, and that therefore it was a claim discharged in bankruptcy. *Id.*

The District Court relied on *Ohio v. Kovacs*. In that case the petitioner, the state of Ohio, had obtained an injunction in state court ordering the respondent to clean up a hazardous waste disposal site. When the respondent failed to comply with the injunction, the petitioner obtained the appointment of a receiver, who was directed to take possession of the respondent's property and other assets and to implement the injunction. The respondent filed a personal bankruptcy petition before the receiver had completed the clean up. The Bankruptcy Court, affirmed by the District Court, declared that the respondent's obligation under the injunction was a discharged debt. The Sixth Circuit agreed, holding that the petitioner essentially sought from the respondent only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the Bankruptcy Code. *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983). The opinion stressed that the petitioner was seeking the payment of money from the respondent to the petitioner:

> Ohio claims that there is no alternative right to payment, but when Kovacs failed to perform, state law gave a state receiver total control over all Kovacs' assets. Ohio later used state law to try and discover Kovacs' post-petition income and employment status in an apparent attempt to levy on his future earnings. In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the [site's] cleanup.
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> . . .
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> We agree, however, with the rationale of the prior opinion in *In re Kovacs*, *supra*, that *Ohio is essentially trying to obtain a money payment from Kovacs*. The impact of its attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligation properly imposed upon him by the State court *except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance.*

Id. at 987-88 (emphasis added).

The Supreme Court affirmed, finding that the respondent's breach of the petitioner's injunction gave rise to a right to payment within the meaning of 11 U.S.C. § 101(4)(B). 469 U.S. at 282-83. In so holding, the Court stressed that what the petitioner wanted from the respondent after bankruptcy "was the money to defray cleanup costs." *Id.* at 283.[3] Since the clean up order had been converted into an obligation to pay money, it gave rise to a "right to payment" and thus was a debt dischargeable under the Bankruptcy Code. *Id.*

The distinction between *Kovacs* and the case before this Court is that in the present case the plaintiff is not seeking an order that defendant Lueking pay money to the plaintiff in order to defray cleanup costs. Based on this distinction, the plaintiff argues that an injunctive order such as is involved in this case is discharged only when the government has an alternative right to payment of money in lieu of compelling the operator or his agent to perform his reclamation duties. Here, plaintiff argues, it is seeking a purely equitable remedy; it does not have a legal right to payment under the terms of the Act.[4] "If the only remedy allowed by law is nonmonetary, the equitable remedy is not transformed into a claim." *In re Aslan*, 65 Bankr. 826, 830-31 (Bankr. C.D. Cal. 1986). In con-

[2] This issue in this case did not arise under the Bankruptcy Act of 1898 because Section 63 of the Act coupled the term "claim" with the concept of provability, limiting the kinds of obligations dischargeable in a bankruptcy. Only provable debts were dischargeable. § 17(a). Section 68 enumerated classes of debts that were provable, a claim not falling in one of the categories was not provable, and therefore not dischargeable. Claims for equitable relief were not included in the enumerated classes and were therefore not provable as debts, and not dischargeable.

[3] The petitioner's counsel even conceded at oral argument that after the receiver was appointed, the only performance sought from the respondent was the payment of money. 469 U.S. at 283.

[4] The plaintiff points out that the Secretary does not have the authority to hold bonds for mines permitted by states during the initial regulatory program, the program under which the defendants' permits were issued. The Secretary does have power to accept money from the forfeiture of a bond posted by a permittee under the permanent regulatory program. 30 U.S.C. § 1259.

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