UNITED STATES BANKRUPTCY COURT

NOT FOR PUBLICATION

SOUTHERN DISTRICT OF NEW YORK

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In re:	:	Chapter 11
TEXACO INC.	:	Case Nos. 87 B 20142 (ASH)
TEXACO CAPITAL INC.		87 B 20143 (ASH
TEXACO CAPITAL, N.V.,	:	87 B 20144 (ASH)
Reorganized Debtors.	:	(Jointly Administered)

- -x

TEXACO INC.,	:	
Movant,	:	
- against -	:	
IMC EXPLORATION COMPANY,	:	
Respondent.	:	

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ADLAI S. HARDIN, JR.
UNITED STATES BANKRUPTCY JUDGE

OPINION ON MOTION TO REOPEN AND ENFORCE CONFIRMATION ORDER

Reorganized debtor Texaco Inc. ("Texaco") has moved for an order reopening its Chapter 11 case, enforcing its March 23, 1988 confirmation order (the "Confirmation Order"), finding respondent IMC Exploration Company ("IMC") in civil contempt of Section 524(a)(2) of the Bankruptcy Code and directing IMC to dismiss its discharged claims asserted in an action now pending against Texaco in the Louisiana State Court (the "Louisiana Action"). For the reasons set forth herein, the motion is granted.

Jurisdiction

This Court has jurisdiction over this proceeding under 28 U.S.C. §§ 1334(a) and 157(a) and the standing order of referral to Bankruptcy Judges signed by Acting Chief Judge Robert J. Ward on July 10, 1984. This is a core proceeding under 28 U.S.C. § 157(b).

Background

In September 1955 Stanolind Oil and Gas Company ("Stanolind") subleased five mineral leases to Wrightsman Investment Company ("Wrightsman") and Seaboard Oil Company ("Seaboard"). The five mineral leases are referred to as the "Leases," and the sublease thereof is referred to as the "Sublease." All five Leases cover land located in Maurice Field, Vermilion Parish, Louisiana. Under a "Reassignment Provision" contained in the Sublease, Stanolind as sublessor retained a right to reassignment of the Leases in the event that the sub-lessees chose to surrender, let expire, abandon, or release all or any of the Sublease rights.

Amoco Production Company ("Amoco") became the successor in interest to Stanolind with respect to the Leases and the Sublease. IMC acquired Wrightsman's interest in the Leases and the

Sublease, and Texaco acquired Seaboard's interest in the Leases and the Sublease. In 1976 Texaco and IMC became parties to an operating agreement (the "Operating Agreement") whereby Texaco was designated "operator" and IMC was designated "non-operator" with respect to the Leases. IMC assigned all of its rights and interests under the Sublease in the Leases to Wintershall Corporation ("Wintershall") effective July 1, 1986. The assignment to Wintershall was "subject to" the Operating Agreement and, accordingly, Wintershall replaced IMC as the non-operator party to the Operating Agreement with Texaco. Thereafter, Texaco and Wintershall entered into a "fifth amendment" to the Operating Agreement.

In 1976 Texaco and IMC filed a document entitled "Release" in the conveyance records of Vermilion Parish which released one of the five Leases. In 1981 Texaco and IMC executed partial Releases with respect to three of the other Leases, also recorded in Vermilion Parish. It is these Releases with respect to four of the five Leases which are the subject of the Louisiana Action.

Under the Reassignment Provision of the Sublease, Texaco and IMC were required to provide Stanolind's successor in interest, Amoco, with notice of any Releases so that Amoco could exercise its right to reassignment of the Leases.

It appears that neither Texaco nor IMC gave the required notice of the Releases to Amoco. In April 1994 Amoco filed suit under the Sublease against Texaco and IMC in Louisiana (the "Amoco Action") based on the failure to give notice of the Releases under the Reassignment Provision. Texaco settled the claims of Amoco before trial and was dismissed from the Amoco Action. Amoco's claims for breaches of the Reassignment Provision in connection with the 1976 and 1981 Releases were tried against IMC. In September 2001, after a trial on the merits, the Court in the Amoco Action found that IMC had breached the Reassignment Provision, and the jury awarded Amoco damages of $30 million, plus pre-judgment interest. This judgment was upheld on appeal.

