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Cedar Chemical Corporation v. United States: The EPA's Breach of Contract Under the Federal Insecticide, Fungicide and Rodenticide Act

I. INTRODUCTION

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)¹ requires the Environmental Protection Agency (EPA) to indemnify owners of pesticide who have "suffered losses by reason of suspension or cancellation" of their pesticide registration.² FIFRA is designed to remedy the inequities that result when a previously-approved pesticide is later suspended or cancelled by the EPA, resulting in losses to owners who relied on initial EPA approval. In *Cedar Chemical Corporation v. United States*,³ the EPA cancelled Cedar Chemical Corporation's pesticide Dinoseb,⁴ resulting in losses to Cedar of more than \$1.5 million. Although the EPA signed an agreement with Cedar in December of 1987 agreeing to expeditiously process Cedar's indemnification claim on its stock of unsold Dinoseb, Cedar has yet to be paid. Based upon contract law, legislative intent, and notions of fair play and justice, this note concludes that the EPA should be held to its contractual obligations with Cedar. Cedar's reimbursement should be paid immediately, regardless of the pendency of another action.

The significance of this case goes beyond the two parties involved. The EPA often suspends and cancels registrations under FIFRA. Similar issues regarding whether a party is entitled to immediate indemnification under FIFRA, despite pendency of a third party challenge to a cancellation order, will likely arise in the future. It is essential that courts establish definite procedures and standards for indemnification to which both parties can be held to avoid the problems of *Cedar Chemical*. This standard should (1) altogether preclude the EPA from entering into settlement agreements like the one entered into with Cedar, or (2) allow the EPA to enter into such agreements while requiring that they make the language and limits of the agreement absolutely unambiguous to the other contracting party.

1. 7 U.S.C. §§ 136-136y (1982).

2. *Id.* at § 136m(a)(3).

3. 18 Cl. Ct. 25 (1989).

4. Dinoseb is a herbicide for control of broadleaf weeds in peanuts and potatoes. *Id.* at 26 n.1.

II. THE Cedar Chemical CASE

A. Background

On December 22, 1987, President Reagan signed into law a bill barring the use of appropriated funds for indemnification of persons injured under FIFRA.⁵ Indemnification payments now come from the Judgment Fund.⁶ Before authorizing payment from the Judgment Fund, the Attorney General must certify that "no appeal shall be taken from a judgment or that no further review will be sought from a decision. . . ."⁷

After the EPA cancelled the registration of the pesticide Dinoseb, an association of growers and food processors challenged the cancellation in *Northwest Food Processors Association v. Reilly*.⁸ The United States argues that the pendency of *Northwest Food Processors* precludes the Attorney General from certifying that no further review will be sought from the decision; the case is still pending before the Ninth Circuit and could be appealed to the Supreme Court. Therefore, the government has refused to pay Cedar any indemnification.

There is no direct precedent dealing with a situation like the present case. However, other cases are similar in many respects. In *Lebanon Chemical Corporation v. United States*,⁹ the United States Claims Court held that the United States was liable for Lebanon's storage costs of banned pesticides on the theory of express breach of contract. The EPA failed to fulfill its contractual obligation to designate disposal sites within a stated period of time after having signed a contract with Lebanon to do so. Also, in *Chevron Chemical Corporation v. United States*,¹⁰ the claims court held that Chevron, as a manufacturer of a pesticide suspended and cancelled by the EPA under FIFRA, was entitled to damages (storage costs) under the Act. The court found that the

5. "None of the funds in this Act shall be available for any indemnity payment under section 15 of the Federal Insecticide, Fungicide and Rodenticide Act." Pub. L. No. 100-202, 101 Stat. 1329-199 (1987).

6. The Judgment Fund states:

(a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—

- (1) payment is not otherwise provided for;
- (2) payment is certified by the Comptroller General; and
- (3) the judgment, award, or settlement is payable
 - (A) under section 2414 . . . of title 28

31 U.S.C. § 1304 (1982).

7. 28 U.S.C. § 2414 (1982).

