

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 99-32193

WEST POINTE PROPERTIES, L.P.

Debtor

ANN MOSTOLLER, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 99-3193

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT and
CONTINENTAL WINGATE
ASSOCIATES, INC.

Defendants

**MEMORANDUM ON
UNITED STATES' MOTION TO RECONSIDER**

APPEARANCES: JENKINS & JENKINS, ATTORNEYS PLLC
Brian C. Quist, Esq.
2121 First Tennessee Plaza
Knoxville, Tennessee 37929
Attorneys for Plaintiff

HARRY S. MATTICE, JR., ESQ.
UNITED STATES ATTORNEY
Pamela G. Steele, Esq.
Assistant United States Attorney
Howard H. Baker, Jr. United States Courthouse
800 Market Street, Suite 211
Knoxville, Tennessee 37902

Jud E. McNatt, Esq.
40 Marietta Plaza, Third Floor
Atlanta, Georgia 30303
Attorneys for United States Department of
Housing and Urban Development

HODGES, DOUGHTY & CARSON
Thomas H. Dickenson, Esq.
Post Office Box 869
Knoxville, Tennessee 37901
VORYS, SATER, SEYMOUR & PEASE, L.L.P.
Phillip J. Smith, Esq.
Post Office Box 0236
Cincinnati, Ohio 45201
Attorneys for Continental Wingate Associates, Inc.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

On January 28, 2002, the United States of America, on behalf of its agency the United States Department of Housing and Urban Development (collectively, HUD), filed a Motion to Reconsider.¹ HUD asks the court to revisit the decision set forth in its January 16, 2002 Memorandum on United States' Motion to Dismiss. *See Mostoller v. United States of America Dep't of Housing and Urban Dev. (In re West Pointe Properties, L.P.)*, Ch. 7 Case No. 99-32193, Adv. No. 99-3193, slip op. (Bankr. E.D. Tenn. Jan. 16, 2002). Specifically, HUD argues that the court erred in not dismissing the negligent misrepresentation and interference with contract counts of the Plaintiff's Complaint. HUD and the Plaintiff, Ann Mostoller, Trustee (Trustee), have each filed a brief in support of their respective theories on this matter.

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The present Complaint was filed on November 4, 1999, by the Debtor as debtor-in-possession under Chapter 11. The case was subsequently converted to Chapter 7, and the Trustee was substituted as Plaintiff by Order entered October 16, 2001.

The portion of the court's January 16, 2002 Memorandum now in dispute is as follows:

[HUD] contends that the Congressional waiver of sovereign immunity found in § 106 [of the Bankruptcy Code] is defeated in this case by the FTCA [Federal Tort Claims Act], which waives sovereign immunity for certain torts but not for "[a]ny claim arising out of . . . misrepresentation . . . or interference with contract rights[.]" *See* 28 U.S.C.A. § 2680(h) (West 1994).

¹ HUD states that its Motion to Reconsider is brought pursuant to FED. R. BANKR. P. 9023. If so, the motion should more properly have been captioned "Motion to Alter or Amend." *See* FED. R. BANKR. P. 9023, incorporating FED. R. CIV. P. 59(e) ("Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.").

HUD's position is not supported by the case law. Courts have consistently determined that the FTCA does not control the waiver provisions of § 106. See, e.g., *Anderson v. FDIC*, 918 F.2d 1139, 1144 (4th Cir. 1990); *Prudential Lines, Inc. v. United States Maritime Admin. (In re Prudential Lines, Inc.)*, 79 B.R. 167, 183 (Bankr. S.D.N.Y. 1987); *Inslaw, Inc. v. United States of America (In re Inslaw, Inc.)*, 76 B.R. 224, 234 (Bankr. D.D.C. 1987); *Kenny v. Block (In re Kenny)*, 75 B.R. 515, 521 (Bankr. E.D. Mich. 1987). "[T]he Bankruptcy Code's explicit waivers of sovereign immunity are entirely distinct, separate and independent from and in addition to those found in any other statute, including the FTCA." *Inslaw*, 76 B.R. at 234.