In April 2004 IMC filed the Louisiana Action against Texaco and others seeking to recover the amount of the judgment awarded in favor of Amoco against IMC in the Amoco Action. In its complaint in the Louisiana Action IMC alleges that the Action "is an action for multiple breaches of contract resulting from Texaco's multiple failures to fulfill its obligations to IMC under [the Operating Agreement]." The complaint further alleges that Texaco as operator owed to IMC a duty to fulfill IMC's obligation to Amoco under the Reassignment Provision of the Sublease to notify Amoco of the Releases in 1976 and 1981 so that Amoco could exercise its right of reassignment of those leasehold interests. In a memorandum filed in opposition to Texaco's motion to dismiss the Louisiana Action, IMC asserted that "the single breach that constitutes the *sine qua non* of this lawsuit was [Texaco's] failure to fulfill its duty to [IMC] of providing notice to Amoco prior to the releases of the Leases." In addition to the foregoing, IMC also claims in the Louisiana Action that Texaco was obligated under the Operating Agreement to defend the Amoco Action on IMC's behalf, that Texaco is liable to indemnify IMC for the Amoco Judgment because of Texaco's failure to perform its contractual obligations to IMC under the Operating Agreement, that Texaco was obligated under the Operating Agreement to settle the Amoco Action on IMC's behalf, and finally that Texaco was unjustly enriched by Texaco's failure to settle the Amoco Action on IMC's behalf and failure to provide the required notice on behalf of IMC under the Reassignment Provision.

The Issues

Texaco asserts that it mailed notice of the Bar Date in its 1987 bankruptcy to IMC, which was a known creditor of Texaco, and that IMC did not file a claim in the Texaco bankruptcy. It is Texaco's position that holders of pre-petition and pre-confirmation claims are barred from asserting such claims against Texaco under (i) the Bar Date Order dated January 26, 1988, (ii) the Confirmation Order dated March 23, 1988, and (iii) Sections 524(a)(2) and 1141(d)(1) of the Bankruptcy Code.

IMC does not dispute that it received due and timely notice of Texaco's bankruptcy and the Bar Date and that it did not file a claim in Texaco's bankruptcy. Nor does IMC dispute the preclusive effects of the Bar Order, the Confirmation Order and Sections 524(a)(2) and 1141(d)(1) of the Bankruptcy Code. In addition, IMC acknowledges that Texaco's failure to give timely notice to Amoco on behalf of IMC of the 1976 and 1981 Releases constituted pre-petition breaches of Texaco's contractual duty to IMC under the Operating Agreement.

IMC asserts that the following causes of action alleged in the Louisiana Action constitute post-confirmation claims and are therefore not discharged or otherwise barred: (a) Texaco's breach in 1994 and thereafter of its duty under the Operating Agreement to defend IMC in the Amoco Action; (b) Texaco's duty under the Operating Agreement to indemnify IMC for IMC's liability and damages sustained in the Amoco Action; (c) the unjust enrichment of Texaco by reason of Texaco's breach of its duties under the Operating Agreement to defend and indemnify IMC in respect of the Amoco Action.

In addition, and in the alternative, IMC asserts that, notwithstanding its 1986 assignment of the Sublease and the Operating Agreement to Wintershall, it remained a party to the Operating Agreement. As a party to the Operating Agreement, when Texaco filed for bankruptcy in 1987 IMC was entitled to notice of assumption of the Agreement and "cure" of Texaco's pre-petition breaches of the Agreement, neither of which was provided by Texaco. Or, if Texaco did not assume the Operating Agreement, the Agreement and all Texaco's obligations thereunder passed through the bankruptcy unaffected. The position is premised on the argument that, under Louisiana law, IMC's 1986 assignment to Wintershall did not constitute a "perfect delegation" of rights and responsibilities under the Operating Agreement resulting in a novation, and that an "imperfect delegation" creates a novation only when the person to whom the performance is owed expressly discharges the original obligor/debtor. Since Texaco was not a party to IMC's assignment to Wintershall and did not "voluntarily and expressly release IMC as

a party to the lease or Operating Agreement," the consequence was that "IMC remained a party to the Operating Agreement despite the 1986 'Assignment' contract to Wintershall."

