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FEDERAL OIL PRICE CONTROLS IN BANKRUPTCY CASES: GOVERNMENT CLAIMS FOR REPAYMENT OF ILLEGAL OVERCHARGES SHOULD NOT BE SUBORDINATED AS "PENALTIES" UNDER 11 USC § 726(a)(4)

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White collar crime and the violation of government economic regulations have flourished in the United States in recent years.¹ For example, wide-

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1. The most enormous and costly fraud probably occurred in the savings and loan industry. According to Attorney General Richard Thornburgh, "Wrongdoing in the savings and loan industry may turn out to be the biggest white-collar swindle in the history of our nation." *Against Savings and Loan Fraud*, 53 BANKING REP. (BNA) No. 24, at 932 (Dec. 18, 1989). A major portion of the federally-insured losses by depositors for which the taxpayers will end up paying is universally attributed to fraud and illegality on the part of the institutions' officers. See, e.g., *Savings Industry's Costly Fraud*, N.Y. Times, Jan. 10, 1989, at D1, col. 3; *Savings Fraud Losses Seen as Lost for Good*, N.Y. Times, Feb. 10, 1989, at D1, col. 4; *Savings Unit Fines Imposed*, N.Y. Times, Jan. 21, 1988, at D26, col. 2. The savings and loan debacle bears interesting resemblances to the oil price regulation violations: (1) both problems were centered in Texas; (2) in both instances, the regulatory enforcement apparatus at least initially proved inadequate to the task of policing and combatting the fraud, perhaps because Congress failed to anticipate the level of fraud which would occur; and (3) in both instances the victims of the frauds were consumers and taxpayers.

In view of the fact that the federal government will have to supply many billions of dollars to make good on the applicable Federal Savings and Loan Insurance Association guarantees, it is also foreseeable that the government will seek restitution from those responsible for those losses

spread violations of the Mandatory Petroleum Price and Allocation Regulations² occurred during the Carter Administration.³ The United States Department of Energy (the "DOE"),⁴ which had been entrusted with the job of enforcing the price regulations,⁵ responded by attempting to force the violators, many of whom were oil resellers,⁶ to disgorge their illegal gains.⁷ By the time DOE auditors and attorneys caught up with the violators in the early 1980s,⁸ however, many of them had become insol-

which resulted from fraud. If that happens and savings and loan institutions go into bankruptcy, such cases might well pose the same legal issue under 11 U.S.C. § 726(a)(4) (1978), which this article addresses.

2. 10 C.F.R. §§ 205, 210, 212 (1987). See *infra* text accompanying notes 27-45. The petroleum allocation regulations are irrelevant to the subject of this article. The relevant cases address only violations of the price regulations.

3. The Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce calculated that, during 1979 and the first six months of 1980 alone, false classification of petroleum by unscrupulous resellers cost American consumers about \$2.2 billion. STAFF OF SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 96TH CONG., 2D SESS., REPORT: THE CASE OF THE BILLION DOLLAR STRIPPER 18 (Comm. Print 1980) [hereinafter SUBCOMMITTEE REPORT].

President Reagan abolished the price regulations on January 28, 1981, one week after taking office. Exec. Order No. 12,287, 46 Fed. Reg. 9,909 (1981). The DOE's effort to enforce the regulations ironically reached a climax during the Reagan Administration—after their abolition. While the DOE's enforcement effort continues, Congress in 1986 enacted the Petroleum Overcharge Distribution and Restitution Act, 15 U.S.C. §§ 450-4507, which set a general deadline of Sept. 30, 1988, for bringing all DOE civil enforcement actions based on violation of the price regulations. 15 U.S.C. § 4504(a)(1) (1974). Congress also provided a "savings clause" for all cases commenced before that date. 15 U.S.C. § 767 (1974). See also 1 U.S.C. § 109 (1947).

4. The DOE was created in August 1977 by the Department of Energy Organization Act, 42 U.S.C. §§ 7101-7375. It replaced the Federal Energy Administration and various other related agencies.

5. The Department of Energy Organization Act transferred authority to enforce the Mandatory Petroleum Price and Allocation Regulations to the DOE.

6. One of the easiest and most lucrative ways to violate the Mandatory Petroleum Price and Allocation Regulations was to raise prices illegally when reselling oil. Accordingly, many if not most of the fraudulent violations of the regulations were committed by resellers.

7. Section 209 of the Economic Stabilization Act (the "ESA"), 12 U.S.C. § 1904 note (1969), adopted by § 5(a) of the Emergency Petroleum Allocation Act (the "EPAA") 15 U.S.C. § 754(a) (1975), authorized the government to enforce the price regulations and stated that courts may grant injunctive relief and "may also order restitution of moneys received in violation of any such order or regulation." While acting pursuant to this authority, the DOE maintained that it was seeking "restitution" of oil price overcharges. The DOE's adversaries strenuously contested this characterization because it had a critical bearing on the bankruptcy penalty issue. See *infra* text at notes 207-09. To avoid prejudging this question, this article will utilize the more neutral term "disgorgement" instead of "restitution."

The constitutionality of the ESA was upheld by a three-judge court in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971). The Temporary Emergency Court of Appeals (the "TECA") cited this decision with approval in *University of Southern Cal. v. Cost of Living Council*, 472 F.2d 1065 (Temp. Emer. Ct. App. 1972), *cert. denied*, 410 U.S. 928 (1973). For the full text of section 209 of the ESA, see *infra* note 32.

8. The DOE's efforts to force the oil companies to make "restitution" of illegal overcharges which violated the Petroleum Price Regulations have yielded massive sums of money for the federal and state governments, injured parties and consumers, setting various litigation records in

vent.⁹ Thereafter, the DOE's pursuit of "restitution"¹⁰ collided and competed with the claims of the debtors' private creditors. The resultant conflict gave rise to a novel legal issue: should a DOE claim for disgorgement of illegal overcharge profits by an insolvent estate be deemed a "penalty" and subordinated to other general unsecured claims pursuant to section 726(a)(4) of the Bankruptcy Code?¹¹

The protagonists in this conflict were the DOE and the bankruptcy trustees. The Economic Stabilization Act (the "ESA") empowers the DOE

the process. On February 23, 1988, Texaco agreed to the largest settlement ever reached between the federal government and a corporation; Texaco consented to pay \$1.25 billion over 5 1/2 years. N.Y. Times, Feb. 24, 1988, at A1, col. 6.

In 1987, Texaco set another unwelcome record when it lost the largest civil judgment in legal history. A Texas court ordered it to pay Pennzoil \$10.53 billion for acquiring Getty Oil Co. after Getty had agreed to be acquired by Pennzoil. This judgment included \$7.53 billion in compensatory damages and \$3 billion in punitive damages. The Court of Appeals for the First District in Houston ordered a *remittitur* of the punitive damages award to \$1 billion but otherwise affirmed the trial court decision. *Texaco, Inc. v. Pennzoil, Inc.*, 729 S.W.2d 768, 866 (Tex. App. 1987). Two months later, on April 12, 1987, Texaco filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. On March 30, 1988, Texaco filed a petition for writ of certiorari in the United States Supreme Court, which was dismissed by agreement of the parties on April 7, 1988. *Texaco, Inc. v. Pennzoil Co.*, 748 S.W.2d 631 (Tex. Civ. App. 1988); *Texaco, Inc. v. Pennzoil Co.*, *cert. dismissed*, 108 S. Ct. 1305 (1988). The parties then settled the case for more than \$3 billion. In view of the settlement, the Texas Court of Appeals granted the parties' motion that it not issue mandate on its judgment and that it dismiss the case. *Texaco, Inc.*, 748 S.W.2d at 631. If Texaco had gone into liquidation under chapter 7 of the Bankruptcy Code, the DOE's claim would undoubtedly have raised the issue which is the subject of this article.

Prior to *Texaco, Inc.*, the largest judgment in legal history was the DOE's victory over Exxon, Pennzoil, Ashland Oil and various other oil companies in *United States v. Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), *cert. denied*, 474 U.S. 1105 (1986). When rendered, that judgment amounted to \$1.635 billion, including interest. Exxon eventually paid the DOE \$2.1 billion in January 1987, after denial of certiorari by the Supreme Court. N.Y. Times, Feb. 24, 1988, at A1, col. 6.

At the time of the *Texaco, Inc.* settlement in February of 1988, oil companies had paid or agreed to pay the DOE a total of \$7.4 billion for price control violations and the DOE was still seeking \$900 million from other oil companies. In addition to the sums from Exxon and Texaco, the \$7.4 billion figure includes \$408 million from Amoco, \$380 million from Arco, and \$180 million from Shell, as well as another \$1.4 billion from the "Stripper Well Settlement," to be paid by Exxon, Texaco, Amoco, Gulf, Arco and thirty other refiners and producers. *Id.*; *In re Stripper Well Litigation*, 4 Energy Mgmt. (CCH) ¶ 26,445 (D. Kan. 1983).

9. The dramatic proliferation of oil resellers during the period of the petroleum price regulations and the demise of so many of them shortly after decontrol suggests that many if not most of the new companies were founded with the specific purpose of making money by violating and evading the regulations. SUBCOMMITTEE REPORT at 5.

10. As indicated *supra* at note 7, section 209 of the ESA authorized courts to order "restitution" of profits resulting from violation of price control regulations promulgated pursuant to the ESA.

11. 11 U.S.C. § 726(a)(4) (1978). See *infra* text accompanying note 66. All Bankruptcy Code provisions discussed herein are part of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. In seeking to defeat the DOE's claims, the bankruptcy trustees argued that the claims constituted "penalties" which should be subordinated pursuant to §726(a)(4) of the Bankruptcy Code in distribution of the estate's assets. Because there is overwhelming case law authority that "restitution" is not a "penalty" (cf. *infra* text at notes 207-35), the logic of the trustees' position required them to deny that the DOE claims were for "restitution."

to enforce the price regulations, go after violators and seek disgorgement of overcharges.¹² Like other federal agencies, it is authorized to pursue claims based on statutory obligations as a "creditor" in bankruptcy cases.¹³ The trustees have the statutory duty of representing the estate and protecting the interests of the creditors.¹⁴ They have uniformly opposed DOE overcharge claims and argued that such claims were "penalties" which should be subordinated pursuant to section 726(a)(4).¹⁵ The DOE section 726(a)(4) penalty issue has been decided to date by several federal bankruptcy and federal district courts but by only one court of appeals.¹⁶ The court of appeals decision, *DOE v. West Texas Marketing Corp.*,¹⁷ by the TECA,¹⁸

12. See *supra* note 7.

13. According to COLLIER ON BANKRUPTCY, "The United States is a creditor not only with respect to public exactions for revenue purposes such as income taxes but also with respect to statutory obligations enforceable by a federal administrative agency in the public interest for the benefit of private parties." 2 COLLIER ON BANKRUPTCY ¶ 101.09 (L. King 15th ed. 1987). As one bankruptcy court stated, "As defined in § 101(9)(A) [of the Bankruptcy Code] 'creditor' includes any 'entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.' Section 101(4) [of the Bankruptcy Code] defines 'claim' as a 'right to payment' while section 101(14) defines 'entity' to include a 'governmental unit.' Thus, in its representative capacity, the DOE meets the definition of a creditor under the Bankruptcy Code." *In re West Texas Marketing Corp.*, 82 Bankr. 839, 830 (Bankr. N.D. Tex. 1988).

Several other decisions have allowed government agencies to pursue claims on behalf of private citizens in bankruptcy. See, e.g., *Nathanson v. NLRB*, 344 U.S. 25 (1952) (NLRB was the proper holder of a claim for employees' back pay, and claim should be treated as a general unsecured claim); *In re Berry Estates, Inc.*, 49 Bankr. 1002 (S.D.N.Y. 1985) (New York State Division of Housing and Community Renewal deemed a "creditor as defined in 11 U.S.C. § 101(9)(a)" which could pursue a bankruptcy claim for excess rents in violation of state and local rent control laws on behalf of the overcharged tenants); *In re Bradbury*, 4 Bankr. Ct. Dec. (CRR) 263 (Bankr. D. Kan. 1978) (State allowed to maintain a claim in bankruptcy on behalf of Kansas consumers to enforce the state's Consumer Protection Act).

14. The trustee has a fiduciary duty to creditors under the Bankruptcy Code to protect and defend the assets of the insolvent estate and this clearly entails combatting unfounded claims. See, e.g., 11 U.S.C. §§ 323, 704 (1978).

15. The author is unaware of a single such case in which the trustee has failed to oppose the DOE claim.

16. The TECA held that the DOE's claim for disgorgement of overcharges was for restitution and not a penalty and should not be subordinated pursuant to section 726(a)(4) in *DOE v. West Texas Marketing Corp. [WTM]*, 763 F.2d 1411 (Temp. Emer. Ct. App. 1985). *Accord* *DOE v. Grates Corp.*, 66 Bankr. 209 (N.D. Tex. 1986), *appeal filed*, No. 86-1436 (5th Cir. June 12, 1986); *In re Independent Ref. Corp.*, 65 Bankr. 622 (Bankr. S.D. Tex. 1986); *In re Seneca Oil Co.*, 76 Bankr. 818 (W.D. Okla. 1987); *In re Compton Corp.*, 90 Bankr. 798 (N.D. Tex. 1988), *reversing* 40 Bankr. 875 (Bankr. N.D. Tex. 1984). In *In re O'Connor*, 67 Bankr. 538 (Bankr. W.D. Okla. 1986), *appeal dismissed*, 85 Bankr. 590 (W.D. Okla. 1987), the court held that section 726 was inapplicable because it was a chapter 11 proceeding and also refused to equitably subordinate the DOE's claim. *Id.* at 541.

17. 763 F.2d 1411 (Temp. Emer. Ct. App. 1985). The author litigated *DOE v. WTM* as a trial attorney for the regulatory litigation section of the DOE's Office of General Counsel in the Bankruptcy Court in Abilene, Texas and Federal District Court in Dallas, Texas but left the agency before the appeal to the TECA was litigated.

18. The DOE's position is that the TECA has exclusive subject matter jurisdiction of the "penalty" issue by virtue of the ESA. See *infra* note 147. Nevertheless, in a subsequent federal district court decision which also held in the DOE's favor on the identical penalty issue, the DOE's

is typical of the penalty issue cases and will be utilized herein as a case study of the section 726(a)(4) penalty issue.

Introduction to the Problem

Distribution of the assets of a debtor's estate to creditors under chapter 7 is governed by section 726 of the Bankruptcy Code. Section 726 establishes six general categories for such distribution in descending order of priority. Fines, penalties, forfeitures, and multiple exemplary and punitive damages are assigned fourth priority,¹⁹ while general unsecured claims receive second priority.²⁰

Designating the DOE's claim as a "penalty" subject to section 726(a)(4) would effectively achieve the trustees' objective of barring the DOE from recovery. This is because all claims at a given level of priority must be paid in full before the claims at the next lower level of priority receive any payment, and it is likely that the estate's assets would be exhausted by distribution to the general unsecured creditors pursuant to sections 726(a)(2) and (3). On the other hand, if the DOE succeeded in avoiding the "penalty" label, its claim would receive second priority and would thus be placed on a par with the claims of unsecured creditors, whose recovery from the estate's assets would diminish proportionately. Thus, the question whether the DOE's claim was a "penalty" became the pivotal issue in a "zero sum game" which pitted the DOE against the trustee and the other creditors. The resultant conflict between the interests of the creditors and the interests of the public in enforcement of the law and in restitution of illegal gains provides an interesting case study of the interplay between two federal regulatory schemes, bankruptcy and energy price controls.

As indicated above, the TECA held in the DOE's favor on the section 726(a)(4) penalty issue in *DOE v. WTM*.²¹ The DOE's claim in the WTM bankruptcy case was based on a "Proposed Remedial Order" ("PRO")²² which the Economic Regulatory Administration of the DOE filed against

adversaries have taken an appeal to the Tenth Circuit, which has reserved decision on both the jurisdictional issue and the merits. *In re Seneca Oil Co.*, 76 Bankr. 818 (W.D. Okla. 1987).

19. 11 U.S.C. § 726(a)(4) (1978). See *infra* text accompanying notes 65-76.

20. 11 U.S.C. § 726(a)(2)-(3) (1978).

21. See *supra* note 16.

22. A PRO is an initial finding by the Economic Regulatory Administration of the DOE that the price regulations have been violated, together with a proposed plan of repayment. 10 C.F.R. § 205.192 (1987). If not successfully contested administratively, a PRO ripens into a "Remedial Order" which requires the company concerned to make repayment, either to the DOE or to the private party or parties overcharged. 10 C.F.R. § 205.199B (1987). Remedial Orders, which permit the governmental agency to resolve violations of the price control regulations and to impose remedies without suing in federal court, had been utilized by the Cost of Living Council and were adopted by the Federal Energy Office and its successors. See Note, *Refunding Overcharges Under the Emergency Petroleum Allocation Act: The Evolution of a Compensatory Obligation*, 79 MICH. L. REV. 1454, 1459-60 (1981). The use of Remedial Orders was effectively upheld in *Bonray Oil Co. v. DOE*, 472 F. Supp. 899 (W.D. Okla. 1978), *aff'd per curiam*, 601 F.2d 1191 (Temp. Emer. Ct. App. 1979).

WTM on September 30, 1982.²³ The PRO charged WTM, PetroTech Trading Company ("PetroTech"), three of WTM's officers and the president of PetroTech with illegally selling and reselling crude oil at excessive prices in violation of applicable price control regulations. The DOE alleged that consumers had been overcharged by approximately \$16 million as a result and demanded that WTM disgorge that amount plus interest to the government.

