

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Dublin Division

IN RE:)	Chapter 7 Case
)	Number <u>92-30278</u>
FARM SERVICE CENTER, INC.)	
)	
Debtor)	
_____)	
)	
ANNE MOORE,)	
CHAPTER 7 TRUSTEE)	
)	
Movant)	FILED
)	at 12 O'clock & 18 min. P.M.
vs.)	Date: 12-21-94
)	
PENNSYLVANIA MILLERS MUTUAL)	
INSURANCE COMPANY)	
)	
Claimant/Respondent)	

ORDER

Came on for hearing the trustee's objection to the claim of Pennsylvania Millers Mutual Insurance Company ("Pennsylvania Millers") in the above-referenced bankruptcy case. Pennsylvania Millers has submitted a bifurcated claim, including a priority claim for \$35,379.42 and a general unsecured claim for \$114,620.58, basing its right to priority payment of \$35,379.42 on its subrogation under

11 U.S.C. § 509(a)¹ to the rights of holders of claims falling under § 507(a)(5)² based on its payment to those claimholders. Pennsylvania Millers' subrogation rights in general are not disputed, only its claimed right of subrogation to the priority status of the claimholders. The trustee objects to the priority claim on the basis that § 507(d) specifically excludes from priority subrogees to claims falling under § 507(a)(5).

An entity that is subrogated to the rights of a

¹11 U.S.C. § 509(a) provides:

Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment.

²11 U.S.C. § 507(a)(5) provides:

The following expenses and claims have priority in the following order: . . .

(5) Fifth, allowed unsecured claims of persons --

(A) engaged in the production or raising of grain, as defined in section 557(b)(1) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b)(2) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility -- but only to the extent of \$2,000 for each such individual.

holder of a claim of a kind specified in subsection (a)(3), (a)(4), **(a)(5)**, or (a)(6) of this section is not subrogated to the right of the holder of such claim to priority under such subsection. (Emphasis added)

11 U.S.C. § 507(d). Pennsylvania Millers argues, though, that the reference in § 507(d) to § 507(a)(5) is actually a legislative error, arguing that reference to § 507(a)(5) is actually intended to refer to subrogees under § 507(a)(6). Accepting this position that § 507(a)(5) should not be listed in § 507(d) would require that the trustee's objection be overruled. I find, however, against the position of Pennsylvania Millers in sustaining the trustee's objection.

The trustee first claims that the use of the word "persons" to describe claimholders in § 507(a)(5) means that a subrogee which is not a natural person may not be subrogated to priority under § 507(a)(5), supporting her position that Pennsylvania Millers is not subrogated to priority. The word "person" is defined at 11 U.S.C. § 101(41) to include individuals, partnerships, and corporations but not governmental units.³

³11 U.S.C. § 101(41) provides:

In this title -- . . .
[41] "person" includes individual, partnership, and corporation, but does not include governmental unit, Provided, however, that any governmental unit that acquires an asset from a person as a result of operation of a loan guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of

Pennsylvania Millers Mutual Insurance Company, a corporation, fits within the definition of "person," and thus is not excluded from subrogation of rights of a holder of a claim under § 507(a)(5).

Pennsylvania Millers relies upon Creditor's Committee v. Massachusetts Department of Revenue, 105 B.R. 145 (D.Mass. 1989), and In re Kaldis, 122 B.R. 54, 55 (Bankr. S.D. Tex. 1990), in support of its position that subrogees to the rights of holders of claims which fall under § 507(a)(5) are also subrogated to the priority of the holders of the claims, contrary to the language of § 507(d). Creditor's Committee and Kaldis, though, as well as the cases cited in these decisions, support a different proposition than that advanced by this creditor. These cases include subrogees of holders of claims under § 507(a)(7) in § 507(d)'s prohibition even though § 507(a)(7) is not named in § 507(d), because after drafting § 507(d) Congress inserted present paragraph (a)(5) into the priority scheme, resulting in a renumbering of the paragraphs, but without then changing the references in § 507(d).

