Jules

JMH-
Please examine carefully. I have ??? Docket Entries 16-19 not taken care of yet as the attachment came in after Report & Rec done. I also wanted to see what changes you will make.

Renée

UNITED ST
EASTERN D

CIVIL ACTION NO. 87-210

DONALD PERRY, ET AL.,

VS: REPORT A

ELIZABETH PERRY, ET AL., *

The above-styled actio
2409 and relevant state law by the
tenant in common an undivided on
Creek in Wolfe County, Kentucky
declaring their interest in and an a
well as the tract of land which wa
common (Myrtle Perry's husband F
Commonwealth of Kentucky in 19
(Frank's new wife, the defendant Elizabeth Perry) through that party's undue influence.

The United States of America has filed a motion for summary judgment, based on the fact that the plaintiffs have failed to file suit before the expiration of the twelve year statute of limitations period in 28 U.S.C. Section 2409a. The plaintiffs have indicated that section 2409, the statute cited in the complaint, is applicable rather than section 2409a. However, examination of the sections leads to the conclusion that the suit is not one for partition of the particular parcel in which the United States is involved and that there is a considerable dispute about the ownership of the land involved; therefore, section 2409a and its twelve year limitations period would apply.

JMH-

Please examine carefully. I have ???s

Docket Entries 16-19 not taken care of yet, as the attachment came in after Report & Rec done. I also wanted to see what changes you will make.

Renée

Jules

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 87-210

DONALD PERRY, ET AL., PLAINTIFFS,

VS: REPORT AND RECOMMENDATION

ELIZABETH PERRY, ET AL., DEFENDANTS.

* * * * * * * * *

The above-styled action was brought pursuant to 29 U.S.C. Section 2409 and relevant state law by the heirs of one Myrtle Perry, who had owned as a tenant in common an undivided one-half share in certain property on Chimney Top Creek in Wolfe County, Kentucky before her death. The plaintiffs seek an order declaring their interest in and an accounting of the rents for both that property as well as the tract of land which was subsequently purchased by the other tenant in common (Myrtle Perry's husband Frank) from the proceeds of a settlement with the Commonwealth of Kentucky in 1961, and subsequently conveyed to a third party (Frank's new wife, the defendant Elizabeth Perry) through that party's undue influence.

The United States of America has filed a motion for summary judgment, based on the fact that the plaintiffs have failed to file suit before the expiration of the twelve year statute of limitations period in 28 U.S.C. Section 2409a. The plaintiffs have indicated that section 2409, the statute cited in the complaint, is applicable rather than section 2409a. However, examination of the sections leads to the conclusion that the suit is not one for partition of the particular parcel in which the United States is involved and that there is a considerable dispute about the ownership of the land involved; therefore, section 2409a and its twelve year limitations period would apply.

Under the language of that section, the action began to accrue "on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. Section 2409a. The question is, then, whether the plaintiffs should have known that the United States was claiming the property in fee simple before July, 1975.

Likewise, as to the Commonwealth, the applicable limitations period may be seen as KRS 413.010, the fifteen years statute of limitations which refers to the time "after the right to institute it first accrued to the plaintiff, or to the person through whom he claims."

Clearly, record notice as to the specific claims of the United States of America and the Commonwealth of Kentucky existed prior to the pertinent dates (i.e., July, 1975 for the United States of America and July, 1972 for the Commonwealth of Kentucky). Although record notice is usually sufficient, when a fiduciary is involved (as a father might be construed to be), this may not be sufficient. E.g., McMurray v. McMurray, 471 S.W.2d 25, 26 (Ky. 1971). The question remains as to whether the father's original conveyance may have been readily ascertainable by other means--most notably, both the Commonwealth of Kentucky and the United States of America represented in their briefs that the land in question was condemned for use in the Mountain Parkway, which was in existence more than twenty years before the initiation of the action. However, there was no indication of what portion of the property was openly in use for the highway nor was there any such specific statement contained in an affidavit or pleading.

Thus, construing the information before the undersigned in a light most favorable to the plaintiff, it appears that there was insufficient information about when the plaintiffs should have known about the conveyance of the property to allow the undersigned to make an automatic decision concerning the time the statute of limitations began to run.

Therefore, IT IS RECOMMENDED that the motions for summary judgment filed by the United States of America and the Commonwealth of Kentucky be DENIED.

Particularized objections to this Report and Recommendation must be filed within ten days of the date of service of ths same or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd 474 U.S. _____, 38 Cr. L. 3031 (December 4, 1985); Wright v. Holbrook, 794 F.2d 1152, 1154-1155 (6th Cir. 1986). A party may file a response to another party's objections within ten days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

This the _____ day of September, 1987.

_____
JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 86-77

B.M.C. COMPANY, INC., ET AL., PLAINTIFFS,

VS:

T.C.H. COAL COMPANY, DEFENDANT.

and

CIVIL ACTION NO. 86-97

B.M.C. COMPANY, INC., ET AL., PLAINTIFFS,

VS:

T.C.H. COAL COMPANY, DEFENDANT.

REPORT AND RECOMMENDATION

By these actions, the plaintiffs seek indemnification for any and all liability that they are adjudged to owe United Mine Workers of America (UMWA) pension plan trustees under the Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendment Act of 1980 (MPPAA). As resolution of pending matters concerns the same issue, a single Report and Recommendation is issued.

FACTS

During the period from 1978 to March, 1981 the plaintiff BMC contracted with the defendant TCH to mine a certain site at Hopkins Creek in Pike County, Kentucky. The contract mining agreement provided that BMC would pay a royalty on the coal mined, in exchange for which TCH would allow the use of the

property and pay certain expenses. According to the complaints, TCH agreed to "make all payments to the Pension Plans required as a result of work performed by B.M.C" under the agreement.

In May of 1985, the UMWA pension plan trustees brought an action under ERISA, as amended by the MPPAA, to collect the penalty for withdrawal from the multiemployer pension plan which occurred when BMC ceased mining at the Hopkins Creek site. By final judgment entered by the District Court for the District of Columbia after these actions were initiated, BMC found liable for in excess of $300,000; the present co-plaintiff, Mitchie Coleman, was adjudged to have no personal liability.

FEDERAL QUESTION JURISDICTION

The central issue to be decided, then, is whether federal question jurisdiction exists in either case.[1]

A recent Supreme Court case fleshed out the meaning of the pertinent statutory provision:

> Article III of the Constitution gives the federal courts power to hear cases "arising under" federal statutes. That grant of power, however, is not self-executing, and it was not until the Judiciary Act of 1875 that Congress gave the federal courts general federal question jurisdiction (in 28 U.S.C. Section 1331). Although the constitutional meaning of "arising under" may extend to all cases in which a federal question is "an ingredient" of the action. . .we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power. . .
>
> Under our longstanding interpretation of the current statutory scheme, the question whether a claim "arises under" federal law must be determined by reference to the "well pleaded complaint." . . .A defense that raises a federal question is inadequate to confer federal jurisdiction. . .
>
> . . .(T)he propriety of the removal in this case thus turns on whether the case falls within the original "federal question" jurisdiction of the federal courts. There is no "single, precise definition " of that concept; rather, "the phrase 'arising under' masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.". . .

> . . .The "vast majority" of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a "suit arises under the law that creates the cause of action.' ". . .Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action.
>
> We have, however, also noted that a case may arise under federal law "where the vindication of a right under state law necessarily turned on some construction of federal law.". . .Our actual holding in Franchise Tax Board (463 U.S.)demonstrates that this statement must be read with caution; the central issue presented in that case turned on the meaning of the (ERISA). . ., but we nevertheless concluded that federal jurisdiction was lacking.
>
> . . (There is a) long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal question jurisdiction.. .(It) candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction.

Merrell Dow Pharmaceuticals, Inc. v. Thompson, No. 85-619, slip op. at 3-10 _____ U.S. _____ (1986).

Reviewing the facts of the present case, it is clear that the suits are not ones in which federal law has created the cause of action. Further examination of the essential facts reveals that the only determination to be made is a matter of construction of the mining contract under the state law--i.e., whether the language of the contract pertaining to indemnification may be said to include a reference to a penalty assessed under federal law not specifically referred to in the agreement. Construction of federal law, then, is only indirectly necessary.

The undersigned is of the opinion that no federal question jurisdiction exists.

CONCLUSION

IT IS HEREBY RECOMMENDED that: (1) Civil Action No. 86-77 be DISMISSED for lack of subject matter jurisdiction; and (2) Civil Action No. 86-97 be REMANDED to the state court system for the same reason.

Particularized objections to this Report and Recommendation must be filed within ten days of the date of service of ths same or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd 474 U.S. _____, 38 Cr. L. 3031 (December 4, 1985); Wright v. Holbrook, 794 F.2d 1152, 1154-1155 (6th Cir. 1986). A party may file a response to another party's objections within ten days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

This the _____ day of September, 1987.

_____
JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

---

[1]The plaintiffs originally sought indemnification for sums which they "might be adjudged" to own. Subsequent developments have made clear that the plaintiff Mitchie Coleman no longer has standing to pursue this claim. However, in view of the recommendation, infra, that these actions be dismissed for lack of federal question jurisdiction, however, the issue is moot.

Moreover, the pertinent state law indicates that the plaintiff has thirty days to appeal the decision of a Board of Education and, upon receiving an appeal, a court is to review the transcript of all proceedings as well as hold any additional hearings necessary. KRS 161.790. The state courts have held that, in reviewing the information, the assessment must take into account that the grounds for demotion of an administrator are left to the sound discretion of the local superintendent and board of education, but may not be "arbitrary or unreasonable or otherwise violative of rights protected by the State or Federal Constitutions." Miller v. Board of Education of Hardin County, 610 S.W. 2d 935, 937 (Ky. App. 1980). In the present case, the plaintiff filed no appeal through the state courts, but instead initiated the present federal action within the specified thirty days period. Thus, it would appear that it is the duty of the federal court to actively review the matter the same as the state court would do, rather than immediately dismiss the action.

Additionally, it is obvious that in completing any sort of assessment of the administrative action in the context of issue preclusion a copy of the actual findings of the Board should have been proffered. Indeed, only what appears to be a partial copy of the transcript of the Board hearing and a copy of one item of correspondence was included as any type of exhibit. It stands to reason that, even if the standards were different, a federal court may not accord preclusive weight to agency fact-finding when it is uncertain what the findings were.

Accordingly, IT IS HEREBY RECOMMENDED that:

(1) the plaintiff's motion to amend his complaint should be DENIED in so far as it refers to the particular amendment proferred; however, the plaintiff should be given leave to submitt an additional amendment in conformity with this Report and Recommendation;

(2) the defendants' motion to dismiss should be denied.

Particularized objections to this Report and Recommendation must be filed within ten days of the date of service of ths same or further appeal is waived. Thoams v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd 474 U.S. _____, 38 Cr. L. 3031 (December 4, 1985); Wright v. Holbrook, 794 F.2d 1152, 1154-1155 (6th Cir. 1986). A party may file a response to another party's objections within ten days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

This the _____ day of September, 1987.

_____
JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

---

[1]According to the partial transcript of the administrative hearing proffered, Grigsby was a former Superintentent of Schools who had voluntarily stepped aside because he felt unjustly-deserved controversy associated with him was interfering with the functioning of the School Board. When he resigned, he maintained, there was a Gentleman's Agreement that he would retain a job as an Administrative Assistant to the Superintendent for three years.

[2]The defendants are correct in pointing out that the proposed amendment is confusing; therefore, it will be recommended that the plaintiff submit an amendment which conforms to the provisions of Rule 8(a), Fed. R. Civ. P.