8. 869 F.2d 542 (9th Cir. 1989).

9. 6 Cl. Ct. 503 (1984).

10. 5 Cl. Ct. 807 (1984).

Government breached an agreement for disposal of the pesticide when the EPA failed to designate disposal sites for the pesticide within eight months, as required by the agreement. Conversely, in *Gro-Green Products, Inc. v. United States*, the claims court refused damages for storage when the EPA had not entered into a settlement agreement.¹¹

The issue in this case is whether the EPA is obligated to immediately perform its side of the agreement with Cedar, or whether it can wait until all challenges to its cancellation of Dinoseb are exhausted. This issue of finality under FIFRA is one awaiting final resolution.

B. *The Facts of the Case*

FIFRA establishes a framework for the regulation of pesticides used within the United States. According to FIFRA, pesticides must be registered with the EPA before they can be sold or distributed.¹² The EPA may suspend or cancel its registration of any pesticide if such an action is required to prevent an imminent hazard. It is illegal to use a pesticide that the EPA has cancelled. The EPA is required to make an indemnity payment to any person who owned any quantity of the pesticide immediately before the notice of cancellation.¹³

On October 7, 1986, the EPA administrator issued an emergency order suspending the registration of the pesticide Dinoseb.¹⁴ Cedar and the EPA eventually signed a settlement agreement on December 31, 1987.¹⁵ In this agreement, Cedar promised not to contest the cancellation of its product's registration, and the EPA promised to accept Cedar's stock of Dinoseb no later than December 31, 1988. The EPA further promised to expedite indemnification to Cedar of its unsold stock.¹⁶ The agreement was contingent upon the administrator's final cancellation order.

On June 10, 1988, the EPA administrator issued the final order cancelling Dinoseb's registration. However, before indemnification

11. 3 Cl. Ct. 639 (1983).

12. 7 U.S.C. § 136a (1982).

13. *Id.* at § 136m.

14. Cancellation Order, United States Environmental Protection Agency Before the Administrator, FIFRA Docket No. 590.

15. Stipulation and Settlement Agreement, Cedar Chem. Corp. v. United States, 18 Cl. Ct. 25 (1989).

16. The agreement states that

[u]pon receipt of an independent audit containing the information required by this paragraph, EPA agrees that Cedar will be entitled under FIFRA section 15 to receive an indemnification payment in an amount equal to the actual production costs or purchase costs determined by the independent audit for the products identified in Attachment D or the amount specified in Attachment E, whichever is less.

Id. at 6.

could occur, several groups challenged the legality of the final order cancelling Dinoseb's registration. In *Northwest Food Processors Association v. Reilly*, a case seeking revocation of the final cancellation order, the Ninth Circuit affirmed the administrator's final cancellation order.¹⁷ As stated earlier, Cedar has received no money from the government.

Cedar brought suit seeking damages for breach of the settlement agreement. The EPA contends that the administrator's order cancelling Dinoseb is not "final" because the order has been appealed and is still subject to reversal. Cedar contends that the agreement with the EPA is a valid contract and that a third party's legal challenge to the administrator's order can only affect the cancellation order and not Cedar's rights under the agreement. In the instant case, the United States Claims Court held for the EPA.

C. *The Court's Analysis*

The court found that the agreement between Cedar and the EPA provided for payment by the General Accounting Office (GAO) from the Judgment Fund only after two steps had been satisfied: (1) the EPA's determination of a right to indemnification (final cancellation order)¹⁸ and (2) certification of finality from the Attorney General.¹⁹ The first step was satisfied on June 10, 1988, when the EPA issued the final order cancelling the registration of Dinoseb. The second step was never satisfied because the Attorney General never certified finality of the cancellation order.²⁰ The court concluded that no payment is due Cedar, nor will payment be due, until *Northwest Food Processors* is resolved.