The courts have extended section 507(d) to include subsection (a)(7) because of a perceived mistake in congressional drafting. [Citations omitted] In 1984, Congress amended the bankruptcy code by adding a new fifth priority in section 507(a). [Cit. omitted] The new fifth subsection granted priority to unsecured claims of grain or fish producers to the extent of \$2,000 where a storage facility

this title;

files for bankruptcy. [Cit. omitted] This new fifth priority was inserted into the priority list of section 507(a) causing the former fifth priority to become the sixth, and the former sixth to become the seventh. Despite this change, the subsections cross-referenced by section 507(d) remained unchanged, and further amendments to the code in 1986 did not correct the problem.

Creditor's Committee, 105 B.R. at 149-150. These courts include § 507(a)(7) subrogees under § 507(d)'s prohibition against subrogation of particular claims to priority because the courts found no evidence of Congressional intent to repeal the judicial construction of this section which disallows subrogees of claims under § 507(a)(7) from priority, relying on the principal that "repeals of judicial constructions of legislation are usually required to be clear and manifest." Id. at 150, quoting In re Missionary Baptist Foundation of America, 667 F.2d 1244, 1246 (5th Cir. 1982).

Pennsylvania Millers argues that inclusion of subrogees of claims under § 507(a)(7) in non-priority supports by negative implication exclusion of subrogees under § 507(a)(5) in § 507(d)'s prohibition.

Section 507(d) bars priority status with respect to subrogated claims which would otherwise receive priority. Such prohibition extends to claims which receive . . . consumer credit priority under section 507(a)(6) (erroneously referred to in the statute as section 507(a)(5))

3 L. King Collier on Bankruptcy ¶ 507.07 at 507-46-47 (15th Ed. 1994). According to this reading of § 507(d), subrogees of claims

under § 507(a)(5) should not be excluded from priority, but rather should be subrogated to the priority rights of their subrogors. There is no case authority to support this notion.

It is a different proposition to perceive the statute to not repeal the judicial practice of excluding subrogees of claims under § 507(a)(7) from priority status, than to depart from the clear language of the statute denying priority status to subrogees of claims under § 507(a)(5) and include such subrogees in the priority scheme as Pennsylvania Millers encourages. Congress amended the Bankruptcy Code in 1986, two years after § 507(d) was added to the Code, and did not alter § 507(d) to delete the reference to § 507(a)(5). Congress again amended the Bankruptcy Code with the Bankruptcy Reform Act of 1994.

An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the rights of the holder of such claim to priority under such subsection.

11 U.S.C. § 507(d). This reflects a clear inclusion of subrogees of claims under § 507(a)(5) as well as under other sections added by the Act. However, pursuant to the Act and with limited exceptions which do not apply in this case, the amendments made by the Act do not apply to cases commenced before the effective date of the Act, October 22, 1994. Bankruptcy Reform Act §702(b), 108 Stat. 4106 (1994). While this amended language is not itself applicable to

this case since this case was initiated prior to the effective date of the Act, I find that to the extent that an analysis of Congressional intent is needed, it evidences a clear Congressional intent different from that offered by Pennsylvania Millers. There is no evidence of a Congressional intent to contradict the language of § 507(d) to exclude subrogees of claims under § 507(a)(5) from the prohibition against priority therein. To the contrary, if any Congressional intent can be established, the failure of Congress to address its "error," as put forth by Pennsylvania Millers, in the 1986 Bankruptcy Code amendments and the unequivocal inclusion of § 507(a)(5) in the revision of § 507(d) in the 1994 amendments evidences no "error" in the 1984 amendments. Subrogees of claims under § 507(a)(5) are not subrogated to the priority of the holders of those claims.

IT IS THEREFORE ORDERED that the objection to the priority status of the claim of Pennsylvania Millers Mutual Insurance Company is sustained;

further ORDERED that the entire claim of Pennsylvania Millers Mutual Insurance Company is to be treated as a general unsecured claim.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 21st day of December, 1994.