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Energy Cos. Say Bankruptcy Nixes Coal Ash Pollution Claims

By **Michael Phillis**

Law360 (February 21, 2019, 2:55 PM EST) -- Two energy companies told a Pennsylvania federal judge that a suit over coal ash dust pollution should be thrown out because the matter should have been aired in bankruptcy court, arguing the plaintiffs forfeited their claims when they ignored those proceedings.

GenOn Energy Inc. and NRG Power Midwest LP said in a memorandum Wednesday that the LaBelle and Luzerne Township families were notified of the companies' bankruptcy proceedings and had the opportunity to participate but chose not to. Bankruptcy proceedings were the proper avenue for the claims and by missing the window, the claims should be tossed, according to the motion.

This inaction means the federal courts lack jurisdiction to hear the suit, according to the memorandum.

"Plaintiffs' claims obviously existed prior to the filing of the bankruptcy, because plaintiffs commenced their action before filing of the bankruptcy. Plaintiff received notice of the bankruptcy, notice that this matter was scheduled as litigation involving a debtor and notice of the requirement that they submit claims to the bankruptcy," the memorandum said. "The notices were sent directly to plaintiffs' counsel at the same address he uses in this action."

The initial complaint argued that the companies are responsible for coal dust pollution from their power plants. The proposed class action stems from coal ash at the LaBelle Refuse Site owned by Matt Canestrale Contracting Inc. The families claim the ash came from several now-closed power plants in western Pennsylvania.

In September, U.S. Magistrate Judge Lisa Pupo Lenihan **granted summary judgment** to FirstEnergy Corp. and NRG Energy Inc., finding that while they owned the companies that operated the plants, the families hadn't established that they controlled day-to-day operations and were responsible for what happened there.

An amendment complaint was submitted. The companies believe that the families do not have standing because they are in the wrong court. The companies have also asked the bankruptcy court for an enforcement order to halt the instant suit.

"A district court lacks subject matter jurisdiction over claims discharged in bankruptcy," the memorandum said.

The companies at issue filed their Chapter 11 claim in June 2017 and mid-September was entered as the general claims bar date. The companies said that any claim that isn't filed by then will in effect "be forever discharged." The plaintiffs in the instant case were told about the bankruptcy proceedings well in advance of the mid-September deadline, but did not act, according to the filing.

"When that choice proved improvident, plaintiffs then opted to wait out the bankruptcy and to attempt to pursue the debtors after confirmation of the plan. But the plan and bankruptcy code prohibit claimants from waiting and striking later," the memorandum said. "Those with claims must process them with all other bankruptcy claimants, or the equities of the process are lost."

And the second amended complaint that was filed in the case was done at a time when the bankruptcy proceedings were ongoing and "claims against these debtors were subject to the automatic stay." When a complaint is filed during a stay, they are void "and must be dismissed," according to the companies.

Representatives with the various parties did not immediately return requests for comment Thursday.

The families are represented by W. Steven Berman and Aaron R. Modiano of Napoli Shkolnik PLLC.

The companies are represented by Matthew R. Divelbiss and James M. Jones of Jones Day.

The case is Holly Rice et al. v. Allegheny Energy Supply Co. et al., case number 2:17-cv-00489, in the U.S. District Court for the Western District of Pennsylvania.

--Additional reporting by Mike Curley. Editing by Connor Relyea.