The court reasoned further that the EPA never promised Cedar payment, rather it only promised *expedition* of its determination that Cedar qualifies under FIFRA for indemnification.²¹ Indeed, the EPA does not possess the power alone to effect payment under FIFRA. The GAO ultimately pays for indemnification. The EPA can only see that the process for payment from the Judgment Fund is immediately set in motion. The terms of the agreement account for the kind of delay en-

17. 869 F.2d 542 (9th Cir. 1989).

18. Stipulation and Settlement Agreement at 2, *Cedar Chem. Corp. v. United States*, 18 Cl. Ct. 25 (1989).

19. 7 U.S.C. § 136m (1982).

20. That is no appeal would be taken from a judgment or no further review will be sought from a decision. The pendency of *Northwest Food Processors* challenging the EPA's final cancellation order of Dinoseb prevented the Attorney General from making such a certification.

21. *Cedar Chem. Corp.*, 18 Cl. Ct. at 29 (emphasis added).

countered in this case.²²

Finally, the court maintained that it had no authority to perform a function committed by law to the Attorney General.²³

III. ANALYSIS: INDEMNIFICATION UNDER FIFRA

The court's analysis in *Cedar Chemical* placed undue emphasis on the indemnification procedure, as established under FIFRA and Public Law No. 100-202, without placing equal emphasis on the agreement between the EPA and Cedar. A binding contract was entered into between Cedar and the EPA. The court's holding seems to be contrary to both the provisions of the contract and the intent of the parties. Furthermore, the court's analysis seems contrary to the intent of Section 15 of FIFRA.

A. *Contrary to Provisions of the Settlement Agreement*

In *Chevron Chemical Corporation v. United States*, a case similar to *Cedar Chemical*, the claims court stated that "settlement or compromise agreements are contractual in nature."²⁴ Therefore, the agreement entered into between Cedar and the EPA is a binding contract.

1. *Pendency of Northwest Food Processors does not affect Cedar's right to indemnification*

Northwest Food Processors Association v. Reilly,²⁵ pending before the Ninth Circuit, should only affect the EPA's cancellation order of Dinoseb, not Cedar's right to indemnification. The contract with Cedar was contingent upon entry of the EPA's final cancellation order. When the EPA entered this final cancellation order on June 10, 1988, a binding contract was formed between Cedar and the EPA. Resolution of the current dispute should be subject only to the terms of that agreement. There are two distinct claims involved in *Cedar Chemical*: the first between Cedar and the EPA and the second between Northwest Food and the EPA. These two claims, though possibly appearing on the sur-

22. The agreement reads, in pertinent part: "EPA makes no representations in this Stipulation and Settlement, either explicit or implicit, concerning the source or timing of any payment of such indemnification." Stipulation and Settlement Agreement at 6, *Cedar Chem. Corp. v. United States*, 18 Cl. Ct. 25 (1989).

23. *Cedar Chem. Corp.*, 18 Cl. Ct. at 28.

24. 5 Cl. Ct. 807, 810 (1984). *Chevron* involved a suit brought by a manufacturer of a pesticide which had been suspended and cancelled by the EPA under FIFRA. The manufacturer was seeking recovery from the government's breach of a settlement agreement for disposal of the pesticide. See *Cheyenne-Arapaho Tribes v. United States*, 671 F.2d 1305, 1309; *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 (1980).

25. 869 F.2d 542 (9th Cir. 1989).

face to be connected, in reality have little to do with each other. If the EPA's cancellation order were overturned, the finality of Cedar's claim against the EPA, based on the contract, would not be affected. Both parties would still be bound.

2. *Cedar cannot collect indemnification twice*

Furthermore, the EPA's fear that Cedar could collect twice if its Dinoseb cancellation order were overturned is unfounded and should play no role in the court's decision. The contract between Cedar and the EPA stipulates:

In the event that such a verification audit determines that the actual production costs or purchase costs for the Dinoseb products listed in Attachment D were less than the amount determined under paragraph 15, nothing in this Stipulation or Settlement shall prevent the EPA or the United States from commencing action to recover any excess amount paid to Cedar. . . .²⁶

The contract further states:

In the event that Cedar exports, or Cedar sells, distributes, or reprocesses for a non-pesticidal purpose, any quantity of any Dinoseb product identified in Attachment D, the indemnification which would otherwise be payable for that quantity of that product shall be reduced by the amount of the net proceeds (if any) from such export, sale, distribution, or reprocessing.²⁷

Not only does the EPA have the above contractual safeguards to protect it from double payment, but preparations are currently underway for the EPA to accept the pesticide.²⁸ Once the EPA acquires Cedar's inventory, Cedar will obviously have no more pesticide to sell and the double payment threat will be gone.