The issues resulting from the foregoing positions may be concisely stated:

1. Was IMC a party to the Operating Agreement after the 1986 assignment to Wintershall?

2. Do IMC's causes of action based on duty to defend, indemnification and unjust enrichment constitute pre-petition, pre-confirmation "claims" within the meaning of Section 101(5) of the Bankruptcy Code?

Discussion

I. IMC was no longer a party to the Operating Agreement after the 1986 assignment to Wintershall

There are two fundamental defects in IMC's argument based upon the law of novation.

First, the concept of a novation arises only in the context of the transfer of a duty of performance owed to an obligee from one obligor to another obligor. The transfer of a contractual duty of performance from obligor 1 to obligor 2 is not effective to bar the obligee's contractual rights against obligor 1 unless the obligee consents to the transfer of the obligation to obligor 2 and the release of obligor 1 from its duty to perform. Where the obligee consents to the transfer of obligor 1's duty to obligor 2 and releases obligor 1 from its contractual duty, that is called a novation. If this case concerned an obligation owed by IMC to Texaco under the Operating Agreement and IMC's assignment to Wintershall of its contractual obligation to Texaco, it would be relevant to consider whether Texaco had given its consent to the substitution of Wintershall in place of IMC as an obligor by reason of the IMC-Wintershall assignment.

But in this case we are concerned not with IMC's obligations to Texaco, but with Texaco's obligations to IMC. The validity and efficacy of a transfer of *rights* (as opposed to

obligations) under a contract is governed by the law of assignment, not the law of novation. Unless the contract specifically provides to the contrary (which is not alleged here), an assignment of rights under a contract does not require the consent of the counterparty obligor. *See* the discussion at page 8 of Texaco's Memorandum in Reply and the Louisiana statutes cited in footnotes 20 and 21.

The second fundamental defect in IMC's argument that it remained a party to the Operating Agreement is that Texaco unquestionably and unambiguously did consent to the assignment by IMC to Wintershall of all of IMC's rights and obligations to and under both the Sublease and the Operating Agreement. *See* the facts and documents set forth and referred to at pages 4 through the top of 8 and the footnotes therein under the heading "A. The Facts Show that Texaco Consented to the Substitution of Wintershall for IMC" in Texaco's Memorandum in Reply. None of these facts is in dispute, and the facts demonstrate irrefutably that Texaco consented to the IMC-Wintershall assignment, thereby effecting a novation with respect to the substitution of Wintershall in place of IMC as obligor to Texaco under the Operating Agreement.

As a consequence of the IMC-Wintershall assignment, the contractual relationships between Texaco and IMC with respect to the Leases, the Sublease and the Operating Agreement were terminated.

When Texaco filed its Chapter 11 petition in 1987, the year following the IMC-Wintershall assignment, Texaco had no contractual relationship with IMC, and therefore no contract with IMC capable of being assumed or rejected. Thus, there was no occasion for Texaco to send IMC a notice of assumption and cure, no contract to reject, and no contract which would "pass through" the bankruptcy unaffected in the event of failure to assume or assign.

After the 1986 assignment to Wintershall, IMC could have no possible claim against Texaco based upon the Operating Agreement, except for claims arising from and based upon a breach of the Operating Agreement by Texaco prior to the 1986 assignment.

II. All of IMC's causes of action alleged in the Louisiana Action constitute pre-petition claims

The starting point for analysis is the definition of "claim" in Section 101(5) of the Bankruptcy Code, because it is pre-petition "claims" that are barred under the Bar Order, the Confirmation Order and the relevant provisions of the Bankruptcy Code. Section 101(5) defines "claims" as follows:

> (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) 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;

The legislative history of the Bankruptcy Code makes quite clear that it was Congress' intention to provide the "broadest possible definition" for the term "claim" in order to provide the debtor with "the broadest possible relief":

> By this broadest possible definition, and by the use of the term throughout title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6266; S. Rep. No. 989, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5807-08.

The courts have consistently given full effect to the broad scope of this definition of "claim." *See, e.g., In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991); *Texaco Inc. v. Sanders (In re Texaco Inc.)*, 182 B.R. 937, 950-51 (Bankr. S.D.N.Y. 1995); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985).