The DOE had been investigating WTM and related companies for some time, and in April 1981, the investigation led to voluntary guilty pleas to felonies by the two principals of WTM.²⁴ On May 14, 1982, probably as a result of pressures flowing from the government investigation, WTM filed a voluntary petition in bankruptcy under chapter 11 in the United States Bankruptcy Court for the Northern District of Texas. On the basis of the PRO, the DOE on November 23, 1982, filed a proof of claim in WTM's bankruptcy case for some \$22 million,²⁵ which the TECA ultimately gave second priority as a general unsecured claim under section 726(a)(2) of the Bankruptcy Code.

The question whether the DOE's claim against WTM for a refund of price control overcharges should instead be subordinated as a "penalty" under section 726(a)(4) was an issue of first impression under the 1978 Bankruptcy Code. The TECA's discussion of the "penalty" issue in *DOE v. WTM*, however, was perfunctory. It comprised only two paragraphs of a fifteen-page decision and cited only two cases, neither one a bankruptcy case.²⁶ While the author believes that the TECA's decision is correct, the

23. Economic Regulatory Administration, DOE, PRO, Case No. 650X00314 (Houston, Texas, Sept. 30, 1982).

24. See *infra* text accompanying note 46.

25. See *WTM*, 763 F.2d at 1413.

26. The TECA stated:

The DOE's claim is clearly for restitution and not for a penalty. The Emergency Petroleum Allocation Act . . . has specific sections which deal with civil and criminal penalties The DOE did not seek these penalties. Instead, the DOE sought restitution under the authority of § 209 of the Economic Stabilization Act of 1970 . . . as incorporated in the Emergency Petroleum Allocation Act of 1972 This statute states "the court may order *restitution* of moneys received in violation of any such order or regulation [sic]." By virtue of the statutory scheme and the regulations issued pursuant thereto, DOE may collect such restitution on behalf of persons suffering loss from overcharges through remedial orders, consent decrees, or actions in the district court.

WTM, 763 F.2d at 1426 (citations omitted).

In subsequently denying WTM's petition for rehearing, the court stated even more emphatically that:

[The] DOE's claim is for single, not multiple, recovery of overcharges. To the extent proved it is for funds which were never rightfully assets of the corporation. In no respect does it bear any relationship to the penalty provisions of the statute or the regulations issued pursuant thereto. It is so manifestly restitutionary in character and not for a penalty as to render further discussion of the point unwarranted.

Order Denying Petition for Rehearing at 2, *DOE v. WTM*, No. 5-111 (Temp. Emer. Ct. App. June 24, 1985).

court's conclusory treatment of the "penalty" issue gives it little persuasive force. The purpose of this article is to more thoroughly investigate the underlying issues and relevant case law, thereby demonstrating the correctness of the court's conclusion.

The Price Control Statute and the Regulatory Scheme

The Mandatory Petroleum Price and Allocation Regulations²⁷ were in effect from August 22, 1973 until January 28, 1981.²⁸ To combat inflation, Congress enacted the ESA,²⁹ which authorized the President to "issue such orders and regulations as he deems appropriate . . . to . . . stabilize prices."³⁰ Pursuant to this authority, the Cost of Living Council promulgated price control regulations for all sectors of the petroleum industry.³¹ The regulations remained in effect under the Cost of Living Council's successor agencies, the last of which was the DOE.

The ESA further authorized those entrusted with enforcement of the price regulations to ask the Attorney General to seek injunctive price relief against their violation.³² The ESA conferred jurisdiction on the federal district courts to hear such cases, to grant injunctive relief and to "order restitution of moneys received in violation of any such order or regulation."³³

27. 10 C.F.R. §§ 205, 210, 212 (1987).

28. See *supra* note 3.

29. See *supra* note 7.

30. ESA, § 203(a), 12 U.S.C. § 1904 note (1969).

31. 6 C.F.R. Part 150, Subpart L, 38 Fed. Reg. 22,536 (Aug. 22, 1973).

32. ESA, § 209. Section 209 provides as follows:

Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

This statute bears a striking resemblance to and was apparently modeled after section 205(a) of the Emergency Price Control Act of 1942, which provided:

Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute a violation of any provision of § 4 of this Act, he may make application to the appropriate court for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

In 1947, Congress amended the Emergency Price Control Act with respect to rent overcharges and codified *Warner Holding Co.* by adding an express provision authorizing the federal government to bring actions for restitution. See *infra* note 144.

33. ESA, § 209. The legislative history of section 209 indicates that the explicit reference to restitution was to make clear that "[t]here was an inherent equitable power in the court to set things right and order restitution." S. REP. NO. 507, 92nd Cong., 1st Sess. 2, *reprinted in* 1971 U.S. CODE CONG. & ADMIN. NEWS 2283, 2291.

On November 27, 1973, after the Organization of Petroleum Exporting Countries ("OPEC") declared an oil embargo, Congress passed the Emergency Petroleum Allocation Act of 1973 (the "EPAA")³⁴ to ensure a fair allocation of available petroleum supplies at "equitable prices."³⁵ Power to enforce the regulations ultimately passed from the Cost of Living Council to the DOE, created on September 15, 1977.³⁶ While allocation controls were added, the price controls on oil remained largely the same during this period.

The oil price regulatory scheme was intended to prevent American producers from benefiting from the sharp run-up in the price of imported oil caused by the OPEC Oil Embargo. Accordingly, price ceilings were placed on "old" oil from domestic wells already in production. On the other hand, Congress did not wish to discourage exploration for and exploitation of new sources. Thus, "new" oil (and of necessity, all imported oil) was not subject to the ceilings and could instead be sold at the much higher market price.³⁷

In order to enforce the price ceilings, the regulations required each seller of oil to certify the "tier" or status of the oil sold.³⁸ The regulations also limited permissible markups upon resale of oil beginning on January 1, 1978.³⁹ Resellers were limited to average markups, and they were prohibited from increasing prices at all upon resale unless they performed a "service or other function traditionally and historically associated with the resale of crude oil."⁴⁰ In addition, firms were forbidden from engaging in any practice designed to obtain prices in excess of those permitted by the regulations.⁴¹

While it perhaps made theoretical sense, this rather complex price control scheme had serious drawbacks from a practical standpoint. The fact that oil is fungible, whatever its legal category and price, and that its correct price classification could only be determined through accompanying documentation presented ample opportunity for fraud by sellers. Furthermore, the fact that uncontrolled or "new" oil was selling for as much as six times the amount of controlled "old" oil created the opportunity for vast profits for those willing to engage in fraudulent conduct.⁴² It is widely agreed,

34. See *supra* note 7.

35. *Id.*; 15 U.S.C. § 753(b)(1)(F) (1975).

36. Executive Order No. 12,009, 42 Fed. Reg. 46,267 (1977). For a good capsule summary of the evolution of all of the administrative agencies with responsibility for enforcing the energy price regulations, see Note, *Refunding Overcharges Under the Emergency Petroleum Allocation Act: The Evolution of a Compensatory Obligation*, 79 MICH. L. REV. 1454, 1459 n.27 (1981).

37. 6 C.F.R. § 150.354 (1987). Congress subsequently added a third "tier"—with an intermediate price—which applied to amounts of oil from pre-existing wells in excess of their production level during a base period (originally 1972, later 1975). 10 C.F.R. § 212.72, 41 Fed. Reg. 4,931 (Feb. 3, 1976).

38. 10 C.F.R. § 212.131 (1987).

39. 10 C.F.R. Part 212, Subpart L, §§ 212.182, 212.183 (1987).

40. 10 C.F.R. § 212.186 (1987). Increasing prices without performing any useful service was called "layering."

41. 10 C.F.R. § 210.62(c) (1987).

42. In late 1979, the first sale price of "old" or lower tier oil averaged about \$5.75 per barrel,

moreover, that Congress had not given the DOE and its predecessors adequate auditing resources to police enforcement of the regulations.⁴³

Fraudulent violation of the oil price control regulations resulted on a massive scale, apparently concentrated among resellers in Texas and neighboring oil-producing states. The number of reseller companies, which had been fewer than ten prior to the implementation of price controls, mushroomed to more than 400 in the late 1970s.⁴⁴ Many observers suspected that the reseller companies were created not to fill any economic need but for the sole purpose of profiting from violation of the price control regulations. As noted above, the price regulations required each seller of oil to "certify" in writing its regulatory price category to each buyer,⁴⁵ and the key to such illegal profits was to certify "old" or "lower tier" oil as "new," "upper tier" or exempt oil, thereby increasing by as much as 500% the price for which the oil would sell.

This illegal miscertification or "flipping" of the certification often took place in the middle of a long series of paper transactions through which the oil was sold back and forth among different resellers as often as twenty times. The majority of these transactions occurred without delivery of the oil by the seller to the purchaser, *i.e.*, while it was traveling through a pipeline. Because the certification of the type of oil sold had to be changed only once for the illegal profits to be made, the majority of the sales in the resulting "daisy chain" were nominally legal. The multiplication of such sales transactions produced a corresponding multiplication of sales and certification documents, creating a veritable paper blizzard which greatly complicated investigation and identification of the fraud. Nevertheless, the diligent efforts of DOE auditors in pursuit of such fraud began to bear

while upper tier oil averaged about \$17.50 per barrel and uncontrolled ("new") oil averaged \$34.75 per barrel. See SUBCOMMITTEE REPORT at 8.

43. This proposition is bolstered by the fact that many of the major price control enforcement cases only reached fruition during the Reagan Administration, after the pertinent regulations had been abolished. See *supra* note 3. It is incontrovertible that the price control regulations were issued under crisis conditions, during the national emergency caused by the 1973 Arab oil embargo. Congress hastily enacted the EPAA, which created and directed the Federal Energy Office to promulgate regulations to ensure a fair allocation of available petroleum supplies at "equitable prices." EPAA, § 4(b)(1)(F) (codified at 15 U.S.C. § 753(b)(1)(F)) (1975)).

It appears that Congress did not foresee the massive level of fraud and violation of the price regulations which would result and, in retrospect, that the auditing resources devoted to enforcement of the new regulations were inadequate. In the author's opinion, the likelihood of such fraud was greatly increased by the nature of the pricing system chosen. This system was tailored to the history and circumstances of individual producers, thus resulting in an infinite variety of legal price levels for the same product in the marketplace. A fixed nationwide price for all oil of the same quality, while arbitrary and less equitable, would have been harder to violate.

44. SUBCOMMITTEE REPORT at 5. WTM was incorporated in May 1978; it "bought and sold, and then rebought and resold, over 18 million barrels of domestic crude oil in instantaneous back-to-back 'in-line' transfers." Appellant's Brief and Opposition to Appellee's Motion to Dismiss at 5, DOE v. WTM, 763 F.2d 1411 (Temp. Emer. Ct. App. 1985).

45. 10 C.F.R. § 212.131 (1987).

fruit in the early 1980s. One of the first cases to become ready for administrative enforcement was *DOE v. WTM*.

WTM'S Violation of the Mandatory Petroleum Price Regulations

On April 2, 1981, John T. Troland, Chairman of the Board and President of WTM, and David W. Ratliff, the company's Executive Vice President, pled guilty to criminal offenses involving violation of the price control regulations. Both men were sentenced to fourteen months in prison and ordered to pay fines of \$10,000.⁴⁶ They were found guilty of violating 18 U.S.C. § 1001⁴⁷ by certifying that there were no barrels of lower tier crude oil in a representative sale in October 1979 of 77,500 barrels of oil to PetroTech, although both knew that all of the barrels were lower tier oil. Subsequently, on May 14, 1982, WTM filed for bankruptcy under chapter 11, and the DOE issued its PRO against WTM, PetroTech and four of their officers on September 30, 1982.⁴⁸

The PRO charged that WTM and PetroTech did not perform any service or other useful economic function in connection with their purchases and sales of crude oil in May and June, 1979. Rather, it alleged the entire trading system was directed at extracting profits in violation of the regulations without performing any such function. The system operated with WTM initially purchasing oil in all three categories (lower tier, upper tier and exempt) which it sold to PetroTech with the appropriate regulatory certifications. PetroTech sold the same volumes of oil to BPM, a Tulsa, Oklahoma reseller, without changing the certifications. BPM then sold back to PetroTech the same volumes of crude oil, the certifications of which had been altered so as to indicate that the oil was 100% exempt.⁴⁹ PetroTech

46. *United States v. Troland*, No. 81-CR-23-E (N.D. Okla. Apr. 2, 1981). WTM had a long history of resisting compliance with DOE regulations.

47. 18 U.S.C. § 1001 (1976) provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly or willingly falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

This statute was applied against oil companies falsely certifying the price category of crude oil. See *United States v. Uni Oil*, 646 F.2d 946 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982); *United States v. Wolf*, 645 F.2d 23 (10th Cir. 1981).

48. PRO, Case No. 650X00314, *supra* note 23, at 13.

49. *Id.* at 11. BPM was controlled by Robert Sutton. According to Reuters' Washington Dateline, Aug. 29, 1986, "Sutton and his various affiliated companies in Oklahoma and the Bahamas were allegedly the largest violators of government oil price regulations, with more than \$1.2 billion in overcharges." In 1980, Sutton was prosecuted on racketeering and fraud charges in "the largest criminal case, in dollar terms, ever brought by the Department of Justice against one man." *FORBES MAGAZINE* at 14 (Sept. 24, 1984). After the court threw out the racketeering and fraud charges and found Sutton guilty of the lesser charge of obstruction of justice, the DOE brought a civil action seeking restitution of some \$763 million in overcharges for violation of the

then sold the same volumes to WTM, which sold them to its customers as 100% exempt. In sum, WTM and PetroTech sold the identical barrels of oil twice, once at the beginning of the chain of paper transactions and once at the end, but at different prices and with different certifications.⁵⁰

The PRO further charged that WTM and PetroTech raised the price of the oil each time they sold it without performing any economic function. The oil was flowing through the pipeline while the numerous sales occurred; therefore, no other service regarding the oil could be performed. WTM added \$.50 per barrel for "gathering," but performed no "gathering" or related activities with regard to the sale. PetroTech added \$.15 per barrel when it sold oil to BPM and \$.50 per barrel after it repurchased the same oil from BPM and resold it to WTM, without even alleging or specifying in the sales certificate any useful service it had performed.⁵¹

It appears that the purpose of this maze of transactions involving the same oil was twofold. First, every resale provided at least a surface justification for adding a markup to the price of the oil. Second, the volume of resales which made the entire scheme feasible buried the illegal "flipping" of certifications somewhere midway in the "daisy chain." Among a large number of ostensibly legal transactions, it was more difficult for auditors to trace the illegal certification. The net result was obvious. Consumers, whom this regulation was designed to shield from higher prices, paid unregulated and far higher market prices for large quantities of oil.⁵² The regulations were violated, the regulatory scheme was frustrated, and the benefits of this fraud went not to the producers but rather to middlemen conducting paper transactions with no useful economic function.

The Bankruptcy Case

The DOE's PRO against WTM demanded that WTM "refund" overcharges of \$16,360,315.48 (plus interest totalling \$6,875,397.23) for layering or, in the alternative, \$15,929,396.53 (plus interest totalling \$6,683,344.99) for "circumvention and contravention" of the regulations.⁵³ The DOE's

Mandatory Petroleum Price and Allocation Regulations. Sutton was found personally responsible for more than \$210 million in overcharges (plus some \$212 million in accumulated interest) for such violations and the Court ordered that he make restitution of \$423 million. *United States v. Sutton*, N. 1, 82-C-1069-B (N.D. Okla. Sept. 14, 1984), *aff'd*, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), *cert. denied*, 479 U.S. 1030 (1987).

The government never collected this judgment, "the largest ever imposed against an individual sued by a government entity," (LEGAL TIMES at 3 (Mar. 18, 1985)), because the debt was discharged in Sutton's chapter 11 bankruptcy proceeding. Jereski, *Minus-Centi-Millionaire No More*, FORBES MAGAZINE at 8 (Oct. 26, 1987). Sutton did, however, serve thirty months in federal prison for obstruction of justice and on a subsequent conviction for bribing a DOE attorney. *Id.*

50. PRO, Case No. 650X00314, *supra* note 23, at 11.

51. *Id.* at 11-13.

52. As indicated *supra* at note 3, a congressional subcommittee estimated that such frauds cost consumers \$2.2 billion for one eighteen-month period alone.

53. PRO, Case No. 650X00314, *supra* note 23, at 19-22; *DOE v. WTM*, 763 F.2d 1411, 1413-14 (Temp. Emer. Ct. App. 1985).

procedural regulations provided ample opportunity for WTM to contest the PRO before the DOE's Office of Hearings and Appeals. If not so contested, the PRO would automatically ripen into a Remedial Order with a legally binding order of disgorgement.⁵⁴ The response of WTM's trustee in bankruptcy was to argue that any such administrative proceedings by the DOE to liquidate or fix its claim against WTM were in violation of 11 U.S.C. § 362, the automatic stay provision of the Bankruptcy Code; that the DOE's proof of claim should be disallowed because it had been tardily filed; and that even if it were accepted, the DOE claim should be subordinated pursuant to 11 U.S.C. § 726(a)(4) or equitably subordinated pursuant to 11 U.S.C. § 510(c)(1).⁵⁵

Bankruptcy Judge Bill Brister did not directly respond to the trustee's argument that the DOE's administrative proceedings were automatically stayed pursuant to section 362 by commencement of the bankruptcy case.⁵⁶ In a Memorandum and Order, he did, however, utilize the "discretionary stay" provision, 11 U.S.C. § 105, to bar the DOE from proceeding with the administrative case against WTM until the bankruptcy subordination issue had been decided by the bankruptcy court.⁵⁷

54. Cf. 10 C.F.R. Part 205, Subpart O, §§ 205.192, 205.193, 205.196, 205.199B (1987).

55. Complaint for Injunctive Relief, WTM v. DOE, No. 182-00034, Adversary No. 183-00033 (Bankr. N.D. Tex., filed Apr. 29, 1983); Memorandum *re* Department of Energy Claim No. 38, at 3-6, 10-21. *In re* WTM, No. 182-00034 (Bankr. N.D. Tex., filed Mar. 21, 1983). The trustee later abandoned the equitable subordination argument. See *infra* note 60.