B. *Contrary to Intent of Parties*

When Cedar and the EPA entered into their contract, they did so with similar notions of what each was agreeing to do and what each would expect in return. Cedar, by signing the contract, agreed that it would not seek or otherwise defend continued registration of the pesticide Dinoseb.²⁹ Cedar's only inducements to enter into the contract

26. Stipulation and Settlement Agreement at 7, Cedar Chem. Corp. v. United States, 18 Cl. Ct. 25 (1989).

27. *Id.* at 7.

28. Defendant's Response to Plaintiff's Requests for Admission No. 9, Cedar Chem. Corp. v. United States, 18 Cl. Ct. 25 (1989).

29. Stipulation and Settlement Agreement at 2, Cedar Chem. Corp. v. United States, 18 Cl.

were the EPA's specific undertakings in the contract: (1) to provide a relatively simplified procedure for determination and payment of Cedar's indemnity claim, thus expediting such payment;³⁰ and (2) to provide facilities to accept cancelled Dinoseb products owned by Cedar and others for storage and ultimate disposal no later than December 31, 1988.³¹ The EPA understood that these two grounds were Cedar's inducement for entering into the agreement.

1. *The EPA's contractual obligation is unclear*

It is unclear what the EPA is bound to do under the agreement. Certain language within the agreement indicates that the EPA has a duty to expedite payment to Cedar the indemnification and dispose of the pesticide.³² However, language elsewhere in the agreement denies any obligation concerning the timing of the indemnification.³³ This language appears to be contrary to the earlier language and creates an ambiguity.

2. *Established rules of contract interpretation should govern*

A cardinal rule of contract construction law is that the parties' own interpretation of the contract controls.³⁴ The EPA admits that it

Ct. 25 (1989).

30. *Id.* at 5-6.

31. *Id.* at 8.

32. The language of the agreement reads as follows:

Upon receipt of an independent audit containing the information required by this paragraph, EPA agrees that Cedar will be entitled under FIFRA section 15 to receive an indemnification payment in an amount equal to the actual production costs or purchase costs determined by the independent audit for the products identified in Attachment D or the amount specified in Attachment E, whichever is less.

Id. at 6. The agreement reads further:

Based on the above certifications by Cedar, EPA acknowledges that the dinoseb products identified in Attachment D would upon entry of a final cancellation order qualify for acceptance under FIFRA section 19(a). . . . EPA agrees that it will accept pursuant to FIFRA section 19(a) the dinoseb products . . . as soon as practicable . . . but no later than December 31, 1988. . . . In the event that EPA fails to accept the dinoseb products identified in Attachment D by December 31, 1988, EPA agrees that Cedar may initiate an appropriate legal action to enforce this paragraph.

Id. at 8-9.

33. *See supra* note 22.

34. "In the interpretation of contracts whether they be ambiguous in the sense that that term is here defined or simply contain language of doubtful meaning, the primary concern of the courts is to ascertain and to give effect to the true intention of the parties." 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 601, at 310 (3d ed. 1961). *See also* Stevens v. Fanning, 59 Ill. App. 2d 285, 207 N.E.2d 136 (1965) ("The fundamental question in determining the meaning of a contract is always the intent of the parties, which is to be gathered by giving the contract a fair and reasonable interpretation, from the language of the entire contract, considered in light of the circumstances under which it was made."); Hart v. Ehlers, 319 S.W.2d 418 (Tex. Civ. App.