To permit HUD to participate in the claims process without subjecting itself to any liability it might have to the Trustee would be unfairly one-sided. See *Anderson*, 918 F.2d at 1143; see also *United States of America v. Rhodney (In re R&W Enters.)*, 181 B.R. 624, 645 (Bankr. N.D. Fla. 1994). Section 106 was enacted to prevent a governmental entity from receiving "a distribution from the estate without subjecting itself to any liability it has to the estate within the confines of a compulsory counterclaim." *Kenny*, 75 B.R. at 521 (quoting H. R. REP. NO. 595, at 317 (1977); S. REP. NO. 989, at 29-30 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5814-15.). The court also notes the principle of statutory construction that, where a conflict exists, the more recent statute - in this case the Bankruptcy Code - should control because it is the most current expression of Congressional intent. See *Anderson*, 918 F.2d at 1143 n.4.

To the extent that it seeks dismissal based on the jurisdictional restrictions of the FTCA, HUD's Motion to Dismiss must therefore be denied.

West Pointe Properties, slip op. at 5-7.

In its Motion to Reconsider, HUD points the court to several opposing provisions of 11 U.S.C.A. § 106. As partially noted above, § 106(b) and (c) provide that a governmental entity that files a claim thereby waives its sovereign immunity as to compulsory or permissive counterclaims "that [are] property of the estate." 11 U.S.C.A. § 106(b)-(c) (West Supp. 2001). Section 106(a)(5), however, directs that "[n]othing in this section [§ 106] shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." 11 U.S.C.A. § 106(a)(5) (West Supp.

2001). In other words, § 106(a)(5) requires that the Trustee show she is entitled to relief by a source outside of § 106. See *Jove Eng'g, Inc. v. IRS (In re Jove Eng'g, Inc.)*, 92 F.3d 1539, 1549 (11th Cir. 1996); *United States of America v. Braeview Manor, Inc. (In re Braeview Manor, Inc.)*, 268 B.R. 523, 526 (Bankr. N.D. Ohio 2001). The Trustee cannot make that showing, according to HUD, because actions against the government for misrepresentation or interference with contract rights are not "authorized outside of Section 106." See 28 U.S.C.A. § 2680(h) (West 1994).

Harmonizing § 106(a)(5), (b), and (c) is troublesome. Section 106(c) rejects "any" assertion of sovereign immunity as to permissive counterclaims and § 106(b) provides for the waiver of sovereign immunity as to compulsory counterclaims. Section 106(a)(5), however, under the reading advanced by HUD, then undoes its companion subsections by giving controlling weight to non-section 106 sovereign immunity provisions. As applied to the present case, the language of § 106(b) and/or (c) trump the FTCA's sovereign immunity limitations, while § 106(a)(5) at the same time conversely makes the FTCA dispositive, because under FTCA § 2680(h) there is no "cause of action [for misrepresentation or interference with contract] otherwise existing" outside of § 106.

A closer reading of § 106(b) and (c) is sufficient to resolve the issue, at least as it pertains to the present motion. As noted, these sections govern sovereign immunity against counterclaims "that [are] property of the estate." 11 U.S.C.A. § 106(b)-(c). A claim is not property of the estate unless the debtor possessed it "as of the commencement of the case." 11 U.S.C.A. § 541(a)(1) (West 1993).

As of the commencement of this case, the Debtor did not possess a claim against HUD for misrepresentation or interference with contract rights because the FTCA preserves sovereign immunity as to those actions. See 28 U.S.C.A. § 2680(h). The claims therefore never became property of the estate. See 11 U.S.C.A. § 541(a)(1). Because the claims are not property of the estate, the Trustee cannot employ § 106(b) or (c) to defeat the sovereign immunity asserted by HUD.

Count Four of the Trustee's Complaint, alleging negligent misrepresentation against HUD, and Count Five, alleging interference with contract against HUD, must therefore be dismissed. HUD's Motion to Reconsider will be granted and The Government's Motion to Dismiss Complaint, to the extent that it seeks dismissal of Counts Four and Five, will be granted.

An order consistent with this Memorandum will be entered.

FILED: February 20, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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ORDER

For the reasons stated in the Memorandum on United States' Motion to Dismiss filed on January 16, 2002, and in the Memorandum on United States' Motion to Reconsider filed this date, the court directs the following:

1. The Government's Motion to Dismiss Complaint filed by the Defendant United States of America, on behalf of its agency, the Department of Housing and Urban Development, on November 30, 2001, is, as to Count Four (Negligent misrepresentation), Count Five (Interference with Contract), and Count Six (Violation of Administrative Procedure Act), GRANTED. The Government's Motion to Dismiss Complaint is in all other respects DENIED.

2. The Plaintiff's Complaint filed November 4, 1999, is, as to Counts Four, Five, and Six,
DISMISSED.

SO ORDERED.

ENTER: February 20, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE