

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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PRODUCT DESIGN & FABRICATION, INC.

*Debtor.*

Bankruptcy No. 92-11526LC

Chapter 7

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### ORDER RE: TRUSTEE'S REPORT OF ABANDONMENT

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The matter before the court is the trustee's report of abandonment. Hearing was held September 14, 1994 in Cedar Rapids, Iowa. Appearing were Harry R. Terpstra, Chapter 7 trustee, Gregory J. Epping, attorney for the trustee, and John M. Titler, attorney for All Iowa Body, Inc., objector to the report. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

#### FINDINGS OF FACT

This case began as a Chapter 11 reorganization filed August 14, 1992. On September 15, 1993, the case converted to Chapter 7. Dennis Currell was appointed Chapter 7 trustee. On July 5, 1994, Harry Terpstra was appointed successor Chapter 7 trustee.

Product Design & Fabrication, Inc. (PDF) was a manufacturer of seed corn detasseling equipment. PDF's operation included a facility for painting the equipment. The facility generated paint waste materials including waste solvents and residual paint. PDF had contracted with two firms to dispose of the waste. After PDF became delinquent under the contracts, the disposal firms stopped hauling the material away. The waste material accumulated from approximately one year before filing the Chapter 11 petition until conversion to Chapter 7. Some material was hauled away by contractors during the Chapter 11 case. Approximately 35-40% of the material remaining was generated during the Chapter 11 case.

The waste material is located on property owned by All Iowa Body. The property is a compound housing seven businesses. PDF is a former tenant, no longer in possession of the premises. Since 1985, All Iowa Body's sole business has been ownership and lease of real estate. All Iowa Body is now a Chapter 11 debtor-in-possession.

Irvin Janey is president and a shareholder of All Iowa Body. Janey also was president and a 50% shareholder of PDF. Marty Sixt is also a shareholder of All Iowa Body and was the other 50% shareholder of PDF.

After the Chapter 7 conversion, the trustee held a liquidation sale. He attempted to sell the unused paint, but was unsuccessful. After the trustee's sale, All Iowa Body moved the waste materials in order to lease the premises to another tenant. It gathered most of the materials on a flatbed truck. The truck is owned by Rainbow Paint & Blasting and is located on property leased from All Iowa Body by Rainbow. Janey is the general manager of Rainbow. His wife, Samuella, is its 100% shareholder. Rainbow also generates paint waste but keeps it segregated. Rainbow has a contract with Barton Solvents to remove its waste materials twice a month.

Currell, the former trustee, filed a motion to incur expenses to dispose of the waste products. Currell asked Van Waters & Rogers Inc., a company that disposes of environmental waste, to bid on removal of the material. The firm estimated that the cost of disposal would be \$12,703. Exhibit 4.

Terpstra, the successor trustee, withdrew the motion to incur expenses for disposal and filed a motion to abandon the following material:

All drums, cans or other containers containing paint, solids, sludge or liquid and any and all other drums, cans, pails or other containers of paint, paint thinner and/or any other solvent in which the Debtor arguably has an interest located at real property formerly leased by the Debtor from All Iowa Body, Inc., Cedar Rapids, Iowa.

Terpstra hired Chem-eco Environmental to inspect the site. The inspection was conducted August 26, 1994 by Carol Wilson, owner of Chem-eco. Wilson has a masters degree in chemical engineering. She has extensive experience in various aspects of hazardous waste assessment and management. Exhibit 1. She has worked for a Nebraska agency as a hazardous waste program specialist and for the United States Air Force as a civilian environmental engineer. For approximately the last four years she has been a consulting engineer working in areas including hazardous waste management and environmental law compliance. Her work experience has given her a very good understanding of Environmental Protection Agency (EPA) regulations.

Wilson said her instruction was to determine whether the stored waste represented an "imminent and substantial threat of harm to human health or the environment." Wilson examined the containers for integrity and to see whether releases had occurred. She checked the site to determine whether it was secure and whether the containers were being inspected regularly. Terpstra also inspected the site on August 26, 1994 and took photographs of the site and the containers. Exhibit 3. The materials have not been moved from their location on the date of the inspection.

The materials are contained in three types of storage. There are 26 55-gallon drums on a flatbed truck. The drums are covered with a tarpaulin to reduce the heat from exposure to the sun. Also on the flatbed truck are several one- and five-gallon containers of unused paint in a wooden box. The flatbed truck is located in a corner of the lot out of the way of traffic from the other businesses. In another location on the property is a 1000-gallon tank containing approximately 500 gallons of waste solvents. The tank is housed in a portable container that resembles an enclosed truck body. The housing is secured with a latch.

The materials are observed daily and inspected at least weekly. The property is surrounded by a chain link fence that the trustee estimated is seven to nine feet high, with barbed wire in some places. There are two controlled entrances to the premises. After business hours, the entrance gates are secured and a guard dog is on the premises.

None of the 55-gallon drums was leaking. There are two types of drums: drums which open at the top by removing the entire lid, and drums which are sealed on top and access is had through bung holes. The cover had been removed from one of the open-top drums. This drum contained used paint filters which had been rolled up and placed in water. The bung hole covers were missing from four of the sealed-top drums. All of the drums would be considered intact under EPA regulations for storage of the waste materials. Two of the drums probably would not meet Department of Transportation requirements for shipping.

Wilson was not able to inspect all of the one- and five-gallon containers because they were stacked on top of each other. She did not observe any leakages or release from the containers. She inspected under the flatbed truck and found no evidence of any releases. The 1000-gallon tank appeared intact. The court finds that the waste materials are not a leakage or spillage hazard.

Janey testified that the hazard of the material is its volatility, its ability to ignite and to explode. PDF once had a flash fire caused by a spark or heat near open solvents. Janey said that some of the waste material has a flash point of 180 degrees. Janey is concerned that the waste materials could expand from the heat of the sun and cause an explosion. There are two businesses within 50 feet of the flatbed truck.

Wilson's opinion is that the waste materials do not represent an imminent hazard for fire or explosion. She bases her opinion on the assumption that the waste profile prepared by Van Waters & Rogers, Exhibit 2, accurately characterizes the materials that are in the containers. There is no evidence that the profile is not accurate. Wilson testified that waste material may be classified as hazardous due to toxicity or ignitability. She said the EPA defines ignitability as having a flash point of less than 140 degrees. The flash point is the temperature at which the vapor over a liquid will burn if a source of ignition is present. If a source of ignition is applied to a closed container, there are conditions under which the container could explode and burn. Wilson did not observe a source of ignition in the areas near the flatbed truck or the container housing the 1000-gallon tank. The materials in the open-top drum were not an ignition hazard. The safer

storage would be to close the bung holes on the other type of drum. Wilson stated that the stored waste materials in their present condition present no imminent or substantial threat because of ignitability.

Wilson also believed the materials did not present a threat of ignition from being stored outside in the sun. She defined the autoignition point as the temperature at which material would combust on its own. She stated it would be extremely unlikely that the stored materials would reach the autoignition point. The court finds that the waste materials are not an imminent hazard for fire or explosion.

Janey testified that PDF is in violation of EPA regulations because of the volume of material stored. Wilson testified that the materials constitute an EPA violation, not for the volume of material, but for the time of its accumulation. She said the EPA requires waste to be removed within certain time limits, depending on the classification of the company generating the waste.

The trustee served the Iowa Department of Natural Resources (DNR) and the EPA with the report of abandonment of property. Neither agency has filed an objection.

Terpstra spoke with a representative of the EPA on about July 29, 1994. He sent the EPA a fax copy of the report of abandonment. On the same day Terpstra also spoke with a DNR representative who indicated the DNR was taking no position on the matter and considered it the responsibility of the EPA. Neither the DNR nor the EPA has indicated to the trustee who would be responsible for disposal of the waste materials if the trustee is allowed to abandon the property. Janey has not investigated the issue. The trustee has not investigated whether secured creditors could be surcharged pursuant to 11 U.S.C. § 506(c) for the cost of disposing of the material. The EPA has visited the premises four times and has inspected and inventoried the material. The most recent inspection was in early September, 1994. Another inspection took place about two and a half weeks earlier. Shortly after PDF converted its case to Chapter 7, the EPA met with Currell and Janey for a half day. In early 1992, before the Chapter 11 was filed, the EPA made a three-day visit.

The trustee has \$257,998.88 on deposit. The funds are subject to secured claims, priority claims and administrative expenses. There is a federal tax claim for \$68,000 and a state tax claim for approximately \$20,000. All Iowa Body's counsel stated it would be filing a rent claim in an amount between \$80,000 and \$113,000. The trustee does not know whether this claim will be entitled to priority. The estate continues to accrue administrative expenses, including litigation costs and fees for the attorney for the trustee. The trustee has two preference actions pending. The trustee does not know whether there will be funds available to pay unsecured claims.

## DISCUSSION

The trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. 11 U.S.C. § 554(a). Abandonment divests the trustee of control of the property; it is no longer property of the debtor's estate. In re McGowan, 95 B.R. 104, 106 (Bankr. N.D. Iowa 1988).

The parties agree that the property is burdensome to the estate. The waste material is unsaleable. The cost of disposing of the material would be approximately \$13,000. The issue is the applicability of the narrow exception to the trustee's power of abandonment established in Midatlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 106 S.Ct. 755 (1986).

In Midatlantic, a state environmental protection agency had found the debtor in violation of its operating permit for accepting oil contaminated with PCB, a highly toxic carcinogen. The agency ordered the debtor to clean up the site. At another of its facilities, the debtor was storing PCB-contaminated oil in deteriorating and leaking containers. Midatlantic, 106 S.Ct. at 757-58. The Court stated that a bankruptcy court may not allow a trustee to abandon property "without formulating conditions that will adequately protect the public's health and safety." Id. at 762. The Court held that:

a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.