56. The Bankruptcy Code provides that filing of a voluntary or involuntary petition in bankruptcy operates as a stay, applicable to all entities, of:

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
- (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title

11 U.S.C. § 362(a) (1978).

Section 362(b)(4) of the Bankruptcy Code, however, exempts from the automatic stay provision "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" 11 U.S.C. § 362(b)(4) (1978). Section 362(b)(5) exempts "the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" 11 U.S.C. § 362(b)(5) (1978). Two courts have held an administrative proceeding by the DOE to determine whether oil price regulations have been violated to be exempt from the automatic stay provision under section 362(b)(4). *In re* Vantage Petroleum Corp., 25 Bankr. 471 (Bankr. E.D.N.Y. 1982); *In re* County Fuel Co., 29 Bankr. 534 (Bankr. D. Md. 1983).

57. Section 105(a) of the Bankruptcy Code states: "The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (1978). Judge Brister's "temporary injunction" stated:

The court concludes pursuant to § 105 of the Bankruptcy Code that Department [sic] of Energy, its attorneys, agents, employees and successors should be temporarily restrained and enjoined from proceeding or continuing in any manner the administrative proceedings against the debtor until a reasonable time has elapsed after the

In a second Memorandum and Order entered on June 21, 1983, Judge Brister rejected the trustee's contention that the DOE's proof of claim in bankruptcy had been tardily filed.⁵⁸ This was a hollow victory for the DOE, however, because Judge Brister's next decision concluded that the DOE's claim must be subordinated under 11 U.S.C. § 726(a)(4).⁵⁹ According to Judge Brister:

[T]he words of the statute are clear. If DOE suffered no actual pecuniary damages its claim must be subordinated to the claims of those creditors who *did* suffer actual pecuniary damages.

I conclude that the claim of DOE, while timely filed, should be subordinated in distribution under § 726(a)(4) to those claims evidenced by § 726(a)(1), (2) and (3).⁶⁰

After the DOE moved for reconsideration of this subordination decision, Judge Brister on August 9, 1983, issued an "Additional Finding" which made explicit what had been implicit in his earlier order, that the DOE's claim was for a "penalty" which should be subordinated pursuant to 11 U.S.C. § 726(a)(4).⁶¹ The DOE appealed Judge Brister's

timeliness of filing of claim issue and the two subordination issues have been resolved by this court.

Memorandum and Order, WTM v. DOE, No. 182-00034, Adversary No. 183-00033 at 5 (Bankr. N.D. Tex. May 11, 1983).

58. WTM v. DOE, No. 182-00034 (Bankr. N.D. Tex. June 21, 1983).

59. Because the claims of WTM's other general unsecured creditors exceeded the funds in the estate, the DOE's \$22 million claim would yield a payout of zero upon liquidation if it were subordinated and given fourth priority pursuant to 11 U.S.C. § 726(a)(4).

60. Memorandum and Order, WTM v. DOE, No. 182-00034, Adversary No. 183-00033 (Bankr. N.D. Tex. June 21, 1983). Judge Brister's decision to subordinate the DOE's claim pursuant to section 726(a)(4) made it unnecessary for him to reach the trustee's alternative argument that the claim should be equitably subordinated pursuant to 11 U.S.C. § 510(c). The trustee subsequently abandoned the equitable subordination argument, which was untenable in view of the fact that the courts have uniformly required a showing of fraud or inequitable conduct on the part of a claimant before his claim could be equitably subordinated—and no such allegation could be sustained with regard to the DOE. *See* *Pepper v. Litton*, 308 U.S. 295 (1939); *Holt v. Federal Deposit Ins. Corp.*, 868 F.2d 146 (5th Cir. 1989); *In re Missionary Baptist Foundation of America*, 712 F.2d 206, 211 (5th Cir. 1983); *In re Bellucci*, 29 Bankr. 814, 815 (Bankr. 1st Cir. 1983); *Wright v. United States*, 75 Bankr. 387 (Bankr. M.D. Fla. 1987).

61. Additional Finding, WTM v. DOE, No. 182-00034 (Bankr. N.D. Tex. Aug. 9, 1983). Judge Brister stated: "In reviewing my order of June 21, 1983, I failed to find that anywhere in that order did I specifically state that the claim evidenced by the proof filed by the DOE was a penalty, fine or forfeiture or represented a claim for multiple, exemplary, or punitive damages. However, the finding that the proof of claim is a penalty is certainly implied, if not expressed, in that memorandum and order. Therefore, the order heretofore entered should be supplemented with this additional finding . . . the claim evidenced by the proof of claim filed by Department [sic] of Energy and challenged by the trustee, is a penalty." *Id.* at 2. Judge Brister, accepting the trustee's argument that profits disgorged by price control violators went to the DOE and were not returned to the injured consumers, also rejected the DOE's contention that its claim against WTM was for restitution. *Id.* at 2-3.

decision,⁶² which was subsequently affirmed by United States District Judge David Belew.⁶³ The DOE appealed this decision to the TECA, which reversed it.⁶⁴ The balance of this article will analyze the various facets of the question whether the DOE's claim was for a penalty and consequently must be subordinated under section 726(a)(4).

The "Fine, Penalty or Forfeiture" Subordination Provision

The starting point in construing the "fine, penalty or forfeiture" provision is the language of the statute itself.⁶⁵ Section 726(a)(4) subordinates "payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages . . . to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim."⁶⁶

A claim which is given this classification is near the bottom of the list in order of distribution, preceded by a long list of claims with higher priority.⁶⁷ The only lower priorities in liquidation are those for payment of post petition interest⁶⁸ and payment to the debtor himself.⁶⁹

Section 726(a)(4) was clearly patterned after section 57j of the former Bankruptcy Act, which provided:

Debts owing to the United States or to any State or any subdivision thereof as a penalty or forfeiture shall not be allowed, *except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose*, with reasonable and actual costs occasioned thereby and such interest

62. The WTM bankruptcy case was brought under chapter 11. DOE appealed Judge Brister's decision on a second ground—that section 726(a)(4) does not apply to chapter 11 cases. *See In re O'Connor*, 67 Bankr. 538, 541 (Bankr. W.D. Okla. 1986); *In re Colin*, 44 Bankr. 806 (Bankr. S.D.N.Y. 1984). This point became moot when District Judge Belew granted the trustee's subsequent motion to convert the case to a chapter 7 (liquidation) proceeding.

63. The district court had jurisdiction of the bankruptcy appeal pursuant to 28 U.S.C. § 158(a). Judge Belew, in affirming his June 21, 1983 decision, adopted Judge Brister's opinion. No. 1-83-73K (N.D. Tex. July 26, 1984). *See DOE v. WTM*, 763 F.2d 1411, 1413 (Temp. Emer. Ct. App. 1985).

64. *DOE v. WTM*, 763 F.2d at 1413.

65. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 508 (1981).

66. 11 U.S.C. § 726(a)(4) (1978) (emphasis supplied).

67. Under the Bankruptcy Code, highest priority in distribution of the debtor's estate assets is given under section 726(a)(1) to six types of claims described in section 507, such as administrative expenses, certain wage claims up to \$2000 per person, contributions owed to employee benefit plans, and various taxes. The next highest priorities in distribution are for the mass of general unsecured claims not included in other special categories and then for tardily filed unsecured claims. *See* 11 U.S.C. § 726(a)(2), (3) (1978). Obviously, in the vast majority of cases, the estate's assets will be exhausted by distribution to these claimants, leaving nothing for distribution under section 726(a)(4).

68. 11 U.S.C. § 726(a)(5) (1978).

69. 11 U.S.C. § 726(a)(6) (1978).

as may have accrued on the amount of such loss according to law.⁷⁰

The Supreme Court interpreted section 57j as follows:

[I]t plainly manifests a congressional purpose to bar all claims of any kind against a bankrupt except those based on a 'pecuniary' loss. So understood, this section, which has been a part of the Bankruptcy Act since its enactment in 1898, is in keeping with the broad aim of the Act to provide for the conservation of the estates of insolvents to the end that there may be as equitable a distribution of assets as is consistent with the policy of the penalty provisions themselves. Tax penalties are imposed at least in part as punitive measures against persons who have been guilty of some default or wrong. Enforcement of penalties against the estates of bankrupts, however, would serve not to punish the delinquent taxpayer but rather their entirely innocent creditors.⁷¹

Similarly, Congress' intent in enacting section 726(a)(4) was to protect unsecured creditors from "the debtor's wrongdoing."⁷²

The DOE itself, of course, was not the victim of WTM's illegal acts, and it conceded from the outset that "it has not itself suffered actual pecuniary loss here."⁷³ Unlike the other creditors in the WTM bankruptcy case, the DOE was seeking to recover not for its own account but rather on behalf of the consumers of petroleum products who *had* suffered pecuniary loss by being forced to pay higher prices for such products as a result of WTM's illegal activities.⁷⁴ The DOE's concession meant that the second clause of section 726(a)(4) concerning "pecuniary loss" was irrelevant to the case and had to be disregarded.⁷⁵ Because the trustee did not make (nor could he

70. Section 57j of the Bankruptcy Act (codified at 11 U.S.C. § 93(j), repealed 1978) (emphasis supplied). This section had not changed in substance since 1898. There is a major difference between the two sections: section 57j totally barred payment of claims based on penalties and forfeitures; section 726(a)(4) merely subordinates them to most other claims.

71. *Simonson v. Granquist*, 369 U.S. 38, 40-41 (1962) (citing *United States v. Childs*, 266 U.S. 304, 307 (1924)).

72. H.R. REP. NO. 595, 95th Cong., 1st Sess. 382 (1977).

73. Brief of Appellant DOE at 5 n.3, *DOE v. WTM*, No. 1-83-73K (N.D. Tex. July 26, 1984). The DOE was simply fulfilling its statutory mandate to enforce the Mandatory Petroleum Price and Allocation Regulations. See ESA, at § 209, 12 U.S.C. § 1904 note (1969); EPAA, 15 U.S.C. §§ 751, 753, 754, 755, 757.

Interestingly, the TECA itself had stated that the precise kind of overcharges committed by WTM not only defrauded the oil purchasers but also defrauded the United States. This injury, however, is not measured by a precise amount of pecuniary loss. See *United States v. Zang*, 645 F.2d 999, 1007 (Temp. Emer. Ct. App. 1981).

74. The DOE is a significant purchaser of petroleum products for its own account, and an argument could have been made that it shared in the price increases to the general public which resulted from WTM's activities. Any such injury to the DOE, however, would have constituted only a minuscule portion of its \$22 million claim.

75. The reason for this is simple. While most claims involving "any fine, penalty, or forfeiture . . ." are subject to the relatively unfavorable treatment provided by section 726(a)(4), claims

plausibly make) any claim that what the DOE was seeking was "a fine, . . . forfeiture, or . . . multiple, exemplary, or punitive damages,"⁷⁶ the entire case reduced itself to the pivotal issue of whether the DOE's claim was for a "penalty" under section 726(a)(4). The only way the DOE could avoid subordination (and a zero payment on its claim) was to demonstrate that it was not seeking a "penalty." Once the DOE's claim was denominated a "penalty," subordination was automatic.

Do DOE Demands for Repayment of Price Control Overcharges Constitute "Penalty" Claims Under the Bankruptcy Code?

As indicated above, *DOE v. WTM* was a case of first impression. No other court had determined whether claims like that of the DOE against WTM were for "penalties" under either section 57j of the Bankruptcy Act or section 726(a)(4) of the Bankruptcy Code. While relevant authority is sparse, the natural starting point in addressing this issue is the bankruptcy case law construing and applying the two sections. This section will discuss the most pertinent cases under both of the above statutes which have decided whether a given claim is a "penalty" for bankruptcy purposes.⁷⁷

The bankruptcy case most similar to *DOE v. WTM* is *In re Maier Brewing Co.*⁷⁸ In *Maier*, the debtor corporation had sold beer at prices exceeding the ceiling prices established under the Emergency Price Control Act of 1942. The Office of Price Administration sought treble damages for the overcharges.⁷⁹ When the Office of Price Administration reached a compromise settlement with the trustee, the debtor corporation opposed this, arguing that the Office of Price Administration was seeking a penalty which it could not enforce against the debtor's estate. The court rejected this argument. It

based on "compensation for actual pecuniary loss suffered by the holder of such claim" are specifically excepted and would thus receive the more favorable classification for general unsecured claims provided by section 726(a)(2) or (3). See *supra* note 67. Because the DOE, as "holder" of the claim against WTM, had not itself suffered "pecuniary loss," it could not benefit from this second clause. Consequently, if the DOE's claim against WTM were characterized as a "penalty," there would be no way to avoid its being subordinated pursuant to section 726(a)(4).

76. 11 U.S.C. § 726(a)(4) (1978).

77. It must of course be borne in mind that "a satisfactory and clear-cut formula to separate penalties from nonpenalties has not yet been agreed upon by the courts." 3 COLLIER ON BANKRUPTCY ¶ 57.22[2], at 387 (14th ed. 1975). Accord *In re Kline*, 403 F. Supp. 974, 977 (D. Md. 1975), *aff'd*, 547 F.2d 823 (4th Cir. 1977).

78. 1 OPA Op. & Dec. 1288 (No. 37544-H, S.D. Cal. Mar. 10, 1944), *printed in* Opinions and Decisions - Opinions of the Price Administrator and Decisions of the Federal and State Courts on Price Control - Rent Control - Rationing (Office of Price Administration, undated).

79. *Id.* at 1289-90. Unfortunately, the obscure decision is only one and one-half pages long and adopts the facts stated in the Office of Price Administration's brief without even summarizing them. Section 925(e) of the Emergency Price Control Act of 1942 provided that persons selling at prices in excess of the legal ceilings were liable for treble damages in actions brought either by the buyer or by the Office of Price Administration.

concluded that the Office of Price Administration would probably prevail if the issue were litigated and accordingly approved the compromise settlement.⁸⁰

Apparently the only other bankruptcy case which addresses the question whether disgorgement of unjust enrichment constitutes a disallowable "penalty" under section 57j of the Bankruptcy Act⁸¹ is *United States v. Wagner*.⁸² The Commodity Credit Corporation (the "CCC") had paid the debtor to store wheat which was commingled with wheat owned by others in the debtor's grain elevator. When the CCC ordered its wheat shipped, 16,800 bushels were discovered missing. While the CCC was to be paid in full for this shortage, it further sought reimbursement of \$17,099.20 it had paid for the storage of the 16,800 bushels under the terms of the storage contract.⁸³ The district court, upholding the ruling of the referee, disallowed this claim on the grounds that the government had suffered no pecuniary loss, and that to allow the claim would penalize the other creditors.⁸⁴

On appeal, the Tenth Circuit affirmed in part and reversed in part. The court agreed that while section 17(d) would authorize a refund of all storage charges for the 16,800 bushels in a contract case, bankruptcy law did not permit such a refund. It would constitute a penalty in bankruptcy to require the debtor to refund charges for the period *before* the conversion, during which time the grain was actually in storage and services were provided. The Tenth Circuit reversed the lower court's holding, however, as to the government's claim for reimbursement of storage charges for the period after the conversion, because the debtor had provided no services to earn these fees. The court's rationale reflects the distinction between disgorgement or restitution of unearned charges, on the one hand, and penalties, on the other:

We agree that the bankrupt cannot retain charges for periods during which the wheat was not being stored. Such an allowance would constitute unjust enrichment

By storing and caring for the wheat, Cheyenne Wells performed a service for which it was entitled to be paid, and indeed it was paid. Upon conversion of the wheat, however, Cheyenne Wells no longer stored nor cared for it, no services were performed nor charges earned. When conversion of the wheat occurred, Section 17(d) became effective and by its terms demanded the return of *all* storage charges paid; however, Section 17(d) exacts a penalty only to the extent it requires the return of charges actually earned. Requiring the return of storage charges paid for periods of time

80. *Id.* at 1290.

81. See *supra* note 70.

82. 390 F.2d 13 (10th Cir. 1968), *aff'g in part and rev'g in part*, *In re Cheyenne Wells Elevator Corp.*, 264 F. Supp. 1018 (D. Colo. 1967).

83. The CCC invoked § 17(d) of the Uniform Grain Storage Agreement which stated in relevant part: "In the event of any disposition of the grain contrary to the terms of this agreement, no charges shall accrue for any period of time such grain is not in store and no charges of any kind shall be payable on any quantity of the grain not loaded out" *In re Cheyenne Wells Elevator Corp.*, 264 F. Supp. at 1019.

84. *Id.* at 1020-21.

after the conversion does not penalize Cheyenne Wells for it was not entitled to the charges in the first instance.⁸⁵

This holding provides strong support for the DOE's position that forcing an insolvent oil company like WTM to disgorge illegal overcharge profits does not constitute a penalty under section 726(a)(4), because, as in *Wagner*, the debtor "was not entitled to [these illegal profits] in the first instance." There was no entitlement because these profits were never properly part of the debtor's estate.⁸⁶

The above cases, of course, arose under section 57j of the former Bankruptcy Act rather than section 726(a)(4) of the Bankruptcy Code. The legislative history of the new provision, however, indicates that Congress endorsed the approach followed by the *Maier* and *Wagner* courts, *i.e.*, distinguishing between and treating differently "penalties" that represent compensation for actual pecuniary loss and "penalties" that do not. The House Judiciary Committee Report which introduced the Bankruptcy Code commented on section 726(a)(4):

Fourth distribution is to holders of fine, penalty, forfeiture, or multiple, punitive or exemplary damage claims. These claims are disallowed entirely under present law. They are simply subordinated here. *Paragraph (4)*, in combination with paragraph (2), *will require that claims for fines, penalties, and damages be divided into the portion that is in compensation for actual pecuniary loss and the portion that is not.* Distribution under the two paragraphs will be made accordingly.⁸⁷

The clear implication of this passage is that even if denominated a "penalty," a bankruptcy claim that represents compensation for actual pecuniary loss (or the corresponding portion of such a claim) should be ranked with the other general unsecured claims under section 726(a)(2). Thus, under this approach the DOE's claim should be included in full in the section 726(a)(2) category of claims and not subordinated under section 726(a)(4), because it is in the exact amount of the pecuniary loss represented by the illegal overcharges without any additional charge.

Nevertheless, because allowance of any claim on a debtor's estate by the federal government further reduces the recovery of private creditors in the typical liquidation, the DOE's claims predictably aroused the hostility of private creditors and stimulated efforts by trustees to defeat them.⁸⁸ In arguing that the DOE's claim was for a penalty, the trustee in WTM made an impassioned appeal that allowance of the DOE's claim without subordination would unfairly penalize WTM's "legitimate creditors" by cutting the recovery

85. *Wagner*, 390 F.2d at 15 (emphasis in original).

86. *Id.*

87. H.R. REP. NO. 595, 95th Cong., 1st Sess. at 383 (emphasis supplied). See also 4 COLLIER ON BANKRUPTCY ¶ 726.02(4) (1983). See *supra* text accompanying note 66.

88. The trustee has a statutory duty to combat unfounded bankruptcy claims. See *supra* note 14.

of these “real, living, suffering claimants” in half.⁸⁹ The DOE responded that “[t]he fruits of debtor’s overcharges never rightfully belonged either to the debtor or to its creditors. There is no reason why the other creditors should gain a windfall at the expense of the overcharge victims or profit by the debtor’s illegal gains.”⁹⁰

The DOE’s position is supported by a number of appellate court bankruptcy decisions. In *In re F.W. Koenecke & Sons, Inc.*,⁹¹ the debtor, a cigarette distributor, had engaged in a fraudulent licensing scheme to avoid paying the taxes it collected for the state on the cigarettes it sold. The bankruptcy judge subordinated the state’s claim for the unpaid taxes, holding that it would be inequitable for the state to participate on either a priority or equal basis in distribution with other creditors. On appeal, the Seventh Circuit reversed. It noted that all the people of the state benefitted when taxes lawfully owing were collected, and it rejected the argument that the state was profiting at the expense of the creditors.⁹² The court categorically dismissed the notion that allowing the state’s claim would be unfair to the other creditors:

*The creditors of Koenecke, of course, are not being penalized or prosecuted in any way. Their complaints are against Koenecke not the state. Their right to enjoy the illegal fruit of the Koenecke scheme by usurping the unpaid State taxes resulting from the multiple license plan can be no greater than the taxpayer’s right to avoid those taxes.*⁹³

In another case,⁹⁴ the same court applied a similar principle in holding that the proceeds of mail fraud by a debtor are not part of its estate. Dennis Roberts, doing business as Teltronics, Ltd. (“Teltronics”), had defrauded thousands of consumers who responded to magazine advertisements offering digital watches. The watches were never delivered, and Roberts absconded with \$1,300,000 of the \$1,700,000 he had received in prepaid orders. He was

89. A large number of these “real, living, suffering” creditors of WTM were other oil resellers who had themselves apparently made overcharges in violation of the Mandatory Petroleum Price and Allocation Regulations. Based on their examination of the bankruptcy case file, DOE attorneys calculated that 99% of WTM’s indebtedness, excluding the DOE’s claim, was accounted for by other resellers. Appellant’s Brief and Opposition to Appellee’s Motion to Dismiss at 10 n.18, *DOE v. WTM*, No.5-111 (Temp. Emer. Ct. App. 1985).

90. Brief of Appellant at 22, *DOE v. WTM*, No. 1-83-73K (N.D. Tex. July 26, 1984).

91. 533 F.2d 1020 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

92. The apparent basis for the lower courts’ decision was not section 57j of the Bankruptcy Act, but rather the doctrine of equitable subordination, which as the Seventh Circuit acknowledged, gives a bankruptcy court the inherent power “under basic equitable principles” to subordinate any claims to those of general creditors. *In re F.W. Koenecke & Sons, Inc.*, 533 F.2d at 1024. *Cf. supra* note 60.

93. *In re Koenecke & Sons, Inc.*, 533 F.2d at 1025 (emphasis supplied). *See also In re Serignese*, 214 F. Supp. 917, 920 (D. Conn. 1963), *aff’d on the opinion of the district court sub nom.*, *Goring v. United States*, 330 F.2d 960 (2d Cir. 1964) (requiring the insolvent corporation to pay unpaid taxes “does not unjustly punish other creditors”). *In re Serignese* is discussed *infra* at note 111.

94. *In re Teltronics, Ltd.*, 649 F.2d 1236 (7th Cir. 1981).

later found guilty of fifty counts of mail fraud,⁹⁵ and a state court receiver acting pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act froze the corporation's assets.

The Seventh Circuit affirmed the district court decision refusing to order the receiver to turn over the seized assets to the bankruptcy trustee. It stated, "The rule that property obtained by fraud is not part of the bankrupt's estate represents the policy that property should remain in the hands of its rightful owners, no matter how legitimate the claims of creditors."⁹⁶ It further declared that "[s]ince the monies were obtained by fraud, the receiver administers monies that are not properly part of the bankrupt's estate,"⁹⁷ and that to add them to the estate would give its creditors "a windfall at the expense of the defrauded customers."⁹⁸

While neither is a section 726(a)(4) case, *Koenecke* and *Teltronics* plainly indicate that the proceeds of a debtor's illegal activities are not properly part of the estate in bankruptcy, even if they have been commingled with the debtor's other assets. Accordingly, restoring the debtor's illegal gains to their rightful owners does no injustice to the creditors, who have no rightful claim to these gains. WTM's oil price overcharges deserve the same treatment as Koenecke's converted tax revenues and Teltronics' fraudulent profits; they should be disgorged by the estate. Such disgorgement does not "penalize" the estate's other creditors in the sense of section 726(a)(4).

In summary, *Maier* and *Wagner*, which held that claims for restitution similar to that of the DOE were not barred as penalties under section 57j of the Bankruptcy Act, furnish unmistakable if somewhat obscure support for the DOE's position that its claim for disgorgement of WTM's overcharges should not be subordinated as a penalty pursuant to section 726(a)(4) of the Bankruptcy Code. This conclusion is bolstered by *Koenecke's* and *Teltronics'* holdings that disgorgement of illegal gains in no way penalizes the debtor's other creditors, who had no rightful claim to the illegal overcharges in the first place and who would receive an undeserved windfall if disgorgement did not occur. Thus, bankruptcy case law provides strong support for the DOE's effort to block subordination of its claim as a penalty.

Does Case Law Support the Trustee's Position That the DOE's Claim Is a Penalty Which Should Be Subordinated?

Careful research has disclosed no relevant authority concerning restitution or disgorgement which supports the trustee's position that the DOE's claim

95. Cf. 18 U.S.C. § 1341 (1970); *In re Teltronics, Ltd.*, 649 F.2d at 1238.

96. *In re Teltronics, Ltd.*, 649 F.2d at 1239 (citing *In re Paragon Securities Co.*, 589 F.2d 1240, 1242 (3d Cir. 1978)).

97. *Id.*

98. *Id.* at 1241. Similarly, the TECA in *WTM* stated that the DOE's claim "is for funds which were never rightfully assets of the corporation." Order Denying Petition for Rehearing at 2, *DOE v. WTM*, No. 5-111 (Temp. Emer. Ct. App. June 24, 1985). For bankruptcy decisions involving claims of constructive trusts, see *Nicklaus v. Bank of Russellville*, 336 F.2d 144, 147 (8th Cir. 1964); *In re Independent Clearing House*, 41 Bankr. 985, 1000 (Bankr. D. Utah 1984); *In re First Fidelity Fin. Serv., Inc.*, 36 Bankr. 508, 511 (Bankr. S.D. Fla. 1983).

should be subordinated as a penalty. Consequently, the trustee had no alternative but to invoke bankruptcy cases involving different kinds of claims, such as those for taxes.⁹⁹

The trustee's most important case support came from *Simonson v. Granquist*,¹⁰⁰ which involved not only a different type of bankruptcy claim from that of the DOE (*i.e.*, a tax penalty), but also a different, defunct statute (section 57j of the former Bankruptcy Act).¹⁰¹ Justice Black's opinion for the Supreme Court in *Simonson* stated that section 57j of the Bankruptcy Act "plainly manifests a congressional purpose to bar all claims of any kind against a bankrupt except those based on a 'pecuniary' loss."¹⁰² The WTM trustee seized upon this quotation as proof of his contention that any bankruptcy claim which, like the DOE's claim, was not based upon direct pecuniary loss to the holder was *ipso facto* a penalty which must be barred under former section 57j and subordinated under current section 726(a)(4).¹⁰³

Taken out of context, the above statement might appear to provide strong support for WTM's argument. Taken in context, however, it is a dictum which, while superficially favorable to the trustee's case, is irrelevant because the two cases are distinguishable. The pertinent statutes¹⁰⁴ in *Simonson* labeled the government claims "tax penalties,"¹⁰⁵ and the Internal Revenue Service's argument that the "penalty" language of section 57j applied only to unsecured penalties but not to secured penalties was obviously strained.¹⁰⁶ In contrast, the DOE's claim against WTM was labeled "restitution" by the statute which gave rise to it, section 209 of the ESA.¹⁰⁷ Thus, the DOE was seeking to effectuate the terminology used by Congress, while the

99. Perhaps the strongest argument the trustee could make to distinguish the four previously discussed cases would be that, contrary to the facts in those cases, there was no guarantee that any funds the DOE recovered from the WTM estate would in actuality reach the victims of the illegal overcharges. However, the DOE is engaged in an ongoing and substantially successful effort to identify and reimburse the victims of the illegal overcharges. See *infra* note 136.

100. 369 U.S. 38 (1962). See *supra* note 71 and accompanying text.

101. While an argument concerning the meaning of a current statutory provision, section 726(a)(4), based on a case construing section 57j is subject to obvious challenge, it is not as weak as it might first seem. The Bankruptcy Code did not completely change every aspect of the former law, and courts in Bankruptcy Code cases frequently cite pre-Code cases in support of their holdings. Moreover, the similarity in language of the two provisions indicates that section 726(a)(4) was modeled after section 57j, despite the important differences, and both provisions were intended to protect innocent creditors from the debtor's wrongdoing. See *supra* text accompanying notes 66-72.

102. See *supra* text accompanying note 71.

103. See, *e.g.*, Brief of Appellee at 5, DOE v. WTM, No. 1-83-73K (N.D. Tex., filed Sept. 30, 1983) ("The courts have defined penalty in functional terms and have found that a claim is for a penalty unless it represents actual pecuniary loss to the claimant.").

104. The government's claim in *Simonson* was based on section 6321 of the Internal Revenue Code of 1954. In *Harris v. United States*, its companion case, the government's claim arose under section 3670 of the Internal Revenue Code of 1939. *Simonson v. Granquist*, 369 U.S. 38 (1962).

105. *Id.*

106. The government claims in *Simonson* were secured claims based on perfected liens. *Id.*

107. ESA, at § 209. See *supra* note 32.

Internal Revenue Service in *Simonson* was trying to read into the statutory provision a distinction without apparent basis in the terminology Congress had used.¹⁰⁸

There is a more serious flaw, however, in the trustee's argument that the DOE's absence of pecuniary loss turns its claim against WTM into a penalty. It necessitates rewriting the statute. Instead of barring all government penalties not occasioned by pecuniary loss, section 57j under the trustee's interpretation would bar all government claims not occasioned by pecuniary loss and would define "penalty" in the statute as absence of any pecuniary loss.¹⁰⁹ The interpretation would in effect collapse the two requirements for barring a claim in section 57j into one: Instead of requiring (1) that a claim be found to be a "penalty" and (2) that the claim entail an absence of pecuniary loss before it could be barred, absence of pecuniary loss would by itself warrant preclusion, and the "penalty" requirement would in effect have been written out of section 57j.¹¹⁰

We should hesitate to ascribe any such revisionist intention regarding section 57j to such a champion of legislative prerogatives as Justice Black. A more plausible interpretation of the quoted passage is that Justice Black used the word "claims" rather loosely as a synonym for "penalties," perhaps to vary the style of the passage. The context is critical here. Justice Black's purpose in *Simonson* was to firmly reject the Internal Revenue Service's proffered distinction between unsecured and secured claims, as far as penalties are concerned. It is doubtful that Justice Black intended to suggest that the mere fact that a claimholder has suffered no pecuniary loss automatically turns the claim into a penalty.

108. *United States v. Moore*, 366 F.2d 243 (5th Cir. 1966), which the trustee also cited, is distinguishable for the same reason. In *Moore*, the defendants had produced cotton in excess of the marketing quota for their farms established under the authority of section 346(a) of the Agricultural Adjustment Act, 7 U.S.C. § 1346(a). Accordingly, they were assessed "a penalty" by the CCC of 50% of the cotton parity price pursuant to section 1346(a). *Id.* at 244 n.1. When the defendants filed bankruptcy, the bankruptcy referee rejected the government's argument that such a section 1346(a) penalty was not a penalty under section 57j of the Bankruptcy Act. The district court and the Fifth Circuit affirmed this finding. The Fifth Circuit, however, held that it was error not to allow the government an opportunity to prove that part of the penalty represented "pecuniary loss," and reversed and remanded that part of the decision. *Id.* at 246-47.

109. The trustee stated this position explicitly: "[T]he DOE now asserts a right to recover amounts which bear no relationship to actual pecuniary losses suffered by DOE. This circumstance constitutes assertion of a penalty which bankruptcy law will not recognize or allow." Memorandum *re* Department of Energy Claim No. 38 at 3, *WTM v. DOE*, No. 182-00034 (Bankr. N.D. Tex., filed Mar. 21, 1983). The appeal of such an interpretation of the statute to the trustee is obvious. It would free the trustee from the need to demonstrate that the DOE's claim for "restitution" was in fact a "penalty" and would mean that by conceding its lack of pecuniary loss, the DOE had in effect given away its case to the trustee.

110. Such a rewriting of the statute does violence to basic principles of statutory construction. "As in every case involving the interpretation of a statute, analysis must begin with the language employed by Congress." *Howe v. Smith*, 452 U.S. 473, 480 (1981). When the terms of a statute are unambiguous, judicial inquiry is complete, except in "rare and exceptional circumstances." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187 n.33 (1978). *Accord* *Howe v. United States*, 449 U.S. 424, 430 (1981). Absent any ambiguity in the wording of section 726(a)(4), the plain meaning of the statute should govern. 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §§ 46.01, 46.04 (C. Sands 4th ed. 1973).

This interpretation and analysis of *Simonson v. Granquist* is consistent, moreover, with another tax case in which the court upheld a bankruptcy claim based upon a statutory "penalty" under the Internal Revenue Code for failure to pay taxes, even though the debtor was not personally liable for the taxes.¹¹¹ The debtor, Michael Serignese, was an officer, stockholder and manager of Advance Caterers, Inc. ("Advance"), which filed a petition for arrangement under chapter 11 in August, 1960. Serignese was responsible for seeing that payroll taxes for Advance's employees were forwarded to the Internal Revenue Service. After Serignese himself was adjudicated a bankrupt in January, 1961, the Internal Revenue Service assessed against him a "penalty" for the exact amount of the withholding and social security taxes due from Advance for the last six months of 1960, which had never been paid.¹¹² In reversing the referee's decision disallowing the Internal Revenue Service claim, the district court observed that the claim, even if labeled a "penalty," represented "the Government's actual pecuniary loss."¹¹³ The court distinguished *Simonson v. Granquist*:

Simonson v. Granquist . . . and *In re Tom's Villa Rosa, Inc.* . . . are said to be authority for the proposition that penalties are not in concert with the purpose of the Bankruptcy Act and are not allowed. However, in *Simonson*, the penalties involved were penalties "on unpaid federal taxes" . . . i.e. amounts over and above the unpaid tax. In that case the penalty was more than the loss sustained by the non-payment. Such a penalty punishes for delinquency. The penalty tax in the present matter is merely to recoup the losses due to non-payment.

Similarly, in *Tom's Villa Rosa*, the controversy centered on a penalty over and above the amount of the unpaid taxes. The instant case is readily distinguishable. *The penalty here does not exact an amount over that lost by the Government in unpaid taxes. It does not unjustly punish other creditors.* Therefore, the Court finds that the Government's claim is allowable under § 57(j) [sic].¹¹⁴

111. *In re Serignese*, 214 F. Supp. 917 (D. Conn. 1963), *aff'd on the opinion of the district court sub nom.*, *Goring v. United States*, 330 F.2d 960 (2d Cir. 1964). *Accord In re Saxe*, 14 Bankr. 161 (Bankr. S.D.N.Y. 1981).

112. The IRS proceeded under section 6672 of the Internal Revenue Code of 1954, which provided in pertinent part:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over

26 U.S.C. § 6672 (1978).

113. *In re Serignese*, 214 F. Supp. at 919.

114. *Id.* at 919-20 (citations omitted) (emphasis supplied). Similarly, the court stated in *In re Saxe*, a case which squares completely with *In re Serignese*:

If the trustee succeeds in this application the creditors will receive a windfall to

While tax claims and orders to disgorge funds are quite different, there is a significant similarity in the restitutionary nature of the requirement that Serignese make the government whole for taxes not paid because of his nonfeasance, and the requirement that WTM disgorge illegal profits from its overcharges. As in *DOE v. WTM*, the amount Serignese was required to pay was the exact amount of the loss resulting from his actions, unlike the tax penalty in *Simonson v. Granquist*. This provides further support for rejecting subordination of the DOE's claim against WTM.

