



U.S. Department of Justice
Office of the Solicitor General

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Washington, D.C. 20530

December 26, 1991

Michael Davidson, Esq.
Senate Legal Counsel
642 Hart Building
Washington, D.C. 20515

Re: Paul D. Reardon, et al. v. United States,
No. 90-1319 (1st Cir.) (en banc).

Dear Mr. Davidson:

On October 29, 1991, the United States Court of Appeals for the First Circuit ruled in the above-referenced case that the statutory lien provision of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9607(1), is inconsistent with the Due Process Clause of the Fifth Amendment. Pursuant to 2 U.S.C. 288k(b), I am writing to notify you that the United States has determined not to petition the Supreme Court for a writ of certiorari to review that decision.

The Reardons own property in Norwood, Massachusetts, that is partially contaminated with polychlorinated biphenyls (PCBs). After removing 518 tons of PCB contaminated soil from the property, the Environmental Protection Agency (EPA) filed a notice of lien on all of the Reardons' property pursuant to 42 U.S.C. 9607(1). The Reardons filed suit in the United States District Court challenging EPA's action and claiming, among other things, that the filing of the lien without prior notice and hearing violated the Due Process Clause of the Fifth Amendment.

The district court concluded that the statutory provision is constitutional on the ground that the lien did not deprive the Reardons of a "significant property interest" protected by the Due Process Clause. Reardon v. United States, 731 F. Supp. 558 (D. Mass. 1990). The district court relied on the Supreme Court's summary affirmance of a prior case involving a mechanic's lien. Spielman-Fond, Inc. v. Hanson's Inc., 379 F. Supp. 997 (D. Ariz. 1973) (three judge panel), aff'd mem., 417 U.S. 901 (1974).

The Reardons appealed. While the case was pending before the en banc court of appeals, the Supreme Court issued an opinion in Connecticut v. Doehr, 111 S. Ct. 2105 (1991), holding that attachments or liens on real property deprive property owners of significant interests that are subject to protection under the Due Process Clause. Id. at 2112-2113. The Court distinguished Spielman-Fond as possibly resting on an alternative ground. Id. at 2113 n.4.

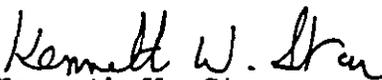
The court of appeals in this case subsequently relied on Doehr to invalidate the CERCLA lien provision, 42 U.S.C. 9607(1). It held that the lien deprives landowners of a significant property interest because it clouds title, impairs the ability to sell, taints any credit rating, reduces the chance of obtaining a loan, and can place the mortgage in technical default. In addition, the CERCLA scheme affords no procedural safeguards to protect against erroneous deprivation of that interest. The court of appeals noted, however, that those shortcomings could be rectified through administrative procedures affording a landowner notice and an opportunity for a hearing.

The Supreme Court's holding in Doehr that a lien or attachment deprives a landowner of a "significant property interest" eliminates the basis for defending the constitutionality of 42 U.S.C. 9607(1) as heretofore administered and as applied to the Reardons. The CERCLA statutory scheme does not in itself afford timely opportunity to challenge the validity of a lien, and the Reardons received no formal pre-deprivation notice and hearing. EPA, however, has expressed an interest in developing some form of administrative procedures for the protection of landowners. Should those procedures be implemented, courts in future cases may find 42 U.S.C. 9607(1) as administered free from constitutional infirmity.

In light of EPA's interest in developing administrative safeguards and in changing its implementation of 42 U.S.C. 9607(1) to enhance the arguments supporting the constitutionality of the statute, I have determined not to file a petition for a writ of certiorari in the present case. My decision in this case does not, of course, foreclose the possibility of seeking Supreme Court review of an adverse decision in some future case where additional procedural safeguards have been employed.

The time for petitioning for a writ of certiorari in the present case expires on January 27, 1992. Please do not hesitate to contact me if you have any questions.

Sincerely,


Kenneth W. Starr
Solicitor General

cc: Steven R. Ross, Esq.
General Counsel to the Clerk
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