Water Law Review

Volume 4 | Issue 2 Article 18

1-1-2001

United States v. Jolly, No. 99-5700, 2000 U.S. App. LEXIS 29907 (6th Cir. Nov. 20, 2000)

Jon Hyman

United States v. Jolly, No. 99-5700, 2000 U.S. App. LEXIS 29907 (6th Cir. Nov. 20, 2000)

on the FCA, not the CWA, and, thus, failed to state a claim covered under the insurance policy. Because M/G failed to state a claim covered within the insurance plan, WQIS did not breech its duty to defend or indemnify M/G in its *qui tam* action. Accordingly, the court affirmed WQIS' summary judgment motion and denied M/G's request for relief.

Kirstin E. McMillan

United States v. Jolly, No. 99-5700, 2000 U.S. App. LEXIS 29907 (6th Cir. Nov. 20, 2000) (holding, under the Safe Drinking Water Act, failure to timely challenge an administrative order precluded judicial review of that order and the district court did not abuse its discretion in the assessment of penalties and injunction, where a history of noncompliance and disregard for regulation procedures existed).

Peter E. Jolly appealed a partial summary judgment against him for violation of the Safe Drinking Water Act ("SDWA"). In 1977, Jolly and his associates formed the JAF Oil Company ("JAF"). JAF owned and operated eighty-nine injection wells on oil and mineral leases in Easton Field, Hancock County, Kentucky. Eventually, Jolly became JAF's sole shareholder, officer, director, and employee. In 1985, the Environmental Protection Agency ("EPA") informed JAF that the wells did not comply with the SDWA or the Underground Injection Control program ("UIC"). In 1988, JAF filed for bankruptcy but continued to operate the wells. In 1992, the EPA issued an administrative order ("AO") to remedy JAF's violations. Jolly continued solely to operate the wells under the name Strategic Investments Incorporated ("SI"). In 1995, the United States filed a civil enforcement action in the United States District Court for the Western District of Kentucky against JAF, SI, and Jolly to enforce the AO. The district court granted partial summary judgment to the government on claims that JAF failed to meet the AO compliance deadlines. Under state-law veil piercing theories, the court held Jolly individually liable for the JAF and SI violations. Additionally, the court held SI liable for failing to reply to EPA's request for information. Finally, the district court held JAF, SI, and Jolly liable for failing to comply with SDWA and UIC regulations. The court granted the government's injunctive request to shut down the wells, and issued a $500,000 civil penalty to each defendant. Jolly appealed.

The first issue Jolly raised on appeal was whether EPA denied Jolly due process when they issued the AO. Under SDWA section 3000h-2(c)(6), the court of appeals did not review Jolly's compliance with the AO because Jolly failed to appeal the issuance of the AO. Section 3000h-2 authorized EPA to issue an AO and required the agency to notify Jolly of his right to request a hearing. The hearing granted Jolly the right to dispute the order's compliance requirements. Jolly failed to request a hearing. Once the AO became final, Jolly had another thirty days to appeal the AO in federal district court. Jolly again failed

to appeal the AO. Therefore, the court precluded Jolly from challenging the validity of the AO. The court stated Jolly's failure to exhaust his judicial review opportunities cost him consideration of his due process claims. Additionally, the preclusion of judicial review disallowed the court from considering his second issue of whether there was a genuine issue of fact as to the existence of an underground drinking water source.

The third issue Jolly raised on appeal was whether the district court abused its discretion in administering the injunction and civil penalties. Jolly argued the penalties were excessive in light of his financial hardship and history of family medical problems. He also argued the injunction was unwarranted because he did not violate UIC regulations requiring a response for information. The government stated the penalties were not an abuse of discretion given Jolly's history of noncompliance and explicit disregard of the regulations. Additionally, the government argued Jolly provided insufficient evidence to support economic hardship. The court examined the enforcement provisions of the SWDA. The SWDA provides that a violator of the UIC program may be assessed penalties of up to $25,000 a day. The provisions also state that a failure to reply to a request for information could result in an injunction. Jolly claimed he never received the information request. EPA presented evidence that they attempted to deliver the information. Federal Express returned letters sent to Jolly's and SI's listed addresses as undeliverable. However, EPA successfully sent a fax to Jolly and received a fax confirmation. The court therefore presumed Jolly received the request and did not respond.

The appellate court next examined the factors considered in assessing a civil penalty for violations of an AO. These factors included: 1) the seriousness of the violation; 2) the economic benefit resulting from the violation; 3) history of violations; 4) good faith efforts to comply; and 5) the economic impact of the penalty on the violator. The court affirmed the district court's assessment of penalties. The court found Jolly's history of bad-faith noncompliance in excess of seven years, his refusal to accept notices, his avoidance of liability through the transfer of assets from JAF to SI, and the seriousness of the violations were well within the discretion of the lower court's issuance of penalties.

Jon Hyman

NINTH CIRCUIT

Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141 (9th Cir. 2000) (holding environmental organizations' members showed sufficient injury-in-fact to confer Article III standing on the organizations to survive summary judgment on the standing issue).