entered into a contract on December 31, 1988, to dispose of the Dinoseb products which are the subject of Cedar's indemnity claim.³⁵ The EPA also admits that its contractor will carry out such disposal as soon as possible, *regardless of any future developments in the Northwest Food suit*.³⁶ Further, on or about March 2, 1989, the EPA's Deputy Director notified all known owners or holders of Dinoseb products, including Cedar, that they "are now legally eligible for indemnification and disposal based on the June 9, 1988, Final Cancellation Order."³⁷

It was the intention of both parties to the agreement that Cedar would not contest the cancellation of Dinoseb and that, in return, the EPA would expedite payment of the indemnification and disposal of the pesticide. Now, almost two years after the entry of the Final Cancellation Order, Cedar is still waiting for its indemnification payment and disposal of its Dinoseb stocks. Simply by delaying payment, the government has reduced the value of the indemnity claim which Cedar bargained for and has forced Cedar to incur legal costs. Cedar has not received the benefit of its bargain.

C. *Contrary to Intent of FIFRA Section 15*

1. *FIFRA Section 15 is designed to protect Cedar*

FIFRA's indemnification provision is intended to protect private parties who have relied on the EPA's registration system. It is designed to ensure that such private parties do not end up bearing the cost of the government's mistaken registration of a pesticide later cancelled.³⁸ Cedar, through the EPA's cancellation order and by contract, has lost or will lose its stock of Dinoseb due to the EPA's cancellation of its

1958); *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154 (1951).

In addition, "[i]t is quite the universal holding that, where the interpretation of a contract is fairly debatable, the court will adopt the practical construction which the parties to the contract have heretofore adopted, whether by conduct or otherwise." *Fort Dodge Co-op. Dairy Marketing Ass'n v. Ainsworth*, 217 Iowa 712, 716, 251 N.W. 85 (1933). *See also Hanson v. P.A. Peterson Home Ass'n*, 35 Ill. App. 2d 134, 182 N.E.2d 237 (1962); *Albert v. Ford Motor Co.*, 112 N.J.L. 597, 172 A. 379 (1934); *RESTATEMENT (SECOND) OF CONTRACTS* § 228(4) (1973).

Finally, the standard of "reasonable expectation" is what should be applied to contract interpretation: "The standard most applicable to a bilateral transaction would seem to be that of reasonable expectation, that is, the sense in which the party using the words should reasonably have apprehended that they would be understood by the other party." 4 S. WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 603, at 344-45 (3d ed. 1961).

35. Defendant's Response to Plaintiff's Request for Admissions No. 1, *Cedar Chem. Corp. v. United States*, 18 Cl. Ct. 25 (1989).

36. Defendant's Response to Plaintiff's Requests for Admissions No. 9, *Cedar Chem. Corp. v. United States*, 18 Cl. Ct. 25 (1989) (emphasis added).

37. Defendant's Response to Plaintiff's Supplemental Request for Admission No. 7, *Cedar Chem. Corp. v. United States*, 18 Cl. Ct. 25 (1989).

38. 7 U.S.C. § 136m (1982).

previous registration of Dinoseb. FIFRA was clearly intended to cover Cedar's situation.

2. *A more reasonable interpretation of FIFRA section 15*

Section 15 of FIFRA requires the administrator to make indemnity payments to injured persons once the registration has been "cancelled as a result of a final determination that the use of such pesticide will create an imminent hazard."³⁹ It is this provision upon which the EPA rests its claim that no payment is due Cedar because a "final determination" has yet to be made regarding the cancellation of Dinoseb. The court cited no authority backing up its interpretation of FIFRA when it accepted the EPA's interpretation. There is a more reasonable interpretation of FIFRA section 15 than the one adopted by the court.

The EPA concedes that a final determination was made by the administrator incident to his cancellation order in the present case.⁴⁰ The court found likewise.⁴¹ The EPA presented no compelling argument that a pending collateral attack upon such a final determination should affect this determination in any way. In fact, when one looks to the language of section 15, the clear impression is that such a collateral attack should not have the effect which the court has given it. Section 136d(b) says that in the event a hearing is requested, "a decision pertaining to registration or classification issued after completion of such hearing *shall be final*."⁴² And further, under section 136n(b), any person adversely affected by a final cancellation order can obtain judicial review in the United States Court of Appeals, but the commencement of such proceedings "shall not, unless specifically ordered by the court to the contrary, operate as a stay of an order."⁴³ Thus, the clear intent of the Act is that collateral attacks—like the one brought in *Northwest Food*—do not affect the finality of an administrative final decision.

D. *The EPA's Lack of Control over Payment Is Easily Remedied*

The EPA argues that the GAO, not the EPA, has control over the Judgment Fund. Therefore, if Cedar were found to be entitled to immediate payment, the EPA could not pay Cedar until the Attorney General gave the GAO approval for such payment. This argument

39. *Id.* at § 136m(a)(2).

40. Defendant's Memorandum in Opposition at 4, Cedar Chem. Corp. v. United States, 18 Cl. Ct. 25 (1989).

41. Cedar Chem. Corp., 18 Cl. Ct. at 28.

42. 7 U.S.C. § 136d(b) (1982) (emphasis added).

43. *Id.* at § 136n(b).

stumbles under scrutiny. Such administrative approval by the Attorney General is not listed as a condition of the contract. Furthermore, although such administrative approval may be required in order to approve payment of Cedar's indemnity claim from the Judgment Fund *prior* to any judgment, such certification is certainly not required as a requisite to entry of a judgment in the same case. If such an Executive Branch sign-off were required, the United States Claims Court would in effect be powerless to enter judgments in favor of any plaintiff without concurrence by the Executive Branch. This would clearly defeat the purpose of the claims court. A holding by the claims court for Cedar would mandate payment.

E. A Proposition

To avoid further confusion—and thus further litigation—regarding the cancellation of pesticide registrations and agreements between the EPA and injured parties, one of two possible steps could be taken. First, the EPA could simply be forbidden to enter into settlement agreements with injured parties. Or preferably, the EPA could be permitted to enter into settlement agreements with injured parties, but forced to abide by the strict requirements regarding the construction and content of those agreements. The language in the agreements would have to clearly indicate to the injured party that ultimate payment is subject to the Attorney General's determination that no appeal would be taken from the judgment and that no further review would be sought from a decision affirming the same.⁴⁴ The injured parties should know that such a determination by the Attorney General could be impeded by pendency of a third party action contesting the cancellation. Finally, the contract should inform the injured party that the EPA does not have the authority to make payments under FIFRA, nor does it have authority to force someone else to make such a payment. Rather, the EPA can only authorize the first step toward payment.

Permitting the EPA to enter only those settlement agreements containing the above recommendations would be somewhat burdensome and inefficient. Nevertheless, the result would be less misunderstanding, less litigation, and more fairness to parties injured under FIFRA.

IV. CONCLUSION

When the EPA suspended and cancelled its registration of Dinosorb, it had a duty under FIFRA to indemnify any person suffering

44. 28 U.S.C. § 2414 (1982).

losses as a result of such suspension or cancellation. When Cedar and the EPA entered into the agreement, Cedar gave up its right to challenge the cancellation order and the EPA promised to expedite payment of the indemnification and to take and dispose of Cedar's unsold stock of Dinoseb. Now, long after entry of the Final Cancellation Order, the government has not indemnified Cedar, nor has it removed Cedar's stock of Dinoseb. This is an unjust and unlawful state of affairs. The EPA's argument against immediate payment seemingly contradicts the language of the settlement agreement, the intent of the parties, and the intent of FIFRA. Furthermore, the court's decision simply leads to an unfair result.

The issue raised in the present case is new. The holding of the court in this case will set an undesirable precedent. The EPA will undoubtedly enter into settlement agreements with other parties who have been adversely affected by the EPA's suspension or cancellation under FIFRA. The EPA should be required to clearly inform these parties that it can only do its part to expedite the process of indemnification and that the ability to indemnify injured parties is ultimately in the hands of the Attorney General.

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