Given the extremely broad definition of "claim" in the Bankruptcy Code, the question is how and when did IMC's claims asserted against Texaco in the Louisiana Action arise. Assuming

arguendo, but without deciding, that IMC has valid claims against Texaco for breach of Texaco's alleged duty to timely notify Amoco on IMC's behalf of the 1976 and 1981 Releases, and that Texaco breached a duty to defend IMC in the Amoco Action, and that Texaco is liable to indemnify IMC for the judgment against IMC in the Amoco Action, and that Texaco is liable to IMC for unjust enrichment in the amount of the Amoco judgment against IMC by reason of the foregoing,[1] it is quite clear that all of these causes of action constitute "claims" that arose pre-petition and pre-confirmation. That is because all of the alleged post-petition causes of action — the alleged duty to defend, right to indemnification and unjust enrichment — arise out of and are based upon Texaco's putative breach of the Operating Agreement by failing to give notice to Amoco of the Releases in 1976 and 1981. The duty to defend, indemnification and unjust enrichment claims are entirely dependent upon and have no existence apart from Texaco's alleged contract breaches in 1976 and 1981 when it failed to give Amoco notice of the Releases. With one possible exception, the damages sought in the Louisiana Action are the amount of Amoco's judgment against IMC in the Amoco Action, and that judgment was based solely on Texaco's pre-petition breach of the Reassignment Provision of the Sublease and concomitant and contemporaneous breach of Texaco's alleged duty to IMC under the Operating Agreement. The possible exception appears from IMC's argument that Texaco's duty to defend IMC in the Amoco Action would exist "*even if it had been ultimately proven that Texaco <u>did</u> notify Amoco* of the release of portions of the Subject Leases" (emphasis in original), suggesting perhaps that IMC is asserting a claim for its legal costs in defending the Amoco Action as well as indemnification for the $30 million Amoco judgment. But that claim (if such it is) is also a pre-petition claim, because IMC was no longer a party to the Operating Agreement after the 1986 assignment to Wintershall, and Texaco's alleged duty to defend IMC in a suit commenced after 1986 could not exist except with respect to a claim against IMC arising prior to the 1986 assignment.

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[1] Texaco denies that it had a duty under the Operating Agreement to notify Amoco on IMC's behalf of the 1976 and 1981 Releases, and it further denies that it had any duty under the Operating Agreement to defend IMC in the Amoco Action. Hence, Texaco also denies that it has a duty to indemnify IMC on account of the Amoco judgment or that it was unjustly enriched by failing to do any of the foregoing.

IMC's duty to defend, indemnification and unjust enrichment claims constituted unliquidated, contingent, unmatured claims within the meaning of Section101(5) of the Bankruptcy Code arising out of Texaco's alleged breach in failing to give Amoco notice on behalf of IMC of the Releases in 1976 and 1981. All of the acts, or in this case omissions, by Texaco giving rise to the duty to defend, indemnity and unjust enrichment claims occurred in 1976 and 1981. Although unliquidated, contingent and unmatured, all those claims were foreseeable as precisely the claims to which IMC would become subject if and when Amoco learned of the Releases and sought to enforce its rights against IMC based upon the failure to give notice in 1976 and 1981. Moreover, the existence of IMC's contingent and unmatured claims for defense, indemnification and unjust enrichment was readily subject to detection and verification at any time after Texaco's breaches in 1976 and 1981 occurred by the simple expedient of making written inquiry addressed to Texaco, or to Amoco, at any time after the breaches occurred in 1976 and 1981. At the time of the 1986 assignment, when IMC transferred its interests in the Sublease and the Operating Agreement to Wintershall, IMC knew that it had potential obligations to Amoco arising prior to the Wintershall assignment, and potential rights against Texaco under the Operating Agreement arising, if at all, prior to the Wintershall assignment. When IMC received notice of the proposed Bar Order and the proposed Confirmation Order in Texaco's bankruptcy in 1987 and 1988, IMC could readily have ascertained whether the required notices of the Releases had been given to Amoco on its behalf by Texaco. And in any event, IMC could have filed a contingent claim in Texaco's bankruptcy to preserve any and all potential contingent claims against Texaco that might be later asserted based on the Sublease and the Operating Agreement.

The cases in the Second Circuit and elsewhere consistently have held that "[a] claim...arises under the Bankruptcy Code at 'the time when the acts giving rise to the alleged liability were performed.'" *In re Chateaugay Corp.*, 112 B.R. 513, 520 (S.D.N.Y. 1990), *aff'd*, 944 F.2d 997, 1004 (2d Cir. 1991) (in the bankruptcy context, contingent claims refer to "obligations that will become

due upon the happening of a future event that was within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created") (citations omitted). To the same effect, *see, e.g., In re Johns-Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) ("Procedural and extraneous factors such as the timing of the filing of a summons and complaint by a third party, which is not associated with the underlying nature of the cause of action . . ., simply should not determine the existence or nonexistence of a 'claim.' Rather the focus should be on the time when the acts giving rise to the alleged liability were performed . . ."); *Texaco Inc. v. Sanders (In re Texaco Inc.)*, 182 B.R. 937, 953 (Bankr. S.D.N.Y. 1995) (". . . in this case the evidence demonstrates that all of the physical events giving rise to Respondents' rights of action, if any, occurred prior to the Confirmation Order and were capable of detection by scientific means available . . ."); *Grady v. A.H. Robbins Co., Inc.*, 839 F.2d 198, 203 (4th Cir.) (without deciding the issue of dischargeability, the court held ". . . that the Dalkon Shield claim in the case before us, when the Dalkon Shield was inserted in the claimant prior to the time of filing of the petition, constitutes a 'claim' 'that arose before the commencement of the case' within the meaning of 11 U.S.C. § 362(a)(1)"), *cert. dismissed, Joynes v. A.H. Robbins Co., Inc.*, 487 U.S. 1260 (1988); *In re Edge*, 60 B.R. 690, 705 (Bankr. M.D. Tenn. 1986) ("In conclusion, a right to payment and thus a claim arose at the time of the debtors' prepetition misconduct. Plaintiff's postpetition state court action against the debtors was prohibited by the automatic stay. 11 U.S.C. § 362 (1982 ed.)").

The Second Circuit's analysis of contingent claims is instructive in *In re Manville Forest Products Corp.*, 209 F.3d 125 (2d Cir. 2000). In that case the predecessor of the debtor had executed a contract to indemnify and defend Olin for any actions brought in connection with a certain property. Olin did not file a proof of claim under the indemnification agreement in the debtor's bankruptcy. Twelve years after confirmation of the debtor's plan, the Louisiana Department of Environmental Quality sent demand letters to Olin and the reorganized debtor for remediation of the property. Olin then sent a letter to the reorganized debtor requesting indemnification pursuant to the pre-petition contract of

indemnification. The reorganized debtor argued that any claims Olin might have arising under the indemnification agreement had been discharged by the confirmation order. The Second Circuit agreed and held that Olin's rights under the pre-petition indemnification agreement constituted contingent pre-petition claims as "'obligations that will become due upon the happening of a future event that was within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created'" (209 F.3d at 128-129, quoting *In re Chateaugay Corp.*, 944 F.2d at 1004).

IMC's duty to defend, indemnification and unjust enrichment claims are clearly within the scope of "contingent claims" defined by the Second Circuit in *Chateaugay* and *Manville Forest Products*. All of IMC's claims arose from and are predicated upon Texaco's alleged breach in 1976 and 1981 of its purported obligation to IMC under the Operating Agreement to report the Releases to Amoco. All of IMC's claims were precisely the sort of claims which were contemplated by the Reassignment Provision of the Sublease and that provision of the Operating Agreement on which IMC relies for its claim that Texaco had a duty to report the Releases to Amoco on IMC's behalf. As Olin could have filed a claim in the Manville Forest Products bankruptcy in respect of its contingent and unmatured pre-petition right of indemnification, so also could IMC have filed a claim in the Texaco bankruptcy in respect of Texaco's pre-petition breach of the Operating Agreement. IMC failed to do so, and its claims arising from and based upon Texaco's pre-petition breaches are barred.

Conclusion

The motion is granted. Texaco is directed to prepare an appropriate order and forward the same to counsel for IMC for approval as to form, without any waiver of IMC's right to appeal from the order. In the event of any dispute as to the form of the order, counsel will promptly arrange a conference call with the Court to identify the precise issue to be resolved by the Court.

Dated: White Plains, NY
April 18, 2005

/s/ Adlai S. Hardin, Jr.
U.S.B.J.