A relatively obscure case which at least superficially lends credence to the trustee's position is *In re James Butler Grocery Co.*,¹¹⁵ in which the New York state government sought to enforce an agreement by a debtor grocery to disgorge a discount or rebate it had received in violation of the New York Agriculture and Markets Law. The court held that "the payments to be made by the bankrupt herein were penalties within the meaning of section 57j of the Bankruptcy Act."¹¹⁶ Requiring forfeiture of an illegal rebate, which forfeiture is intended to enforce minimum milk prices or a price floor, is of course quite different from ordering restitution of illegal overcharges, which has the opposite purpose of enforcing a price ceiling. Moreover, Butler's receipt of the rebate caused no direct pecuniary loss to anyone. Unlike the DOE,¹¹⁷ the New York Milk Control Board had no power to require disgorgement of the rebate and only exacted Butler's agreement to disgorge by threatening to exercise its statutory power to revoke Butler's milk dealer's license.¹¹⁸ Such a threat embodies a punitive purpose.

In re Kline,¹¹⁹ another case cited by the trustee, involved sanctions levied by the Internal Revenue Code for self-dealing with respect to tax-exempt private foundations.¹²⁰ The "tax" imposed for violations was 5% per year

which they are not entitled. The penalty in this case is to recoup a pecuniary loss. It does not exact an amount over that lost by the Government in unpaid taxes, and it does not unjustly punish other creditors.

In re Saxe, 14 Bankr. at 165.

See also *In re Abingdon Realty Corp.*, 21 Bankr. 290, 294 (Bankr. E.D. Va. 1982) (section 57j case which upheld an I.R.S. bankruptcy claim based on a \$1.8 million promissory note executed by debtors to guarantee payment of unpaid wage taxes).

115. 22 F. Supp. 993 (E.D.N.Y. 1938).

116. *Id.* at 994.

117. The ESA authorized the federal district courts to order, and the DOE to apply for, "restitution of moneys received in violation of any such [price control] order or regulation." See *supra* note 32.

118. "The agreement to pay \$2,738.43 was not a simple contract as that is ordinarily understood, but was a payment coerced by the fear of the sovereign's power to revoke the license . . ." *In re James Butler Grocery Co.*, 22 F. Supp. at 994. The statute did have a separate provision, comparable to the restitution provision of the Emergency Price Control Act of 1942, under which a court might have ordered payment to producers who had been paid less than the minimum price. See *Grandview Dairy, Inc. v. Baldwin*, 3d Dept., 269 N.Y.S. 116, 239 A.D. 640 (1934). The government did not invoke this provision.

119. 403 F. Supp. 974 (D. Md. 1975), *aff'd per curiam*, 547 F.2d 823 (4th Cir. 1977). Accord *In re Unified Control Sys., Inc.*, 586 F.2d 1036 (5th Cir. 1978).

120. Internal Revenue Code of 1954 (codified as amended at 26 U.S.C. §§ 4941, 4944).

for each act of self-dealing and 200% if it was not corrected within a specified period.¹²¹ Despite the statutory “tax” label, the court held it a nonallowable penalty under section 57j because of the clear punitive purpose evinced by the legislative history, which referred to these provisions as “sanctions.”¹²² In reaching this result, moreover, the court emphasized that the graduated levels of sanctions bore no relation to the amount of revenue the government might have lost through such conduct as self-dealing.¹²³ This distinguishes such penalties from the disgorgement the DOE sought in the exact amount of WTM’s overcharges.

In summary, *WTM* was a case of first impression concerning the question whether restitution of price control overcharges constitutes a “penalty” under section 726(a)(4). Only a single obscure case - *In re Maier Brewing Co.*¹²⁴ - addressed the same question with respect to section 57j of the former Bankruptcy Act. *Maier* supports the DOE’s position that requiring a debtor’s estate to make restitution does not violate bankruptcy law. Similarly, cases requiring the debtor to disgorge other forms of illegal enrichment also support the DOE’s position: *United States v. Wagner*¹²⁵ (unearned grain storage fees); *In re Teltronics, Ltd.*¹²⁶ (the proceeds of a fraudulent scheme in which those who had paid the debtor for a product never received it); *In re F.W. Koenecke & Sons, Inc.*¹²⁷ (cigarette taxes which the debtor had collected but failed to turn over to the state government); and *In re Serignese*¹²⁸ (payroll taxes which a corporate officer had withheld but failed to turn over to the federal government).

121. *In re Kline*, 403 F. Supp. 974, 977 (D. Md. 1975), *aff’d*, 547 F.2d 823 (4th Cir. 1977).

122. *Id.* at 978 n.5.

123. *In re Kline*, 403 F. Supp. at 978. The Fifth Circuit followed *Kline* in *In re Unified Control Systems, Inc.*, 586 F.2d 1036 (5th Cir. 1978), which was on all fours with *Kline*. The Fifth Circuit’s reasoning resembled that of *Kline*: “The language of the Act, its legislative history, the graduated levels of the sanctions imposed, and the almost confiscatory level of the exaction assessed, convince us that the exactions in question were intended to curb the described conduct through pecuniary punishment.” *Id.* at 1039.

There are other decisions in which section 57j penalties have been asserted without any relation to pecuniary loss to the government or anyone else. *See, e.g., In re Caponigri*, 193 F. 291 (S.D.N.Y. 1912) (government claim for forfeiture of bond by debtor bail bondsman, after accused criminal for whom he had posted bail absconded, disallowed as a section 57j penalty); *United States v. Moore*, 366 F.2d 243 (5th Cir. 1966) (“penalty” imposed on farmers that had exceeded cotton production allotments under the Agricultural Adjustment Act found to be section 57j penalty); *In re Flick*, 5 Bankr. 637 (E.D. Pa. 1980) (civil contempt sanctions under Pennsylvania’s Unfair Trade Practices and Consumer Protection Law deemed to be section 57j penalties—found unrelated to pecuniary loss to Commonwealth or debtor’s customers). *See also In re Thrift Packing Co.*, 100 F. Supp. 907 (N.D. Tex. 1951).

124. 1 OPA Op. & Dec. 1288 (No. 37544-H, S.D. Cal. Mar. 10, 1944), *printed in* Opinions and Decisions - Opinions of the Price Administrator and Decisions of the Federal and State Courts on Price Control - Rent Control - Rationing (Office of Price Administration, undated).

125. 390 F.2d 13 (10th Cir. 1968), *aff’g in part and rev’g in part, In re Cheyenne Wells Elevator Corp.*, 264 F. Supp. 1018 (D. Colo. 1967).

126. *In re Teltronics, Ltd.*, 649 F.2d 1236 (7th Cir. 1981).

127. 533 F.2d 1020 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

128. *In re Serignese*, 214 F. Supp. 917 (D. Conn. 1963), *aff’d on the opinion of the district*

In contrast, there appear to be no cases holding that required disgorgement of either price control overcharges or any other form of illegal enrichment constitutes a "penalty" under either section 726(a)(4) or section 57j. Moreover, the cases cited by the trustee in *WTM* are all distinguishable on both factual and legal grounds. *Simonson v. Granquist*¹²⁹ involved a statutory tax "penalty," *In re Kline*¹³⁰ involved a tax penalty of up to 200% of the amount of the violation, and *In re James Butler Grocery Co.*¹³¹ involved an unlawful discount or rebate - the opposite of a price control overcharge. The clear message of the sparse bankruptcy case law on this subject is that the DOE's claim should not be subordinated as a penalty pursuant to section 726(a)(4).

Because of the sparseness of relevant bankruptcy authority in this area, however, it is appropriate if not required that we refer to nonbankruptcy law to clarify the matter.¹³² Indeed, there is a considerable body of non-bankruptcy case law concerning the question whether government claims for disgorgement of price control overcharges under the ESA and prior statutes constitute penalties. The balance of this article will consider this body of nonbankruptcy "penalty" law and its bearing on resolution of the bankruptcy penalty issue.

*Do DOE Demands for Repayment of Price Control Overcharges
Constitute Claims for "Restitution"?*

Because of the "pecuniary loss" component of section 726(a)(4), and the DOE's acknowledgement that it had not suffered such loss, the trustee argued that the DOE's claim could not be other than for a penalty.¹³³ The DOE countered that despite the lack of pecuniary loss, its claim was for "restitution,"¹³⁴ which, as we shall see, is consistently deemed not to be a

court *sub nom.*, *Goring v. United States*, 330 F.2d 960 (1964). *Accord In re Saxe*, 14 Bankr. 161 (Bankr. S.D.N.Y. 1981).

129. See *supra* note 71.

130. See *supra* note 121.

131. See *supra* note 115.

132. The legislative history of the Bankruptcy Code invites such reference, indicating that the nature of a claim in bankruptcy depends, in the first instance, on the substantive law creating the claim.

Legislative history states:

Bankruptcy is mainly a procedural device, prescribing the method of accomplishing rehabilitation or liquidation, but generally leaving undisturbed legal relationships that existed before bankruptcy. To this end, *the Bankruptcy Act incorporates State and general Federal law in many important areas. The bankruptcy judge must apply to the many diverse and frequently complex fact patterns that arise in the typical bankruptcy case this general body of law . . .*

H.R. REP. NO. 598, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5971 (footnotes omitted) (emphasis added).

133. See, e.g., Supplement to Reply Brief of Appellee at 15, *DOE v. WTM*, No. 1-83-73K (N.D. Tex., filed Dec., 1983).

134. Brief of Appellant at 1, *DOE v. WTM*, Civ. No. 1-83-73K (N.D. Tex., filed Sept. 8, 1983).

"penalty."¹³⁵ The trustee responded that the DOE's claim could not be for restitution because the proceeds of such a claim would not go to the victims of the overcharges, *i.e.*, the consumers of petroleum products, but rather into the coffers of the federal government.¹³⁶

Considering the question whether the DOE's claim is for restitution is essential to determining whether it is for a "penalty." The DOE, of course, in no way conceded that disgorged overcharges would never be returned to the actual overcharge victims, and indeed there is strong support for the view that the DOE has an obligation to endeavor to identify and reimburse such victims from the disgorged funds.¹³⁷ Nevertheless, in view of the DOE's concession that it had not itself suffered the overcharges,¹³⁸ the trustee's position that payments of overcharges to the DOE did not constitute restitution appears plausible at least on the surface.¹³⁹ Furthermore, because

135. See, *e.g.*, *infra* text accompanying notes 207-09.

136. Brief of Appellee at 13, *DOE v. WTM*, Civ. No. 1-83-73K (N.D. Tex., filed Sept. 30, 1983). The trustee's contentions are belied by the facts. In 1979, the DOE had established special procedures to ensure that petroleum overcharges would, to the maximum extent feasible, be returned to those who were injured thereby. On February 9, 1979, the DOE published its final "Subpart V" regulations, 10 C.F.R. §§ 205.280-205.288 (1987). Their purpose was stated as follows:

This Subpart establishes special procedures pursuant to which refunds may be made to injured persons in order to remedy the effect of a violation of the regulations of the Department of Energy. This Subpart shall be applicable in those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified in a Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance, or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive.

10 C.F.R. § 205.280, 44 Fed. Reg. 8,562 (1979).

For a description of Subpart V procedures, see *Citronelle-Mobile Gathering, Inc. v. Herrington*, 826 F.2d 16 (Temp. Emer. Ct. App. 1982), *cert. denied*, 108 S. Ct. 327 (1987); *RJG Cab, Inc. v. Hodel*, 797 F.2d 111, 113-15 (3d Cir. 1986).

137. The TECA has noted that "the Government has a *duty* to try to ascertain those overcharged, and refund them [sic], with interest, from the restitution funds [recovered from price control violators]." *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d at 717, 723 (Temp. Emer. Ct. App. 1982). See also Note, *Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation*, 32 STAN. L. REV. 1038 (1980) (the remedies utilized by the DOE up to that time failed to fulfill the government's statutory obligation to make restitution to the consumer who actually paid the overcharges).

It is difficult to perform this "duty" when, for example, this entails identifying, years afterward, the precise victims of gasoline overcharges at a particular service station or chain of stations. Nevertheless, it would be anomalous to conclude from this fact that those who violated the price control laws ought to retain the fruits of their illegal actions, and the DOE has successfully argued this in support of its claims for "restitution." See *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F. Supp. 871, 885-86, *aff'd as modified sub nom.* *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Temp. Emer. Ct. App. 1982).

138. See *supra* text accompanying note 73.

139. Justice Rutledge, dissenting in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and joined by Justices Frankfurter and Reed, stated that restitution "contemplates return of the unjustly taken enrichment to him from whom it was taken." *Id.* at 406. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines restitution as:

(1) an act of restoring or a condition of being restored . . . restoration of something to its rightful owner: the making good of or giving an equivalent for some injury

no one denied that WTM had committed illegal acts (the trustee disclaimed any knowledge whether WTM actually had violated the price control regulations), taking the offensive to refute the DOE's restitution argument was the best and probably the only strategy the trustee could adopt in seeking to defeat the DOE's claim.

In order to resolve the restitution question, it is necessary to examine whether the DOE's claim can accurately be characterized as restitution under the prevailing energy law statutes and cases.¹⁴⁰ As noted above, in pursuing refunds from WTM, the DOE was proceeding pursuant to authority conferred on it by section 209 of the ESA, which authorizes the federal government to seek, and the courts to grant, temporary restraining orders and preliminary and permanent injunctions to enforce the price control regulations.¹⁴¹ Section 209 further provides, "In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation. . . ."¹⁴²

It was pursuant to this authority that the DOE issued the PRO demanding that WTM disgorge the fruits of its violation of the price control regulations.¹⁴³ As noted above, moreover, the legislative history of section 209 indicates that the explicit reference to restitution was included to remove any doubt that "there was an inherent equitable power in the court to set things right and order restitution."¹⁴⁴

(as a loss of or damage to property) . . . (2) something intended to cause or serving to cause restoration of a previous state . . . an action based upon equitable principles to recover money or property that in good conscience belongs to the plaintiff or to prevent a defendant from being unjustly enriched at the expense of the plaintiff

140. The trustee in *WTM* questioned the relevance of nonbankruptcy cases cited by the DOE. See Brief of Appellee at 15, *DOE v. WTM*, Civ. No. 1-83-73K (Bankr. N.D. Tex., filed Sept. 30, 1983) (footnote omitted). Yet the trustee himself cited nonbankruptcy cases when they supported his arguments. In any event, the propriety of invoking nonbankruptcy substantive law in deciding issues under the Bankruptcy Code is clear. Despite its unique features, the Bankruptcy Code was never intended to function as an autonomous legal system, divorced from other areas of substantive law. To the contrary, it was intended to incorporate these areas of law. See *supra* note 132.

141. See *supra* note 32.

142. ESA, § 209, 12 U.S.C. § 1904 note (1969). Words chosen by Congress to describe delegated authority are ordinarily to be accorded their "plain meaning," and thus such labels constitute one factor to consider in deciding whether a claim is punitive. *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 237 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976); *United States v. New England Coal & Coke Co.*, 318 F.2d 138, 144 (1st Cir. 1963). Accordingly, Congress' use of the term "restitution" in section 209 should be deemed intentional, thereby reinforcing the argument that such claims cannot be considered penalties.

143. The DOE maintained throughout the case that it was proceeding pursuant to the authority conferred by section 209 of the ESA. The TECA maintained that the DOE "did not assert its claim pursuant to Section 209 of the ESA," which authorizes courts to order restitution but "confers no authority on the DOE to seek overcharges directly from violators." *WTM*, 763 F.2d at 1414-15 n.4. A PRO, while seeking voluntary compliance by the company involved, obviously contemplates litigation if such compliance is not forthcoming. Thus, this conclusion by the TECA seems an illogical quibble, which is contradicted by the later statement in the decision ("On Petition for Rehearing Per Curiam") that "the DOE sought restitution [from WTM] under the authority of § 209 of the Economic Stabilization Act of 1973" *Id.* at 1426.

144. See *supra* note 33. The need for spelling out explicitly the court's equitable restitutionary

Restitution was obviously an extremely sensitive subject for price control violators because it meant not merely foregoing future profits but disgorging significant sums already received.¹⁴⁵ As with the Office of Price Administration cases of the 1940s,¹⁴⁶ violators made every possible challenge to the authority of the agency to seek or order restitution. The TECA¹⁴⁷ uniformly rejected these challenges, confirming that the district courts in price control cases retained the broad power and flexibility of traditional equity courts to combat unjust enrichment by ordering disgorgement of illegal gains.¹⁴⁸

The court in *United States v. Lieb*¹⁴⁹ held constitutional the ESA, Executive Order 11615 empowering the Cost of Living Council to implement the ESA, and the price control regulations issued by the Cost of Living Council.¹⁵⁰ The court further enjoined the defendant landlord from charging rents in excess of the permissible ceiling amounts and ordered him to make restitution

power may have been suggested to the draftsmen of the ESA by the history of the World War II price controls. The Emergency Price Control Act of 1942 contained no explicit restitutionary authority. Therefore, those accused of price control violations vigorously denied that the Office of Price Administration possessed the authority to seek, and the courts the power to grant, restitution of overcharges. The issue was ultimately resolved by the Supreme Court in *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-401 (1946). In *Porter*, the Court held that federal courts had the authority under section 205(a) of the 1942 Act to order restitution in exercise of the traditional equitable power of the courts. *Id.* The draftsmen of the ESA probably had in mind the 1942 Act, the only previous federal price control statute, and desired to avoid the need for a reprise of *Porter*.

