

March 10, 2003  
DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

Petition for Special Redress

Name of Case: Philip P. Kalodner

Date of Filing: July 23, 2002

Case Number: VEG-0010

Philip P. Kalodner, attorney for a group of utilities and manufacturers (hereinafter “Utilities and Manufacturers”), filed an application for “a common fund fee.” Mr. Kalodner seeks a fee of \$60,000 “for his effort in creating [a] \$361,040 addition to” crude oil overcharge funds collected by the DOE. Application at 3. For the reasons set forth below, Mr. Kalodner’s application will be denied.

I. Background

Pursuant to Department of Energy (DOE) policy, purchasers of refined petroleum products could apply to the OHA for a refund from crude oil overcharge funds collected by the DOE. Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 Fed. Reg. 27899 (August 4, 1986) (the MSRP). We established refund procedures for these funds, which were made available through court approved settlements, remedial orders and consent orders entered into by the DOE and numerous firms that sold crude oil during the period of price controls. See, e.g., New York Petroleum, Inc., 18 DOE ¶ 85,435 (1988); Ernest A. Allerkamp, 17 DOE ¶ 85,079 (1988); A. Tarricone, Inc., 15 DOE ¶ 85,495 (1987).

On August 3, 2001, we issued a Proposed Decision and Order (PDO) in which we tentatively decided, in the absence of an objection, to grant a refund of \$1,098,911 to Hercules Incorporated (Hercules), a firm that purchased refined petroleum products during the crude oil price control period. A copy of the PDO was provided to Hercules and to Mr. Kalodner, whose clients Utilities and Manufacturers were identified as potentially interested parties. Utilities and Manufacturers filed an objection to the PDO, and subsequent to that objection, we received additional arguments from both Hercules and Mr. Kalodner. On June 5, 2002, we issued a Decision and Order in which we granted a refund of \$737,871 to Hercules (Case No. RR272-204).

II. Analysis

In his present submission, Mr. Kalodner notes that because the refund granted to Hercules “was \$361,040 less than the proposed award, . . . the funds in the U.S. Treasury Crude Tracking Claimants

accounts will be depleted by \$361,000 less that they would have been by virtue of the PDO.” Application at 3. “A fee of 16 and 2/3% (one-sixth) of the amount saved by Kalodner’s efforts is properly awarded to him for his effort in creating the \$361,040 addition to the Crude Tracking-Claimants account.” Id.

Subsequent to the filing of Mr. Kalodner’s present application, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision regarding a previous request for fees, based on the same common fund theory, that was filed by Kalodner and rejected by the DOE and a federal district court. Kalodner v. Abraham, 310 F.3d 767 (D.C. Cir. 2002). In that case, “Kalodner alleges that his work on behalf of his clients benefitted the entire class of end users, entitling him to still more fees. Expressly disclaiming that he qualifies as a Subpart V claimant, . . . Kalodner argues that he is entitled to an award pursuant to the common fund fee doctrine.” Id. at 769. The appellate court declined to rule on the “merits of Kalodner’s common fund claim” because it found that “Kalodner’s suit is barred by sovereign immunity.” Id.

Although arguing that this action "is against the United States only in its capacity as escrowee of funds belonging to end users found entitled to restitution," Appellant's Reply Br. at 16-17, Kalodner's common fund fee claim nevertheless implicates federal sovereign immunity for a simple reason: He seeks funds in the United States Treasury.

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[T]he sine qua non of federal sovereign immunity is the federal government's possession of the money in question. The government need not have an actual interest in the funds in order to invoke the defense.

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Kalodner has also failed to identify a statutory waiver of immunity that would allow him to bring his common fund fee claim. Congress has waived sovereign immunity for Subpart V claimants--parties actually injured by violations of the EPAA--by authorizing them to seek refunds from escrow accounts held by the United States Treasury and to challenge awards to other claimants. See Goodyear Tire & Rubber Co. v. Dep't of Energy, 118 F.3d 1531 (Fed. Cir. 1997) (party allegedly injured by EPAA violation challenged DOE's denial of its claims for price refunds); Consol. Edison Co. v. Richardson, 233 F.3d 1376 (holding that Subpart V claimants have standing to challenge awards to other claimants). But as Kalodner concedes, he is not a Subpart V claimant nor was he injured by a violation of the EPAA. Appellant's Reply Br. at 21.

Id. at 769-70.

In all relevant respects, Mr. Kalodner's present claim is indistinguishable from that rejected by the court in Kalodner v. Abraham. Relying on the same "common fund fee" theory, he "seeks funds in the United States Treasury" and "has also failed to identify a statutory waiver of immunity that would allow him to bring his common fund fee claim." Accordingly, Mr. Kalodner's claim is barred by sovereign immunity and will be denied.

It Is Therefore Ordered That:

The Application filed by Philip P. Kalodner for a common fund fee (Case No. VEG-0010) is hereby denied.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: March 10, 2003