DOES THE ENRON BANKRUPTCY HAVE AN EFFECT UPON EXERCISE OF EMINENT DOMAIN OVER PROPERTY OF PORTLAND GENERAL ELECTRIC CO. (A SUBSIDIARY CORPORATION) BY AN OREGON GOVERNMENTAL UNIT?

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August 14, 2002

Assumptions: This discussion assumes that (1) the debtor corporations in bankruptcy are various "Enrons", (2) one or more Enrons own all the stock of Portland General Electric Co. ("PGE"), but none has title in its own name to any PGE property; (3) there is no factual basis for finding that PGE failed to preserve and observe all its necessary corporate formalities, and (4) the entity which proposes to exercise eminent domain powers to condemn PGE property in Oregon did not exist prior to the bankruptcy filing.

The available public information is that assumptions (1) and (2) are true. The truth of assumption (3) is unknown. Assumption (4) would be true for a new Oregon entity.

SUMMARY

The automatic stay of proceedings under § 362(a)(1) of the Bankruptcy Code protects (a) the assets of the debtor from (b) actions that were or could have been brought at the time of the petition in bankruptcy, which are not (c) exempt from the stay under § 362(b)(4). Sections 362(a)(2)-(8) are more limited and specific in the actions which are stayed and not relevant to this inquiry.

From the facts presently known to the public, it appears that the automatic stay of proceedings in bankruptcy would not stay a condemnation action brought by an entity formed after the filing in bankruptcy and based upon public need which arose as a consequence of the Enron bankruptcy for the following reasons:

1. PGE is neither the "debtor" nor in the estate of the debtor corporation(s), "Enron," and PGE's property was not in the "possession" of Enron at the time it filed bankruptcy;

2. A condemnation action was not pending at the time Enron petitioned for bankruptcy, and could not have been brought prior to the petition as the entity exercising eminent domain powers did not have such powers at the time of the bankruptcy, and the facts giving rise to the public purpose "need" to exercise eminent domain (potential for sale to unregulated buyer without OPUC approval) would not exist but for the bankruptcy; and

3. Section 362(b)(4), which expressly exempts the exercise of governmental regulatory and police powers (regardless of when commenced) from the stay under § 361(a)(1), may apply to a condemnation proceeding.

DISCUSSION

Section 362(a)(1) of the Bankruptcy Code prohibits:

> the commencement or continuation * * * of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title * * *.

I. PGE IS NOT THE *DEBTOR* IN BANKRUPTCY.

PGE is a distinct corporation entitled to the presumption of the separateness and regularity of the conduct of different corporations. ***In re: Typhoon Industries***, 6 B.R. 886 (Bkrtcy N.Y. 1980). Absent a specific finding of grounds to disregard the separate corporate entities of parent and subsidiary corporations, a bankruptcy court has no jurisdiction to enjoin action between the nonfiling subsidiary corporation and a third party**.** ***In re: Mergo International, Inc.***, 30 B.R. 479, 10 B.C.D. (D.C. N.Y. 1983).

> A bankruptcy court's jurisdiction does not extend to a wholly-owned subsidiary of the debtor, unless the subsidiary is "a mere sham or conduit rather than a viable entity." ***In re Beck Industries***, 479 F.2d 410, 416 (2d Cir. 1973), *cert. denied*, 414 U.S. 858, 94 S.Ct. 163, 38 L.Ed.2d 108 (1973). See ***In re Clifford Resources, Inc.***, 24 B.R. 778, 780 (Bkrtcy S.D.N.Y. 1982) (***Beck*** is still good law even though decided under the old Bankruptcy Act.)

In re Stein & Day, Inc. 113 B.R. 157, 162 (Bkrtcy S.D.N.Y. 1990).

Beck held that power to stay proceedings under the former codification of the Code did not authorize the court to enjoin "a suit against a solvent independent subsidiary of the debtor merely because its stock is held by the debtor in reorganization." It relied upon the weight of authority in the Circuits and the treatises: ***In Re Gobel, Inc.***, 80 F.2d (2d Cir. 1936)[1]; ***In Re South Jersey Land Corp.***, 361 F.2d 610 (3d Cir. 1966); 6 COLLIER ON BANKRUPTCY, ¶ 3.11 at 501; *cf*. ***Greenbaum v. Lehrenkrauss Corp.,*** 73 F.2d 285 (2d Cir. 1934) (equity receiver of parent could not enjoin a suit against the subsidiary).

II. THERE ARE NO FACTS PUBLICLY KNOWN WHICH WOULD ALLOW A COURT TO DISREGARD PGE'S CORPORATE EXISTENCE TO INCLUDE IT IN THE DEBTOR'S ESTATE.

The factual showing necessary for disregarding separate corporate existence is generally the same as the familiar ones necessary for "piercing the corporate veil" between corporate form and an individual person: intermingling of affairs and accounts, failure to observe requisite corporate formalities, proof that non-debtor was involved in fraud on creditors with the debtor, and so on. The ***Typhoon Industries*** case listed three factors for disregarding the separateness of a subsidiary of a bankrupt parent in what is called by many courts the "instrumentality" rule. The factors are (1) control by a parent so that the subsidiary is mere "instrumentality" of the debtor, (2) fraud or wrong by the parent through the subsidiary, and (3) unjust loss to the creditor if the corporate form is not disregarded. See also, ***Pension Benefit Guaranty Corp. v. Ouimet Corp***,

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1. The foregoing general rule was established as the law of this Circuit in the leading case of ***In Re Gobel, Inc.***, *supra*, where we reversed a district court order which had enjoined certain state court proceedings directed at the debtor's subsidiary. Gobel, Inc., the debtor in the bankruptcy proceedings, had voted the common stock of its subsidiary, Decker & Sons, in favor of a sale of Decker's assets to Armour & Co. The appellant therein, which had leased certain equipment to Decker, sought to compel Decker to establish a fund to pay-off the lease (which Armour had refused to assume) and later sought damages for breach of the lease. We found that the Bankruptcy Court had no jurisdiction to restrain the action against Decker, stating "it is plain that the suit was not against this debtor nor was it a judicial proceeding to enforce any lien upon its estate. The assets of the Decker corporation were involved, not the Decker stock, which was part of the debtor's estate. . . . But mere financial interest of a bankrupt estate in the outcome of the litigation pending in state courts does not authorize the issuance of an injunction against such prosecution."

In re Beck Industries, Inc., 479 F.2d 410, 415-416, quoting, ***Gobel, Inc.***, *supra*, 80 F.2d at 852.

711 F.2d 1085 (1st Cir. 1983), *cert denied*, 464 U.S. 961 (1983); ***Itel Containers International Corp. v. Atlanttrafic Express Services***, 909 F.2d 698 (2d Cir. 1990) *on remand*, 781 F.Supp 975 (S.D.N.Y. 1991), *rev'd other grounds*, 982 F.2d 765 (1992) (court employed control test to determine non-bankrupt corporation was not alter ego of debtor).

III. THERE ARE NO FACTS PUBLICLY KNOWN TO SUGGEST THAT THE DEBTOR, ENRON, HAD PGE PROPERTY IN ITS *POSSESSION* UPON WHICH A STAY MIGHT OPERATE.

An expansion of the notion of the "estate of the debtor" is found in § 362(a)(3) to prevent actions to obtain possession of property in the "possession" of the debtor at the time of the bankruptcy. This section is meant to discourage "self-help" by those who have lease interests (evicting the debtor when lease expires) or actually own property stored or leased to the debtor. The stay applies, but relief from the stay will usually be granted upon a factual showing that the property is not in the estate of the debtor.

According to one treatise, the property of a corporation owned by the debtor is not covered by the § 362(a)(3) stay, as there is no automatic disregard of the corporate entity. Cowans, BANKRUPTCY LAW AND PRACTICE, Vol. 3 at p 38; see ***Typhoon Industries***, *supra*; ***Mergo International***, *supra*. If the bankrupt corporate entity were to assert that it owned PGE property (as opposed to owning the stock of PGE), then the stay would apply subject to a hearing on a request for relief from the stay. ***Federal Home Loan Mfg Corp. v. Holme Circle Realty Corp.***, 146 B.R. 135 (E.D. Pa. 1992).

IV. A CONDEMNATION PROCEEDING MAY BE AN EXERCISE OF GOVERNMENTAL POWER EXEMPT FROM STAY UNDER § 362(B)(4).

Furthermore, § 362(b)(4) exempts from the broad stay of judicial and administrative proceedings "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." It appears that a condemnation action for the purpose of protecting the public health and welfare may be exempt from the bankruptcy stay, even if Enron held title in its own name to some PGE assets. One test has been that, if the governmental action is protecting a pecuniary interest, the stay applies; if the action is to effectuate public policy, then the exception applies. ***Universal Life Church, Inc. v. United States*** (***In re Universal Lie Church***), 128 F.3d 1294 (9th Cir. 1997); ***Marin v. Safety Electric Construction Co.***, 151 B.R. 637 (D. Conn 1993); ***In re Ellis***, 66 B.R. 821 (N.D. Ill. 1986).