145. See *supra* note 8.

146. See, e.g., *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944); *Bowles v. Skaggs*, 151 F.2d 817 (6th Cir. 1945). See *infra* text accompanying notes 173-85.

147. Section 211(b)(2) of the ESA gave the TECA (which was modeled after the Emergency Court of Appeals created to adjudicate price control cases during World War II) exclusive appellate jurisdiction of all cases arising under the ESA. Section 5(a)(1) of the Emergency Petroleum Allocation Act adopted section 211 of the ESA and gave the TECA jurisdiction over all cases arising under regulations promulgated pursuant to the ESA and actions taken by the President and Secretary of Energy under the ESA. 15 U.S.C. § 754(a)(1) (1974). The Supreme Court has stated:

Congress created the TECA and vested it with "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." This judicial-review provision was designed to provide speedy resolution of cases brought under the Act and "to funnel into one court all the appeals arising out of the District Courts and thus gain in consistency of decision." The provision thus carved out a limited exception to the broad jurisdiction of the courts of appeals over "appeals from all final decisions of the district courts of the United States."

Bray v. United States, 423 U.S. 73, 74 (1975) (citations omitted).

Another closely related purpose for establishing the TECA was, of course, to insure consistent adjudication of ESA issues nationwide. *Id.*; *Lea Exploration, Inc. v. DOE*, 843 F.2d 510 (Temp. Emer. Ct. App. 1988).

148. *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946).

149. 333 F. Supp. 424 (W.D. Tex. 1971), *aff'd*, 462 F.2d 1161 (Temp. Emer. Ct. App. 1972).

150. 333 F. Supp. at 429. The constitutionality of the ESA was also upheld in *Amalgamated Meat Cutters & Butcher Workmen of North America v. Connally*, 337 F. Supp. 737 (D.D.C. 1971).

of overcharges already received.¹⁵¹ The TECA affirmed this decision,¹⁵² as well as a contemporaneous decision ordering the University of Southern California to refund excess charges for football tickets.¹⁵³ In the latter case, the TECA held, "we find the power to demand a refund properly at the appellant's disposal."¹⁵⁴

While these cases established the power of a court to order restitution upon the agency's application, the plaintiff in *Bonray Oil Co. v. DOE*¹⁵⁵ argued that the agency¹⁵⁶ lacked power to order a refund of overcharges without going to court. In rejecting this claim, the district court observed that regulations authorizing the Federal Energy Administration (the "FEA") to issue remedial orders requiring refunds of overcharges had been in effect throughout the period during which Congress, on four separate occasions, had extended the agency's regulatory authority under the Emergency Petroleum Allocation Act.¹⁵⁷ Moreover, a Congressional committee report on the statute indicated that Congress was familiar with the Cost of Living Council's Petroleum Price Regulations and approved of them.¹⁵⁸ The court stated that requiring refunds of overcharges was "certainly a rational method of accomplishing" goal (f) of the EPAA, which was to achieve equitable pricing and distribution of crude oil and petroleum products.¹⁵⁹ It concluded "that the FEA did not exceed its statutory authority in ordering refunds on overcharges in the Remedial Order presently challenged by plaintiff Bonray."¹⁶⁰ The TECA affirmed the district court decision without modification.¹⁶¹

In *Sauder v. DOE*,¹⁶² the TECA upheld the DOE's position that an individual who managed an oil field in which he had a partial ownership interest was liable for restitution of the illegal profits from the entire oil field and not merely his own proportional share of such profits. Earl Sauder was the driving force and largest investor in a group of six persons who together purchased all nine oil leases covering a crude oil reservoir in Kansas

151. 333 F. Supp. at 429.

152. 462 F.2d 1161 (Temp. Emer. Ct. App. 1972).

153. *University of Southern Cal. v. Cost of Living Council*, 472 F.2d 1065 (Temp. Emer. Ct. App. 1972), *cert. denied*, 410 U.S. 928 (1973).

154. *Id.* at 1070.

155. 472 F. Supp. 899, 903 (W.D. Okla. 1978), *aff'd per curiam*, 601 F.2d 1191 (Temp. Emer. Ct. App. 1979). See *supra* note 22.

156. The original defendant was the Federal Energy Administration, but the DOE was created as the FEA's successor by Congress while the case was pending and was substituted as defendant. Department of Energy Organization Act, 42 U.S.C. §§ 7101-7375.

157. 472 F. Supp. at 903.

158. H.R. REP. No. 628, 93d Cong., 2d Sess. 26 (1973), *cited in Bonray Oil Co.*, 472 F. Supp. 899 (W.D. Okla. 1978).

159. Goal (f) of the Emergency Petroleum Allocation Act was "equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry. . . ." 15 U.S.C. § 753 (b)(1)(F) (1976).

160. 472 F. Supp. at 904.

161. 601 F.2d 1191 (Temp. Emer. Ct. App. 1979).

162. 648 F.2d 1341 (Temp. Emer. Ct. App. 1981).

and consolidated them into three leases.¹⁶³ When the group sold the oil to Mobil Oil Corporation ("Mobil"), Sauder certified that it was exempt from price controls under the "stripper well" exemption.¹⁶⁴ The DOE, disagreeing that the oil was "stripper" production, issued a Notice of Probable Violation and later a Remedial Order which was upheld when Sauder challenged it in federal district court.¹⁶⁵ The court ordered Sauder to make restitution of the entire oil field's illegal profits resulting from his incorrect certification to Mobil.

On appeal, the TECA rejected Sauder's arguments that the regulations were illegal and that the field qualified for the "stripper well" exemption. In response to Sauder's final argument that section 209 of the ESA did not permit the court or the agency to order a violator of the regulations to refund moneys he had not actually received, the TECA stated that section 209 did not purport to limit the courts' power to "a particularly strict interpretation of restitution."¹⁶⁶ Rather, the TECA adopted the following expansive definition from the *Restatement of Restitution*: "In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill gotten gains or to restore the status quo, or to accomplish both objectives."¹⁶⁷ Sauder, of course, had not been personally enriched by that portion of the illegal profits from the field which went to his coinvestors. The court reasoned, however, that because it would be burdensome for the agency to seek refunds from each property owner, because this would divert the agency's energies from its enforcement effort, and because Sauder had caused the overcharges in the first place through his incorrect certifications, it was not unfair to shift that burden to him.¹⁶⁸

163. This aging oil field, which had been exploited since the 1920s, was no longer in the "primary production" state, and special "secondary recovery operations" were necessary to extract the oil. It was advantageous to combine leases covering adjacent tracts so that such operations could be conducted without regard to surface property lines. While Sauder owned 33% of one lease, 41% of the second and evidently no part of the third, the other investors agreed that he should be the sole operator of the leases. *Id.* at 1347.

164. To encourage maximum production of oil from marginal properties with proportionally high overhead costs, Congress exempted oil wells which produced less than an average of ten gallons of oil per well per day ("stripper wells") from the price ceilings from 1973 until 1981, with a brief hiatus in 1975.

165. In a sense, Sauder lost the case by failing to comply with a technical procedural requirement. There was no dispute that formal "unitization" of the property would have made it eligible for the stripper well exemption, but Sauder and the other lease owners had never concluded a formal unitization agreement for the three leases despite the fact that they had been operated as a single unit since 1966.

166. 648 F.2d at 1347. *Accord* United States v. Exxon Corp., 773 F.2d 1240, 1279 (Temp. Emer. Ct. App. 1985), *cert. denied*, 474 U.S. 1105 (1986) *reh'g denied*, 475 U.S. 1112 (1986).

167. RESTATEMENT OF RESTITUTION § 1, comment e (1937), *quoted in* 648 F.2d at 1348 (emphasis added by TECA). *Accord* United States v. Exxon Corp., 773 F.2d at 1278; Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16 (Temp. Emer. Ct. App. 1987), *cert. denied*, 108 S. Ct. 327 (1987). In applying this definition to WTM, of course, "restitution" would be achieved if WTM merely disgorged its illegal gains, regardless whether the funds were actually returned to the overcharge victims.

168. 648 F.2d at 1347-48. *Accord* United States v. Exxon, 773 F.2d at 1269-70; Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16 (Temp. Emer. Ct. App. 1987).

The TECA again quoted the *Restatement of Restitution* in *Citronelle-Mobile Gathering, Inc. v. Edwards*,¹⁶⁹ when it ordered restitution of illegal profits from a trade scheme involving sham "export sales" of oil designed to evade the price control regulations. The court noted that restitution was intended to enforce compliance with the regulatory scheme.¹⁷⁰ Accordingly, the central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched, and to make him disgorge that amount. No proof is required that the plaintiff was damaged, much less the amount of damage:

Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiff's expense . . . [T]he general requirement does not mean that the gain to the defendant need be equated to the loss of the plaintiff, nor indeed that there be by any loss to the plaintiff except in the sense that a legally protected interest has been invaded.¹⁷¹

In accordance with this definition, the DOE was plainly seeking restitution in *WTM* despite its acknowledgement that it had not itself suffered any pecuniary loss.¹⁷² Thus, the settled law of the TECA, the court with exclusive jurisdiction over issues arising under the ESA, is that the DOE has statutory authority to seek restitution and that claims like the DOE's against *WTM* are for restitution, even if the DOE has not suffered pecuniary loss.

The TECA's position concerning restitution of price control overcharges, moreover, is consistent with case law construing the Office of Price Administration's power to enforce the price control scheme instituted by the Emergency Price Control Act of 1942,¹⁷³ the lineal ancestor of the ESA.¹⁷⁴ Like the ESA and the federal antitrust statutes, the 1942 Act provided for a two-track process of enforcement of price controls: by private legal actions for damages by the overcharged individual¹⁷⁵ and by equitable actions brought by the Administrator of the Office of Price Administration.¹⁷⁶

169. 669 F.2d 717 (Temp. Emer. Ct. App. 1982).

170. *Id.* at 721-22. *Accord* *RJG Cab, Inc. v. Hodel*, 797 F.2d 111 (3d Cir. 1986).

171. RESTATEMENT OF RESTITUTION § 1, comment e (1937), *quoted in Citronelle-Mobile Gathering Inc.*, 669 F.2d at 722. *Accord* *United States v. Exxon Corp.*, 773 F.2d at 1286; *United States v. Sutton*, 795 F.2d 1040, 1061 (Temp. Emer. Ct. App. 1986), *cert. denied*, 479 U.S. 1030 (1987); *Citronelle-Mobile Gathering, Inc. v. Herrington*, 826 F.2d 16, 29 (Temp. Emer. Ct. App. 1987). *See also* Note, *Refunding Overcharges Under the Emergency Petroleum Allocation Act: The Evolution of a Compensatory Obligation*, 79 MICH. L. REV. 1454, 1462 (1981).

172. Other cases holding that the DOE's claims for disgorgement of overcharges constitute restitution include *Kirkpatrick Oil & Gas Co. v. DOE*, 4 Energy Mgmt. (CCH) ¶ 26,400 (W.D. Okla. Aug. 30, 1982); *Getty Oil Co. v. DOE*, 569 F. Supp. 1204, 1217-18 (D. Del. 1983); *Prosper Energy v. DOE*, 4 Energy Mgmt. (CCH) ¶ 26,438, 29,262-63 (N.D. Tex. July 20, 1983); *In re Stripper Well Litigation*, 4 Energy Mgmt. (CCH) ¶ 26,445, 29,304, 29,310-11 (D. Kan. Sept. 13, 1983). Similarly, although the National Labor Relations Board had not itself suffered any pecuniary loss, the Supreme Court found it was an appropriate "creditor" in a bankruptcy case to collect from a debtor's estate back pay in compensation for unfair labor practices by the debtor against its employees. *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952).

173. Formerly, 50 U.S.C. § 925 (the "1942 Act").

174. *See supra* note 32.

175. Section 205(e). This section also authorized the injured party to sue for up to three times

Porter v. Warner Holding Co.,¹⁷⁷ the administrator sued a Minneapolis landlord company, alleging that it had charged rents in excess of the legal maximums under the 1942 Act and seeking a decree requiring the defendant to tender refunds to the overcharged tenants. While enjoining defendant from continuing to overcharge its tenants, the district court held that it lacked jurisdiction under the statute to order restitution of the overcharges,¹⁷⁸ and the Eighth Circuit affirmed.¹⁷⁹ This decision squarely conflicted with the Sixth Circuit's decision in *Bowles v. Skaggs*,¹⁸⁰ and the Supreme Court granted certiorari to resolve this conflict.

Because the 1942 Act did not explicitly authorize restitution, a key question on appeal was whether a restitution order constituted the kind of "other order" which section 205(a) authorized courts to issue in enforcement of the statute.¹⁸¹ In *Hecht Co. v. Bowles*,¹⁸² a case decided just prior to *Warner Holding Co.*, the Supreme Court vigorously reaffirmed the traditional equitable powers of the federal courts and endorsed the flexibility they traditionally had to mold decrees to meet the individual needs of a particular case. In *Warner Holding Co.*, the Court reversed the Eighth Circuit and held that federal trial courts did have authority under the statute to order restitution, because "[a]n order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories"¹⁸³

Thus, despite the lack of an explicit reference to restitution in the statute, the Supreme Court squarely concluded in *Warner Holding Co.* that the Office of Price Administration, the agency entrusted with enforcement of the Emergency Price Control Act of 1942, had power and authority to seek restitution of overcharges in violation of the price control regulations. The ESA, the direct descendant of the 1942 Act, explicitly authorizes the government agency to seek restitution. The settled law of the TECA, the court with exclusive jurisdiction over ESA cases, is that claims like the DOE's against WTM constitute claims for restitution despite the lack of pecuniary loss to the DOE.¹⁸⁴ *Warner Holding Co.* provides persuasive additional support for the correctness of the TECA's holdings.¹⁸⁵

the amount of the overcharge. If the injured party failed to sue, the Administrator could bring an action in his stead.

176. Section 205(a). See *supra* note 32 for text of section 205(a).

177. 328 U.S. 395 (1946).

178. 60 F. Supp. 513 (D. Minn. 1944).

179. 151 F.2d 529 (8th Cir. 1945).

180. 151 F.2d 817 (6th Cir. 1945).

181. See *supra* note 32.

182. 321 U.S. 321 (1944).

183. 328 U.S. at 399. *Accord* *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288, 290-91 (1960) (court had power to order reimbursement of back wages to employees who had been discriminatorily fired in violation of section 15(a)(3) of the Fair Labor Standards Act of 1938).

184. See *supra* text accompanying note 172.

185. The holding in *Porter v. Warner Holding Co.*, that the regulatory agency had authority under the statute to seek restitution, applies with special force to the DOE's enforcement efforts under section 209 of the ESA, the text of which is largely identical to section 205(a) of the 1942 Act. See *supra* note 32. When provisions of two statutes contain virtually identical language and

Applying the above principles to *DOE v. WTM*, the DOE's claim is clearly for restitution. "The central purpose of restitution is to determine the amount by which [WTM] has been unjustly enriched, and then to make [WTM] disgorge the amount," and "[n]o proof is required that [the DOE] was damaged"¹⁸⁶ Furthermore, according to Professor Moore's definition of restitution, which the TECA has adopted, restitution occurs when the defendant merely "disgorge[s] ill-gotten gains," whether or not the defendant also "restore[s] the status quo,"¹⁸⁷ i.e., makes refunds to the precise individuals overcharged as the result of the price control violations in the precise amount they were overcharged.¹⁸⁸ Thus, despite the initial plausibility of the trustee's argument that restitution could not be made through payments to the DOE, a nonvictim of the price control overcharges, a solid wall of judicial precedent indicates that the TECA properly rejected this argument and that the DOE's claim was indeed for restitution.

Do DOE Demands for Repayment of Price Control Overcharges Fit the Legal Definition of a "Penalty" in Price Control Overcharge Cases?

As indicated above,¹⁸⁹ the issue whether the DOE's claim in *WTM* should be subordinated pursuant to section 726(a) boils down to the question whether the claim constitutes a "penalty." Once the DOE's claim is deemed a claim for "restitution," subordination is easy to avoid, because it is settled law that restitution is not a penalty. Even if the restitution characterization is put aside, however, there is strong authority in the case law that government efforts to force price control violators to disgorge their illegal profits do not constitute the imposition of "penalties."

The TECA's conclusion in *WTM* that the DOE was not seeking a penalty was based on neither of these propositions. Rather, the TECA simply stated:

The DOE's claim is clearly for restitution and not for a penalty.
The Emergency Petroleum Allocation Act of 1973, as amended,
15 U.S.C. § 751 *et seq.*, has specific sections which deal with civil

the first statute is the source of a provision in the second, the Supreme Court has inferred legislative intent that the second provision be given the same construction as the provision on which it is modeled. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

186. *Citronelle-Mobile Gathering, Inc.*, 669 F.2d at 722.

187. 5 J. MOORE, J. LUCAS & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 38.24[2] (2d ed. 1948), quoted in *Sauder*, 648 F.2d at 1348.

188. *Contra United States v. Parkinson*, 240 F.2d 918, 922 (9th Cir. 1956). In *Parkinson*, the court affirmed the lower court's refusal to order that "restitution" be made by defendants to the United States Treasury Department for the offense of selling in interstate commerce misbranded drugs promising to cure male impotence, holding that the court had no statutory authority, either express or implied, to grant such equitable relief, and that it should not do so in the absence of statutory authority. This case is clearly distinguishable from *DOE v. WTM*, because, as noted *supra* at note 7, section 209 of the ESA authorized courts to order "restitution" of profits resulting from violation of price control regulations promulgated pursuant to the ESA.

189. See *supra* text accompanying note 76.

and criminal penalties. See 15 U.S.C. § 754(a)(3). The DOE did not seek these penalties. Instead, the DOE sought restitution under the authority of § 209 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, as incorporated in the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 754(a)(1) It is manifest that whatever its amount is, DOE's claim is not one for "any fine, penalty or forfeiture, or for multiple or exemplary, or punitive damages," and thus cannot lawfully be relegated to the fourth priority [under § 726(a)(4)].¹⁹⁰

This conclusory passage (1) appears to assume a distinction between "restitution" and "penalty," implying that a claim cannot be both at the same time, and (2) seems to impart excessive significance to such statutory labels as "penalty," as if such a label conclusively characterized that to which it referred. Because neither proposition is self-evident, and no support for either is provided by the above passage, the balance of this article will assess the validity of the propositions by referring to authority omitted from the TECA's opinion.

The second proposition, which the DOE duly argued in *DOE v. WTM*, can be briefly addressed at the outset. This argument focuses not on the essence of the DOE's claim against WTM for disgorgement of overcharges (as "restitution" *vel non*, and as "penalty" *vel non*), but rather on its placement in the statutory and regulatory scheme, in contradistinction to the location of the provisions for "penalties." The argument may be stated as follows: section 209 of the ESA specifically authorizes the DOE to seek restitution, and the DOE sought restitution under this authority in *WTM*.¹⁹¹ Section 5(a)(3) of the EPAA,¹⁹² which replaced the original penalty provisions of section 208 of the ESA,¹⁹³ authorizes the government to seek up to \$20,000 in "civil penalt[ies]"¹⁹⁴ for each violation of the regulations, imprisonment for a period of up to one year and fines of \$40,000 for willful violations.¹⁹⁵ These provisions are not a dead letter. The DOE has sought such penalties in numerous cases, and courts have granted them on occasion.¹⁹⁶ Moreover, in approving the DOE's claim for restitution of price control overcharges but denying its request for penalties, courts have implied that the two are different and that restitution cannot be regarded as a penalty.¹⁹⁷ In *WTM*, the DOE

190. *DOE v. WTM*, 763 F.2d 1411, 1426 (Temp. Emer. Ct. App., 1985). See also *supra* note 26.

191. See *supra* note 142.

192. 15 U.S.C. § 754(a)(3) (1976).

193. 12 U.S.C. § 1904 note (1969).

194. 15 U.S.C. § 754(a)(3)(A)(i) (1976).

195. 15 U.S.C. § 754(a)(3)(B)(i) (1976).

196. See *United States v. Arizona Fuels Corp.*, 638 F.2d 239 (Temp. Emer. Ct. App. 1980), *cert. denied*, 451 U.S. 985 (1981); *United States v. Heller*, 635 F.2d 848 (Temp. Emer. Ct. App. 1980), *on remand*, 542 F. Supp. 157 (D. Mass. 1981); *United States v. Cohen*, 380 F. Supp. 147 (S.D. Ohio 1973), *aff'd on the opinion of the district court*, 501 F.2d 1407 (Temp. Emer. Ct. App. 1974).

197. The court in *United States v. Sutton*, No. 82-C-1069-B, slip op. at 1 (N.D. Okla. 1984),

sought restitution under section 209 and voluntarily declined to seek any penalties under section 5(a)(3).¹⁹⁸ Accordingly, the restitution the DOE sought from WTM cannot be a penalty.

This argument has force. Courts should give some deference to what Congress thought it was authorizing, as reflected in labels like "penalty" and "restitution" attached to statutory provisions.¹⁹⁹ Moreover, the United States Supreme Court has given deference to quite similar arguments in answering the related question whether a statutory penalty is "criminal" or "civil." In *Helvering v. Mitchell*,²⁰⁰ the defendant taxpayer, who had been indicted and acquitted of willful tax evasion, challenged a 50% addition to his tax liability for "fraud" as a criminal penalty which violated the double jeopardy clause.²⁰¹ Justice Brandeis, for the Court, rejected this argument and concluded that the 50% addition was a "civil" penalty.²⁰²

4. *The fact that the Revenue Act of 1928 contains two separate and distinct provisions imposing sanctions, and that these appear in different parts of the statute, helps to make clear the character of that here invoked.* The sanction of fine and imprisonment prescribed by § 146 (b) for wilfull [sic] attempts "in any manner to evade or defeat any [income] tax", introduced into the Act

aff'd, 795 F.2d 1040, 1061 (Temp. Emer. Ct. App. 1986), decreed that defendants remit more than \$423 million to the United States Treasury "as restitution and not as a penalty." Other cases in which courts ordered restitution for price control overcharges but declined to impose civil penalties include *Shrider v. DOE*, 4 Energy Mgmt. (CCH) ¶ 26,273 (S.D. Ohio 1979); *Sauder v. DOE*, 4 Energy Mgmt. (CCH) ¶ 26,157 (D. Kan. 1980), *aff'd*, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981); *Whitmer v. DOE*, 4 Energy Mgmt. (CCH) ¶ 26,358 (N.D. Ohio 1981); *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F. Supp. 871 (S.D. Ala. 1980); *United States v. Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985) *cert. denied*, 474 U.S. 1105 (1986).

198. Appellant's Brief and Opposition to Appellee's Motion to Dismiss at 11, *DOE v. WTM*, 763 F.2d 1411 (Temp. Emer. Ct. App. 1985). The DOE also did not invoke against WTM regulatory provisions which authorized penalties for violations of DOE's regulations and orders.

199. The Supreme Court has stated, "Absent a clearly expressed legislative intention to the contrary, [the language of the statute itself] must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.* 447 U.S. 102, 108 (1980). See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169-71 (1963); *United States v. Childs*, 266 U.S. 304 (1924); *United States v. J.B. Williams Co.*, 498 F.2d 414, 421 (2d Cir. 1974); *United States v. Le Beouf Bros. Towing Co.*, 537 F.2d 149 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977). See also *supra* note 110.

In contrast, when considering whether a federal excise tax was a disallowable "penalty" under section 57j of the former Bankruptcy Act, the Fifth Circuit stated: "We cannot agree with the suggestion that the label placed upon an imposition in a revenue measure is decisive in determining its character. Like all other language in statutes, its meaning depends more upon its context than on its etymology." *In re Unified Control Systems, Inc.*, 586 F.2d 1036, 1037 (5th Cir. 1978) (citations omitted).

200. 303 U.S. 391 (1938).

201. U.S. CONST. amend. V, cl. 2.

202. It is not a violation of the double jeopardy clause for the government to bring a civil action against a defendant previously acquitted of a criminal charge. *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943).

under the heading "Penalties", is obviously a criminal one. The sanction of 50 per centum addition "if any part of any deficiency is due to fraud with intent to evade tax", prescribed by § 293 (b), introduced into the Act under the heading "Additions to the Tax", was clearly intended as a civil one²⁰³

By the same token, a strong argument can be made that restitution pursuant to section 209 ought not to be deemed a penalty, because Congress explicitly provided for penalties elsewhere in the same general statutory scheme.²⁰⁴

While this argument based on statutory language and construction is persuasive, it would not be conclusive if relevant substantive law indicated a contrary result. Accordingly, we must pass to a substantive consideration of whether disgorgement of price control overcharges constitutes a penalty, and this question is not a simple one. It is difficult to define "penalty" in the abstract. As a leading treatise states, "[a] satisfactory and clear-cut formula to separate penalties from non-penalties has not yet been agreed upon by the courts."²⁰⁵ In the absence of such a formula, the first place to look for clarification is obviously the case law construing the statutory term. *DOE v. WTM* was a case of first impression, *i.e.*, no prior case had decided whether price control overcharges constitute "penalties" under section 726(a)(4) of the Bankruptcy Code. Therefore, nonbankruptcy cases addressing the question whether the DOE claims for disgorgement of price control overcharges constitute "penalties" will be examined.²⁰⁶

Authority for the proposition that restitution of price control overcharges does not constitute a "penalty" is overwhelming and unequivocal. In upholding the authority of federal courts to order restitution of overcharges for violation of the price ceilings under the Emergency Price Control Act of 1942, the Sixth Circuit stated: "An order of restitution is not a judgement for damages or for penalties. It compels compliance and is restoration of the status quo which falls within the recognized power of a court of equity."²⁰⁷

203. 303 U.S. at 404-05 (emphasis supplied). *See also* *United States v. Ward*, 448 U.S. 242, 250 (1980). *Accord* *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 231, 236-37 (1972); *Porter v. Household Fin. Corp. of Columbus*, 385 F. Supp. 336 (S.D. Ohio 1974).

204. Section 5(a)(3) of the Emergency Petroleum Allocation Act. Similarly, the captions of the ESA's sections support this distinction between their respective substantive contents. Section 208 of the ESA is entitled "Sanctions; criminal fine and civil penalty." Section 209 is captioned "Injunctions and other relief," while section 210, which authorizes private actions for treble damages, is entitled "Suits for damages or other relief." 12 U.S.C. § 1904 note (1969), adopted by § 5(a) of the EPAA, 15 U.S.C. § 754(a) (1976).

205. 3 COLLIER ON BANKRUPTCY ¶ 57.22[2], at 387 (14th ed. 1975). *Accord In re Kline*, 403 F. Supp. 974, 977 (D. Md. 1975).

206. This discussion is undertaken in full recognition that it is risky to transfer concepts and definitions wholesale from one legal context to another, and that "[w]hat is considered a penalty differs with circumstances and viewpoints." *National Brass Works, Inc. v. Comm'r of Internal Revenue*, 182 F.2d 526, 529 n.9 (9th Cir. 1950) (listing four categories of federal statutory "penalty" questions).

207. *Bowles v. Skaggs*, 151 F.2d 817, 821 (6th Cir. 1945). *Accord* *Woods v. Witzke*, 174 F.2d 855, 856-57 (6th Cir. 1949). It is also settled that "the bankruptcy court in passing on allowance of claims sits as a court of equity." *Pepper v. Litton*, 308 U.S. 295, 307 (1939). In addition,

Shortly afterward, the Supreme Court in *Porter v. Warner Holding Co.*,²⁰⁸ endorsed this view, sharply distinguishing restitution from penalties:

Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from the damages and penalties which may be awarded under § 205(e). When the Administrator [of the Office of Price Administration] seeks restitution under § 205(a) he does not request the court to award statutory damages to the purchaser or tenant or to pay to such person that part of the penalties which go to the United States Treasury in a suit by the Administrator under § 205(e)²⁰⁹

While ignoring *Porter v. Warner Holding Co.*, the trustee in bankruptcy for WTM cited two Office of Price Administration cases in which the courts held that government claims for treble damages under section 205(e) of the 1942 Act constituted penalties.²¹⁰ The *WTM* case, however, was brought under

"[t]here is an overriding consideration that equitable considerations govern the exercise of bankruptcy jurisdiction." *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). *Accord In re Seminole Backhoe Serv., Inc.*, 33 Bankr. 914 (Bankr. N.D. Tex. 1983) (Brister, J.). Because an order of restitution is an equitable remedy, allowance of a claim for restitution by a bankruptcy court seems consistent with the equitable authority and purposes of a bankruptcy court. To argue otherwise, one would have to assume that equitable principles in bankruptcy differ from equitable principles applicable in other contexts.

208. 328 U.S. 395 (1946).

209. *Id.* at 402 (citation omitted). The Emergency Price Control Act was amended in 1947 to expressly codify the holding in *Porter v. Warner Holding Co.* and to authorize the federal government to bring actions for restitution of rent overcharges. See *supra* note 32. Even though they were filed by the federal government on behalf of the injured tenants, government claims brought under the 1947 rent control amendment were uniformly held not to be penalties. *Howard v. United States*, 214 F.2d 759, 762 (10th Cir. 1954) (claim for restitution under 1947 amendment is an equitable claim which confers no seventh amendment right to a jury trial—unlike a treble damage claim under the same statute, which is for a penalty and does entail a right to jury trial). *Accord Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960) (Court upholding equitable power of district court to order reimbursement of lost wages to employees wrongfully discharged in violation of section 15(a)(3) of the Fair Labor Standards Act); *United States v. Cowen's Estate*, 91 F. Supp. 331, 332 (D. Mass. 1950); *United States v. Harris*, 89 F. Supp. 537 (E.D. Pa. 1950) (claim for restitution under 1947 amendment does not abate on death of defendant, unlike treble damage claim under the statute, which does abate because it is a "penalty" claim). See also *United States v. Stinnett*, 111 F. Supp. 384, 385, 387 (E.D. Mich. 1953).

210. *Bowles v. Farmers Nat'l Bank*, 147 F.2d 425 (6th Cir. 1945); *Porter v. Montgomery*, 163 F.2d 211 (3d Cir. 1947). Likewise, in *Testa v. Katt*, 330 U.S. 386 (1947), the Court stated: "[f]or the purposes of this case, we assume, without deciding, that § 205(e) is a penal statute in the 'public international,' 'private international,' or any other sense." *Id.* at 389. *Contra Woods v. Robb*, 171 F.2d 539, 541 (5th Cir. 1948); *Kessler v. Fleming*, 163 F.2d 464, 468 (9th Cir. 1947); *Martino v. Holzworth*, 158 F.2d 845 (8th Cir. 1947); *Amato v. Porter*, 157 F.2d 719, 722 (10th Cir. 1946); *Crary v. Porter*, 157 F.2d 410, 413-14 (8th Cir. 1946); *Speten v. Bowles*, 146 F.2d 602, 604-05 (8th Cir. 1945); *Bowles v. American Stores*, 139 F.2d 377, 379 (D.C. Cir. 1943); *Bowles v. Berard*, 57 F. Supp. 94, 95-96 (E.D. Wis. 1944); *Bowles v. Chew*, 53 F. Supp. 787, 790 (N.D. Cal. 1944). See also *Murkhan v. Kahn*, 11 F.R.D. 520, 521 (S.D. Cal. 1951). *Accord United States v. Harris*, 89 F. Supp. 537 (E.D. Pa. 1950); *Rogers v. Douglas Tobacco Bd. of Trade*, 244 F.2d 471 (5th Cir. 1957). The most comprehensive listing of the many Office of Price Administration cases deciding whether claims for treble damages under section 205(e) of the

section 209 of the ESA, the lineal descendant of section 205(a) of the 1942 Act. As the Supreme Court noted in the above quotation from *Warner*, actions under section 205(a) of the 1942 Act (e.g., for restitution) have nothing to do with actions for damages or penalties under section 205(e).²¹¹ Similarly, section 205(e) penalty holdings are irrelevant to section 209 ESA cases.²¹²

The author is unaware of a single case holding that court-ordered restitution under section 205(a) of the 1942 Act constitutes a penalty. Restitution of the exact amount of overcharges, which seems only fair when the overcharging party has profited from violating the law, contrasts sharply with treble damages, which are undoubtedly punitive or penal.²¹³ Nevertheless, as indicated above, the majority of courts of appeals have held that even treble damages claims under section 205(e) are not penalties: a fortiori, claims for mere restitution of the exact amount of overcharges clearly should not be considered penalties.

The decisions under the Mandatory Petroleum Price Regulations are even more uniform in holding that the DOE claims for disgorgement of overcharges do not constitute penalties. In *Ashland Oil Co. of California v. Union Oil Co. of California*,²¹⁴ Ashland brought an action against Union for damages under section 210 of the ESA,²¹⁵ seeking both recovery of actual overcharges and treble damages for "intentional" overpricing. Because neither the EPAA nor the ESA contained a statute of limitations, the trial court "borrowed" the most analogous California statute of limitations.²¹⁶ It dismissed the entire action as tardily filed under the state's one-year statute for "[a]n action upon

Emergency Price Control Act of 1942 constituted "penalties" may be found in Oglebay, *Provability and Dischargeability of Judgments Against Overcharging Merchants and Landlords Under Emergency Price Control Act*, 21 J. NAT'L A. OF REFEREES IN BANKR. 39, 40-43 (Jan. 1947), with sequels in the July, 1947 edition at 105-06, and in the January, 1948 edition at 44-45. See also Hatton, *State Court Jurisdiction of Federal Rights of Action—Emergency Price Control Act*, 40 ILL. L. REV. 355, 359-64 (1946).

211. Other courts which noted the sharp distinction between equitable section 205(a) actions for restitution and section 205(e) actions for treble damages include *Creedon v. Randolph*, 165 F.2d 918, 919-20 (5th Cir. 1948); *Crary v. Porter*, 157 F.2d 410, 413 (8th Cir. 1946); *United States v. Hart*, 86 F. Supp. 787, 788-89 (E.D. Va. 1949). In the analogous context of antitrust treble damages, it has been stated that "[t]he damage is payable under §726(a)(2), while the remainder [twice the damage claim] is payable under 726(a)(4)." 4 COLLIER ON BANKRUPTCY, ¶ 726.02[4], at 726-67 (L. King 15th ed. 1986). *Accord In re American Federation of Television & Radio Artists*, 32 Bankr. 672, 674 (Bankr. S.D. N.Y. 1983).

212. Further support for the sharp distinction between section 205(a) and section 205(e) actions is found in the fact that nine months after *Farmers National Bank* was decided by the Sixth Circuit, the same court squarely held that an action for restitution under section 205(a) of the 1942 Act did not constitute a penalty. *Bowles v. Skaggs*, 151 F.2d at 820-21. *Accord Woods v. Witzke*, 174 F.2d 855, 856-57 (6th Cir. 1949).

213. The court in *Farmers National Bank* stated that if a sum of money exacted for violation of a statute "is greatly disproportionate to the actual loss it constitutes a penalty rather than damages." 147 F.2d at 428 (footnote omitted).

214. 567 F.2d 984 (Temp. Emer. Ct. App. 1977), cert. denied, 435 U.S. 994 (1978).

215. 12 U.S.C. § 1904 note (1969), incorporated in § 5(a)(1) of the EPAA, 15 U.S.C. § 754 (a)(1) (1976).

216. 567 F.2d at 989. See, e.g., *Runyon v. McCrary*, 427 U.S. 160, 179-80 (1976); *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 701-05 (1966).

a statute for a penalty or forfeiture,"²¹⁷ in effect holding that Ashland's claims were for penalties. On appeal, the TECA agreed that the treble damages claim was "in the nature of a penalty" and thus barred.²¹⁸ The court reached the opposite result, however, with regard to mere overcharges. It held: "An action for compensation logically is not '[a]n action upon a statute for penalty or forfeiture' . . . [I]t would be especially unreasonable to bar gratuitously an action for reimbursement of overcharges on the basis of the one year statute of limitations."²¹⁹ In addition, the TECA rejected defendant Union's contention that the entire ESA was a penal statute.²²⁰

Subsequently, the district court in *Citronelle-Mobile Gathering, Inc. v. O'Leary*²²¹ rejected a claim that restitution of overcharges which it ordered made to the United States Treasury constituted a penalty. In reaching this conclusion, the court applied an almost century-old test for determining a "penalty." The test is derived from *Huntington v. Attrill*,²²² and is based on Blackstone's distinction between "private wrongs" and "public wrongs."²²³ According to this test, a penalty constitutes punishment for an offense committed against the entire community or state, rather than one or more individuals.²²⁴ The court utilized a restatement of the *Huntington* test criteria from a recent Sixth Circuit decision:

- (1) whether the purpose of the statute was to redress individual wrongs or more general wrongs to the public;
- (2) whether the recovery under the statute runs to the harmed individual or to the public; and
- (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.²²⁵

As to factor (1), the court found that the primary purpose of section 209, which sought both to "remedy harm to the individual" and promote the

217. 567 F.2d at 990-92 (court noting that California also provided three-year limitation for action based upon statute "other than for a penalty or a forfeiture").

218. 567 F.2d at 991.

219. *Id.* See also *Rogers v. Douglas Tobacco Bd. of Trade*, 244 F.2d 471 (5th Cir. 1957).

220. 567 F.2d at 991 n.15. The TECA subsequently drew a similar contrast between the treble damages remedy of section 210 of the ESA, which it implied was penal, and section 211, which authorized administrative remedies. *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278 (Temp. Emer. Ct. App. 1980). *Accord Payne 22, Inc. v. United States*, 762 F.2d 91, 93 (Temp. Emer. Ct. App. 1985). *Contra Culver v. Bell & Loffland*, 146 F.2d 29 (9th Cir. 1944). See also *Brooklyn Bank v. O'Neil*, 324 U.S. 697, 707 (1945).

221. 499 F. Supp. 871, 886 (S.D. Ala. 1980), *aff'd as modified sub nom.*, *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 877 (1982).

222. 146 U.S. 657 (1892).

223. *Id.* at 668-69, *quoted in* 499 F. Supp. at 887.

224. *Compare Porter v. Montgomery*, 163 F.2d 211, 215 (3d Cir. 1947) (a civil action is for damages if brought for purpose of individual compensation and characterized as penal if it seeks to obtain a sum of money for the state).

225. *In re Wood*, No. 79-1504, slip op. at 8758 (5th Cir. Aug. 22, 1980) (quoting *Murphy v. Household Finance Corp.*, 560 F.2d 206, 209 (6th Cir. 1977)). For a somewhat different listing of "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character," see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169-71 (1963).

general welfare, is not penal.²²⁶ The third factor “likewise indicates that the restitution ordered herein is not penal. *The amount of restitution is equal to the amount of the illegally obtained profits, and is not at all disproportionate to the harm suffered.*”²²⁷ The second factor, the court conceded, weighed in favor of characterization as a penalty. Still, the court endorsed the Fifth Circuit’s suggestion that *Huntington* needed to be updated to put it in touch with the realities of modern business practices and a complex economy.²²⁸ Because the court found that it was impossible to identify and make whole the precise victims of Citronelle-Mobile’s overcharges, and “permitting the retention of the illegal overcharges would utterly frustrate the purposes of the EPAA,”²²⁹ the court concluded that restitution to the government was not a penalty under the three-part test.

In another case, plaintiffs challenging a DOE Remedial Order to make restitution of price control overcharges argued that any such refund to the United States or the DOE would constitute a civil fine beyond the DOE’s authority to exact.²³⁰ In upholding the Remedial Order, the court summarily rejected this argument: “It appears that controlling authority exists contrary to the contentions of plaintiff and such contentions are therefore found to be without merit, as a matter of law.”²³¹

The TECA in recent cases has reaffirmed the principle that restitution by way of disgorgement of overcharge funds to the DOE is not a penalty. Defendants in *United States v. Sutton*²³² argued, on appeal, that the trial court’s order that they make restitution of \$423 million in illegal overcharges constituted a penalty barred by the statute of limitations. In affirming the restitution award, the TECA held that “[a]n award of restitution is an equitable remedy, and not a penalty.”²³³ In *United States v. Ladd Petroleum Corp.*,²³⁴ The TECA upheld an award of prejudgment interest as part of a restitution award on the following basis:

To the extent defendant has had the free use of the income-producing ability of plaintiff’s money without having to pay for it, he has been unjustly enriched. To divest him of this unjustified

226. 499 F. Supp. at 887.

227. *Id.* (emphasis supplied).

228. *Id.* (quoting *In re Wood*, No. 79-1504, slip op. at 8758 (5th Cir. Aug. 22, 1980)).

229. 499 F. Supp. at 888. The TECA affirmed this decision as modified, holding that while restitution funds could be paid to the government and held by it temporarily, the government had “a duty to try to ascertain those overcharged, and refund them [sic], with interest, from the restitution funds.” 669 F.2d at 723.

230. *Kirkpatrick Oil & Gas Co. v. DOE*, 4 Energy Mgmt. (CCH) ¶ 26,400 (W.D. Okla. Aug. 30, 1982).

231. *Id.* at 28,966 (citing *Bonray Oil Co. v. DOE*, 472 F. Supp. 899 (W.D. Okla. 1978)); *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278 (Temp. Emer. Ct. App. 1980); *Citronelle-Mobile Gathering, Inc. v. O’Leary*, 499 F. Supp. 871 (S.D. Ala. 1980), *aff’d as modified sub. nom. Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (Temp. Emer. Ct. App. 1982), *cert. denied*, 459 U.S. 877 (1982).

232. 795 F.2d 1040 (Temp. Emer. Ct. App. 1986).

233. *Id.* at 1061.

234. 843 F.2d 506 (Temp. Emer. Ct. App. 1988).

benefit is not to penalize him, for it has been determined by the trial that it was never rightfully his.²³⁵

Thus, it is settled TECA law that an award of restitution to the DOE does not constitute a penalty.

*Does the DOE's Claim Against WTM
Fit the General Legal Definition of a "Penalty"?*

The question whether a claim constitutes a "penalty" is not limited to energy cases. A wide range of federal statutes prescribes special treatment for "penalties."²³⁶ The meaning of such a term certainly can vary depending on its context and cannot be mechanically transferred from one legal context to another.²³⁷ Nevertheless, the legislative history of the Bankruptcy Code invites reference to general nonbankruptcy law,²³⁸ which can shed considerable light on the meaning of "penalty" in section 726(a)(4).

One salient context in which the penalty issue arises is taxation. The question is whether certain payments are tax-deductible as ordinary and necessary business expenses or rather are nondeductible penalties. It would make no sense to permit a tax deduction for penalties because this would "reduc[e] the sting of the penalty prescribed by the . . . legislature."²³⁹ In *Jerry Rossman Corp. v. Commissioner of Internal Revenue*,²⁴⁰ Judge Learned Hand, joined by Judges Charles Clark and Jerome Frank, held that a manufacturer's payment to the United States Treasury of overcharges to the manufacturer's customers was not a nondeductible penalty. Rossman inadvertently violated price ceilings set by the Emergency Price Control Act of 1942. Because it was difficult to predict the extent to which goods Rossman dyed would shrink or stretch, Rossman accepted its finishers' shrinkage estimates, which proved

235. *Id.* at 509 (quoting *Feather v. United Mine Workers of America*, 711 F.2d 530, 540 (3d Cir. 1983)). See also *United States v. Exxon Corp.*, 773 F.2d 1240, 1279 (Temp. Emer. Ct. App. 1985), *cert. denied*, 474 U.S. 1105 (1986), *reh. denied*, 475 U.S. 1112 (1986); *Citronelle-Mobile Gathering, Inc. v. Herrington*, 826 F.2d 16, 28 (Temp. Emer. Ct. App. 1987).

236. See, e.g., Title VII of the Civil Rights Act of 1964, §§ 701-18, *as amended*, 42 U.S.C. § 2000(e) to (e)-17 (1982); 11 U.S.C. § 523(a)(7) (1978) (barring discharge in bankruptcy liquidation of any debt "to the extent that such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss"); 28 U.S.C. § 1355 (conferring exclusive jurisdiction on federal courts of any action to recover "any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress"); 19 U.S.C. § 1520(a)(3) (authorizing the Secretary of the Treasury to refund duties or other receipts when "money has been deposited in the Treasury on account of a fine, penalty, or forfeiture which did not accrue, or which is finally determined to have accrued in an amount less than that deposited, or which is mitigated to an amount less than that so deposited or is remitted"); 28 U.S.C. § 2462 (providing that an action to enforce "any civil fine, penalty, or forfeiture, pecuniary or otherwise" must be brought within five years of the claim's accrual).

237. See *supra* note 206.

238. See *supra* note 132.

239. *Tank Truck Rentals v. Comm'r of Internal Revenue*, 356 U.S. 30, 35-36 (1958), *quoted in McGraw-Edison Co. v. United States*, 300 F.2d 453, 455 (Ct. Cl. 1962).

240. 175 F.2d 711 (2d Cir. 1949).

inaccurate. The inaccuracy resulted in overcharges to Rossman's more than 200 customers. The customers, however, had passed the overcharges to consumers, so refunds to Rossman's customers would not correct the effects of the overcharges. Desiring to comply with price control regulations, Rossman consulted the Office of Price Administration, and it was agreed that Rossman would pay the gross overcharge to the United States Treasury.

Rossman subsequently claimed a tax deduction for "ordinary and necessary business expenses" based on this refund. The Tax Court denied the deduction on the grounds it was a penalty. The Second Circuit reversed:

First, it seems apparent to us that the payment of the overcharge - which is all that is here involved - can on no theory be treated as the payment of a "penalty." Taken in its broadest sense that word has a punitive, as opposed to a remedial, meaning; it covers fines and other exactions which are not restitution for a wrong, and are only justified, either as a deterrent, or in order to satisfy an atavistic craving for retaliation. A seller's duty to return the overcharge to the "terminal buyer": that is, to one "who buys . . . for use, or consumption other than in the course of trade or business," is so clearly not a "penalty" under this definition that no argument can make it plainer than its bare statement.²⁴¹

By implication, the court acknowledged that Rossman's payment to the Treasury was "restitution."²⁴² The court further stated that "if the payment was only restitutionary, it could not be a penalty in any event."²⁴³ Consequently, the Rossman Corporation was allowed the tax deduction.²⁴⁴

The *Rossman* decision provides particularly strong support for the DOE's claim that it was not seeking a penalty in *WTM*. In both instances, a government agency sought disgorgement of illegal profits resulting from overcharges in violation of price control laws. In *Rossman*, the violator's payment of overcharges to the federal Treasury, which of course had not sustained pecuniary loss from the overcharges, was held not to be a "penalty." By the same token, the DOE's attempt to force disgorgement of *WTM*'s overcharges was properly held not to be a "penalty." The argument against a penalty is even stronger in *WTM* because payment to the government in *Rossman* was made without direct statutory authorization. In contrast, the DOE's proceeding against *WTM* was an exercise of its explicit authority under section 209 of the ESA to seek "restitution" of overcharges.

Case law in the securities area also supports the proposition that disgorgement of unjust enrichment does not constitute a penalty. In *Securities and*

241. *Id.* at 712. *Accord* McGraw-Edison Co. v. United States, 300 F.2d 453, 455-56 (Ct. Cl. 1962) (Retired U.S. Supreme Court Justice Reed, sitting by designation).

242. *Jerry Rossman Corp.*, 175 F.2d at 712.

243. *Id.* at 714.

244. *Id.* *Accord* National Brass Works, Inc. v. Comm'r of Internal Revenue, 182 F.2d 526, 530 (9th Cir. 1950); Hershey Creamery Co. v. United States, 101 F. Supp. 877 (Ct. Cl. 1952); Farmers Creamery Co. of Fredericksburg, Va. v. Comm'r of Internal Revenue, 14 T.C. 879 (1950).

Exchange Commission v. Texas Gulf Sulphur Co.,²⁴⁵ defendants issued a misleading press release about a discovery of rich ore deposits by Texas Gulf Sulphur. The defendants were found guilty of insider trading in violation of section 10(b) of the Securities Exchange Act of 1934 and rule 10b-5 promulgated thereunder. Several defendants, who were ordered to disgorge profits made from subsequent trading of Texas Gulf Sulphur stock, contended that such payments constituted penalties. Such penalties, the defendants argued, could be imposed only upon conviction of a criminal violation under section 32, and could not be sought by the Commission in a civil action for injunctive relief under section 21(e) of the Act.²⁴⁶ The Second Circuit rejected this claim:

Appellants, of course, contended that the required restitution is indeed a penalty assessment This contention overlooks the realities of the situation. In our prior opinion we found that these appellants had violated the Act by their purchases of TGS stock before there had been a public disclosure of the ore discovery. Restitution of the profits on these transactions merely deprives the appellants of the gains of their wrongful conduct It would severely defeat the purposes of the Act if a violator of Rule 10b-5 were allowed to retain the profits from his violation

Finally, appellants contend that the order is punitive because it contains no element of compensation to those who have been damaged. However, . . . a corporate enterprise may well suffer harm "when officers and directors abuse their position to obtain personal profits" since "the effect may be to cast a cloud on the corporation's name, injure stockholder relations and undermine public regard for the corporation's securities. . . ."

We conclude that the requirement of restitution in this case was a proper exercise by the trial judge of the district court's equity powers.²⁴⁷

In a similar case involving a violation of rule 10b-5 for failing to disclose material information, the Fifth Circuit also upheld the disgorgement of profits ordered by the trial court:

The trial court acted properly within its equitable powers in ordering Pullman to disgorge the profits that he obtained by fraud. The restitution merely forces the defendant to give up to the trustee the amount by which he was unjustly enriched The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gain

Disgorgement is remedial and not punitive. The court's power to order disgorgement extends only to the amount with interest by

245. 446 F.2d 1301 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1972).

246. *Id.* at 1307 n.8.

247. 446 F.2d at 1308 (emphasis supplied) (citation omitted). *Accord* S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1104-05 (2d Cir. 1978).

*which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.*²⁴⁸

In the context of the Truth in Lending Act,²⁴⁹ the penalty question has arisen regarding whether an action for damages brought by a debtor against a lending company passes to the trustee in bankruptcy. Two courts have held that it does, rejecting the argument that it is a penalty which is not transferable.²⁵⁰ Another court, also rejecting the claim that such an action was for a penalty, held that it did not abate upon the death of the plaintiff, as a penalty would.²⁵¹

Thus, actions for disgorgement of illegal profits for violation of price control statutes and antitrust laws have uniformly been deemed not to constitute actions for penalties, regardless of whether the disgorged profits are kept by the government or returned to the injured party. The holdings of general "penalty" cases, which are consistent with the holding of the bankruptcy and energy cases discussed above, provide further support for the DOE's position that its claims in bankruptcy cases for "restitution" based on price control overcharges do not constitute penalty claims which should be subordinated pursuant to section 726(a)(4).

Conclusion

The language and purpose of the Bankruptcy Code, as well as bankruptcy, energy and "penalty" case law, all confirm the correctness of the TECA's decision in *DOE v. WTM* that the DOE's claim in bankruptcy for repayment of the debtor's price control overcharges constituted a general unsecured claim under section 726(a)(2) rather than a "penalty" covered by section 726(a)(4). The proceeds of WTM's overcharges were never rightfully part of the debtor's estate, nor did the debtor's creditors have any right to them either at law or in equity.

Whatever posterity's judgment may be on the wisdom of the Mandatory Petroleum Price and Allocation Regulations, the regulations were issued pursuant to an unambiguous statutory mandate in the ESA and EPAA. Those statutes, which were the law of the land during the period when the overcharges occurred, declared that price controls were in the public interest. Vindication of that public interest demands restitution of illegal profits, even if they have passed into the estate of a debtor.

This conclusion is not altered by the fact that the effects of the illegal overcharges were diffuse and widespread, and the victims thereof are largely anonymous and unaware of the fact or the extent of their economic injury. It would be anomalous if the public interest in restitution, and the public interest in enforcement of the laws which restitution serves, were sacrificed to

248. *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (emphasis supplied).

249. 15 U.S.C. §§ 1601-1677.

250. *Murphy v. Household Finance Corp.*, 560 F.2d 206, 210-11 (6th Cir. 1977). *Accord In re Wood*, 643 F.2d 188, 194-95 (5th Cir. 1980).

251. *James v. Home Construction Co. of Mobile, Inc.*, 621 F.2d 727, 730 (5th Cir. 1980).

such factors. It would be similarly anomalous if the DOE, the agency under a statutory mandate to enforce the regulations and the only body capable of furthering the public interest in restitution, were disqualified from its enforcement role merely because it had not suffered pecuniary loss. The DOE properly sought restitution in *WTM*. Such restitution was not a penalty subject to subordination, and the Tenth Circuit Court of Appeals should reach the same result in *DOE v. Seneca Oil Co.*²⁵² if it determines it has jurisdiction to decide the case.

252. See *supra* note 16.