

CLARK HILL

Morris
Polich &
Purdy

Contact:

Candace C. Carlyon
Senior Attorney
702.697.7530
ccarlyon@clarkhill.com

Delaware Court Denies Request of Beverly Hills Entities to Require Chapter 11 Debtor to Properly Abandon Wells

In *In re Venoco, LLC*, 2017 WL 2374683 (May 31, 2017), the Delaware bankruptcy court denied the request of California governmental agencies to require the Debtor to comply with environmental obligations with regard to an oil and gas well site, located on the same site as the Beverly Hills High School. The court recognized that "It will take time and money for Venoco to meet its obligations and Venoco does not have enough of either."

The City of Beverly Hills and the Beverly Hills Unified School District sought an order requiring that the Debtor, Venoco, LLC (Venoco) comply with a Plug and Abandon Order issued by the California Division of Oil, Gas, and Geothermal Resources, and a Compliance Order issued by the City of Beverly Hills. The site was located in a "sensitive area", directly adjacent on two sides to the Beverly Hills High School recreational facilities, approximately 80 feet from the nearest residence, and less than 250 feet from a hospital.

The lease of the property required that, within 90 days of the termination of Venoco's right to extract oil and gas, Venoco was to "completely abandon all oil and gas operations" on the site, and "restore" the site "to its original condition." This would have required that all wells be plugged, all concrete foundations, oil soaked dirt and debris removed, and the filling of all holes.

Venoco acquired the lease in a recent bankruptcy proceeding of its affiliate, Venoco, Inc., which had represented that it would comply with all applicable laws and regulations regarding any abandonment and restoration obligations. The lease provided for operations to conclude by December 31, 2015. Venoco ceased operations and on April 17, 2017, filed its own Chapter 11 bankruptcy.

The Delaware court recognized that, in *Midatlantic Nat'l Bank v. New Jersey Dep't of Env't'l Prot.*, 474 U.S. 494 (1986), the Supreme Court held that "a bankrupt company may not abandon property in the face of a state statute or regulation that is reasonable designed to protect the public. Instead, the bankrupt must develop conditions that will adequately protect the public's health and safety." However, the Venoco court described that decision as a narrow one, involving "imminent and identifiable harm." In contrast, the Delaware court in Venoco found that the Debtor had not put public health at risk or refused to respond or

reimburse for response costs. The court also noted that Venoco was continuing to monitor the site and was willing to do so for a short period of time. The bankruptcy court concluded that, “[t]he expectation of the Plaintiffs on decommissioning are not suitable in a bankruptcy case.”

Additionally, the Venoco court held that there was no showing of irreparable injury, since the costs of decommissioning were compensable in money damages. The Plaintiffs’ request for a reserve to fund the costs of decommissioning was taken by the court as proof that: “money damages would be sufficient, which defeats the Plaintiffs’ claims of irreparable harm.” The court relegated the governmental authorities to filing claims in the bankruptcy case, with the court to determine at some future date the amount and priority of such claims.

Two lessons can be learned from this decision. The first is the importance of providing evidence of an “imminent and identifiable harm” in order to assert a compliance requirement in a bankruptcy case. This was the critical distinction drawn by the Delaware court in determining whether environmental obligations would trump bankruptcy considerations.

Second, the necessity of requiring that “adequate assurance of future performance” be demonstrated in connection with the assumption of a lease. While Debtor’s predecessor, Venoco, Inc., argued in its own Chapter 11 that its assignee would comply with the end of lease requirements, no reserve or other method of ensuring compliance was created in the prior bankruptcy case. As a result, Venoco was permitted to operate the wells through the lease termination date, while effectively being relieved of the abandonment requirements under both the lease and applicable environmental laws and regulations.