Id. The Court qualified its holding in a footnote:

This exception to the abandonment power vested in the trustee by § 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm.

Id. at 762-63 n.9 (emphasis added).

The court in Borden, Inc. v. Wells-Fargo Business Credit (In re Smith-Douglass, Inc.), 856 F.2d 12 (4th Cir. 1988), interpreting Midatlantic, allowed unconditional abandonment of property that was in violation of state environmental laws in several respects. The court determined in Smith-Douglass that the Midatlantic decision does not require full compliance with environmental laws prior to abandonment. The Fourth Circuit read Midatlantic as a narrow exception to the abandonment power intended only to protect public safety. Smith-Douglass, 856 F.2d at 16. The court said:

[W]here the public health or safety is threatened with imminent and identifiable harm, abandonment of the contaminated property must be conditioned on the performance of procedures that will adequately protect public health and safety.

Id. The court upheld the bankruptcy court finding that the property posed no threat of immediate harm. Id. Moreover, the court found that unconditional abandonment was appropriate in light of the bankruptcy estate's lack of unencumbered assets. Id. at 17.

The court believes that the Smith-Douglass decision represents the majority view. A court may authorize abandonment of property that is regulated by environmental protection agencies if the conditions of abandonment do not present imminent and identifiable harm to public health and safety. This is so even if the condition of the property presently constitutes a violation of environmental law. See, e.g., Matter of MCI, Inc., 151 B.R. 103, 107-09 & n.7 (E.D. Mich. 1992); White v. Coon (In re Purco, Inc.), 76 B.R. 523, 532-33 (Bankr. W.D. Pa. 1987); but see In re Peerless Plating Co., 70 B.R. 943, 947 (Bankr. W.D. Mich. 1987) (trustee may not abandon property in violation of CERCLA, an environmental law reasonably designed to protect the public health and safety from identified hazards). Courts have applied the same analysis whether the property violates federal or state laws. Peerless Plating, 70 B.R. at 948 n.4; see also MCI, 151 B.R. at 108 (EPA incurred cleanup costs; property also violated state laws).

The lack of unencumbered assets available for cleanup is an additional factor in support of authorizing abandonment of property that may violate environmental regulations. MCI, 151 B.R. at 108, citing In re Better-Brite Plating, Inc., 105 B.R. 912 (Bankr. E.D. Wis. 1989); In re Franklin Signal Corp., 65 B.R. 268, 272 (Bankr. D. Minn. 1986).

The court concludes that the trustee may abandon the property. Abandonment would not present a threat of imminent and identifiable harm to the public health or safety. The accumulation of waste material likely violates EPA regulations either for the volume of material on the premises or the time over which it accumulated and should have been removed. However, the material has been on the premises for two or three years. The material on the flatbed truck has been there for approximately a year. The EPA is aware of the status of the material through its own inspection and through contacts with PDF and the trustees. There has been no allegation that the EPA has initiated proceedings or issued administrative orders that would indicate the EPA considers the situation an imminent threat of harm. The material is contained so as to prevent a hazard from leakage or spillage. The containers are inspected regularly. The premises are secure. The material in its present condition does not present an imminent fire hazard; the possibility of explosion is remote.

All Iowa Body argues that abandonment is improper because the trustee assumed administration of the estate, obtained the benefits from sale of the assets and is now walking away from the remaining property. It argues that the trustee has a moral responsibility to properly dispose of the material, which it says is hazardous waste. The trustee has money on hand and All Iowa Body contends that the trustee should not be allowed to abandon the property to avoid the expense of disposal.

The trustee has a duty to administer the bankruptcy estate for the benefit of creditors. The trustee may treat particular items of property differently, depending on what course of action will best maximize the estate. He may sell some

property and abandon other property. Avoiding expense is a legitimate motivation in every trustee decision to abandon property. It would arguably serve public policy to require bankruptcy trustees to dispose of hazardous waste. However, neither the Bankruptcy Code nor the Midatlantic decision requires full compliance with environmental laws prior to abandonment. Smith-Douglass, 856 F.2d at 16.

All Iowa Body's real concern is its potential liability for cleanup costs if the trustee is allowed to abandon the property. Who would be responsible for cleanup, and whether any responsible entities would have claims against the estate are issues not before the court and separate from the question whether the trustee may abandon the property. See Smith-Douglass, 856 F.2d at 15 n.4. The court concludes that the trustee should be allowed to abandon the property.

### **ORDER**

IT IS ORDERED that the objection of All Iowa Body is overruled. The trustee's report of abandonment is approved.

SO ORDERED this 12<sup>th</sup> day of October, 1994.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on \_\_\_\_\_ I mailed a copy of this order and a judgment by U.S. mail to: