NOTE

CERCLA INJUNCTIVE ORDERS IN CHAPTER 11 BANKRUPTCY: FRESH START OR FREE RIDE FOR THE REORGANIZED DEBTOR?

INTRODUCTION

This note examines the current status of environmental injunctive orders in the context of bankruptcy litigation. Specifically, the focus is on whether an environmental injunction, ordering a business to clean up or ameliorate toxic pollution, is a liability that may be reduced or remitted as a result of the offending business' bankruptcy. This issue concerns an unsettled area of law, marked by disagreement within the federal judiciary as to bankruptcy's effect upon environmental enforcement. Before beginning this discussion, however, it may be helpful to consider the following hypothetical, which demonstrates one way that the operation of environmental law may be converted into a bankruptcy issue.

ABC Corporation is comprised of various divisions involved in steel production, aerospace, and energy development. Because of the current economic downturn, ABC seeks to restructure its outstanding monetary debts. By filing for bankruptcy, ABC forces its creditors into a single forum where the parties will renegotiate ABC's debts. During these bankruptcy proceedings, ABC also attempts to reduce its environmental liabilities which arose from ABC's prior disposal of hazardous by-products derived from its manufacturing operations. ABC believes that its existing environmental liabilities should be reduced at the same rate as its unsecured monetary debts. ABC further argues that any future environmental claims that derive from its pre-bankruptcy disposal practices are fully discharged following bankruptcy. ABC's objectives are to escape liability under the environmental laws and to gain a windfall in appreciated property values once its hazardous waste sites are cleaned up at taxpayers' expense.[1]

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1. *See* Richard L. Epling, *Impact of Environmental Law on Bankruptcy Cases*, 26 WAKE FOREST L. REV. 69, 74-75 (1991) (discussing the reorganization of LTV Steel, Inc. and its affiliate the Chateaugay Corp., upon which this hypothetical is based); *see also infra* part

Part III.B of this note discusses how one federal court of appeals analyzed these facts. At this point, however, it is important to understand that two central issues concerning the status of environmental obligations in bankruptcy are (1) whether the environmental offense occurred *before or after* the responsible party filed for bankruptcy, and (2) whether the environmental enforcement agency *has incurred actual cleanup costs* at the offending site. These issues derive from the conflicting operation of the Bankruptcy Code[2] and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[3] The conflict begins with each statute's definition of a *claim*, and the point in time at which a justiciable claim originates. These concepts are central to the analysis of bankruptcy's effect upon the environmental laws and the interplay between CERCLA and the Bankruptcy Code. However, before considering how these two statutes interact, it is helpful to understand their independent operation.

I. OVERVIEW OF CERCLA AND CHAPTER 11 OF THE BANKRUPTCY CODE

A. CERCLA

CERCLA and its subsequent amendments address the extraordinary threat to the environment and public health presented by the unsafe disposal of hazardous substances.[4] At the time of its enactment in 1980, CERCLA sponsors estimated that industry disposed of 100 billion pounds of hazardous chemical waste annually, "90 percent of it improperly."[5] The resulting pollution, according to congressional estimates, threat-

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III.B.8 (discussing *In re* Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991)).

2. Bankruptcy Reform Act, Pub. L. No. 95-598, 92 Stat. 2549 (1978), *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *amended by* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (codified as amended at 11 U.S.C. §§ 101-1330 (1988 & Supp. II 1990)).

3. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990)).

4. Brief for the United States at 7, *In re* Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991) (No. 90-5024(L)); *see also* New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (discussing CERCLA's enactment).

5. 126 CONG. REC. 26,342 (1980) (statement of Rep. Gore).

ened to poison groundwater that half the nation's population relied upon for its water supply.[6] Against this threat, CERCLA's passage was directed at two goals:

> First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.[7]

Today, the threat posed by the release of hazardous substances into the environment is increasing. But rather than suggest that the environmental laws are ineffective, the rising number of hazardous sites requiring CERCLA attention attests to the need for greater vigilance in enforcing those existing laws. Since CERCLA's enactment, nearly 35,000 hazardous sites have been reported to the United States Environmental Protection Agency ("EPA").[8] Of those identified sites, more than 1200 have been targeted for priority cleanup under Superfund.[9] Less intensive cleanup activities have been performed at over 2600 sites.[10] Despite these cleanup efforts, progress is slow and costly. After spending nine billion dollars during little more than a decade, less than forty of those sites which pose the greatest risks have been cleaned sufficiently to be removed from the priority list.[11]

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6. *Id.*

7. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

8. *EPA Should Evaluate Health Risks, Speed Cleanup Studies, Witnesses Say*, [Current Devs.] 22 Env't Rep. (BNA) 1650-51 (Nov. 1, 1991).

9. *Lautenberg, Dingell Blast Superfund Studies; Reilly Focuses on Accomplishments of Program*, [Current Devs.] 22 Env't Rep. (BNA) 1531 (Oct. 11, 1991) [hereinafter *Superfund Studies*]. National Priorities List ("NPL") sites are those that pose the greatest risk to human health and to the environment. Once listed on the NPL, a site may be cleaned by using funds appropriated through CERCLA, i.e., the Superfund. *See* 40 C.F.R. §§ 300.5, 300.425 (1991).

10. *Superfund Studies*, *supra* note 9, at 1531.

11. *Id.*; *see also Goals for Site Cleanup in 1992, 1993 Outlined by Region in Memo from Reilly*, [Current Devs.] 22 Env't Rep. (BNA) 2140 (Jan. 17, 1992).

CERCLA grants broad enforcement powers to EPA,[12] authorizing the agency "to investigate hazardous sites, select a remedy, and . . . seek affirmative [injunctive] relief . . . to force a cleanup."[13] Under this policy, "more than 60 percent of site cleanup work" is performed by those parties found to be responsible for the toxic pollution.[14] Alternatively, EPA can perform the cleanup itself.[15] In either case, however, after incurring response costs EPA is authorized to seek reimbursement for these costs[16] from any "potentially responsible party" ("PRP").[17] Once

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12. "Although CERCLA expressly delegates authority to the President, the President has transferred most of that authority to EPA." *Shore Realty Corp.*, 759 F.2d at 1037 n.2 (citations omitted). CERCLA authorizes the President to "delegate and assign any duties or powers imposed upon or assigned to him" under the Act. 42 U.S.C. § 9615 (1988).

13. Brief for the United States at 8, *In re* Chateaugay Corp., 944 F.2d 997 (No. 90-5024(L)); *see* 42 U.S.C. § 9606 (1988) (authorizing the President to issue abatement orders as may be necessary to protect public health and welfare and the environment); *see also infra* text accompanying notes 46-53.

14. *Superfund Studies*, *supra* note 9, at 1531.

15. *See* 42 U.S.C. § 9604 (1988) (authorizing "removal and other remedial action" by the President whenever there is a substantial threat of a release into the environment of any hazardous substance, pollutant, or contaminant which may present an imminent and substantial danger to the public health or welfare); *see also infra* notes 43-44.

16. 42 U.S.C. § 9607 (1988).

17. CERCLA provides for the recovery of cleanup and other specified costs from PRPs, who include current and former site owners and operators, waste generators who arranged for disposal of their waste at a site, and certain persons who transported waste to a site. CERCLA section 107(a) provides:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

identified as a PRP, that entity is held strictly liable for costs associated with cleanup of the hazardous site.[18]

It is important to recognize that EPA may sue to recover its response costs for investigation or cleanup of a hazardous site only *after* the agency has incurred those costs. Under CERCLA, EPA has no authorization to pursue prospective cost recovery litigation. CERCLA's cost recovery scheme seeks to avoid the continued threat to public health that would occur if litigation were allowed to postpone the cleanup of an improperly contained hazardous substance. In contrast, the Bankruptcy Code recognizes *unmatured* and *contingent* claims, as well as claims for costs already incurred. This distinction will be discussed further in part II.

B. Procedures for Reorganization Under the Bankruptcy Code

The Bankruptcy Code of 1978 and its subsequent amendments (collectively the "Code") allow most types of businesses[19] to achieve financial relief through the process of *reorganization*. Chapter 11 of the Code[20] describes the statutory procedures that are specific to a bankruptcy reorganization and, throughout this note, the terms "reorganization" and "Chapter 11" are used interchangeably. The provisions of Chapter 11 reflect the Code's unique social and economic policies which have been described as serving three principal goals: providing a "fresh start" for debtors, encouraging the rehabilitation of financially troubled businesses, and ensuring that creditors receive an equitable distribution of the debtor's assets.[21]

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 9607(a) (1988).

18. *See id. But see* 42 U.S.C. § 9607(b) (1988) (liability subject to four enumerated defenses).

19. In general, a corporation, partnership, sole proprietor, business trust, or unincorporated association may seek relief through reorganization. However, certain types of business entities are ineligible for reorganization, including insurance companies, banking institutions, stock and commodities brokers, government bodies and municipalities. 11 U.S.C. § 101(41) (Supp. II 1990); *id.* § 109(d) (1988).

20. *Id.* §§ 1101-1174.

21. Epling, *supra* note 1, at 69.

One similarity between the Code and CERCLA is that both statutes increasingly are being applied in the courts. During the 1980s, the number of businesses seeking a fresh start under Chapter 11 tripled, to 20,783 in 1990.[22] The benefits of restructuring corporate debt are not limited to those businesses on the brink of financial disaster. In 1991, eleven companies with assets of $1 billion or more sought a new financial life through bankruptcy.[23] Indeed, a business that petitions for bankruptcy is not required to allege that it is insolvent or unable to meet its debts.

The filing of a voluntary "petition" with the bankruptcy court constitutes the debtor's request for Chapter 11 relief.[24] Under certain conditions, however, creditors may seek a remedy under Chapter 11 by filing an involuntary petition against the debtor.[25] In either case, the debtor will usually remain in control of its business operations throughout the bankruptcy proceedings.[26] This includes a "debtor in possession" of a hazardous site and, as discussed in part III.B, this ongoing possession has significant consequences when environmental injunctions are litigated in bankruptcy.

The provisions of Chapter 11 encourage negotiation between the debtor and the various classes of creditors. For present purposes, the distinction between creditor classifications is not important, except that a debtor seeking to discharge its CERCLA liability generally argues that any cognizable environmental claim should be paid, pro rata, as an unsecured claim.[27] Negotiation during bankruptcy allows the debtor to formulate a reorganization "plan" that is acceptable to a majority of creditors and to the

22. Mary Graham, *Bankrupt and Bullish*, THE ATLANTIC, Mar. 1992, at 24. According to the American Bankruptcy Institute, during the first quarter of 1992 there was a 5.3% increase over the number of businesses that filed for bankruptcy during the same period in 1991. *Bankruptcies at Record High*, S.F. EXAMINER, June 16, 1992, at D1.

23. Graham, *supra* note 22, at 24.

24. 11 U.S.C. § 301 (1988).

25. *Id.* § 303(a), (b).

26. *Id.* § 1107(a); *see also* BENJAMIN WEINTRAUB & ALAN N. RESNICK, BANKRUPTCY LAW MANUAL ¶ 8.08 (3d ed. 1992).

27. An unsecured claim is a claim without a corresponding property interest.

court.[28] The plan establishes the post-bankruptcy status of each class of claims and is, therefore, the foundation of the debtor's future financial life.

Once confirmed by the court, the provisions of the plan are binding on both the reorganized debtor and the creditors. Moreover, confirmation releases the debtor's "bankruptcy estate."[29] Confirmation vests all property of the estate in the reorganized debtor, subject only to the provisions of the plan itself and the court's confirmation order.[30] With certain enumerated exceptions, confirmation of the plan discharges the reorganized debtor from pre-confirmation debts.[31]

II. DEFINING A "CLAIM" UNDER THE BANKRUPTCY CODE AND CERCLA

A. "Contingent" and "Unmatured" Claims Under the Code

The Code defines a "claim" as any:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
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> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.[32]

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28. The Chapter 11 reorganization plan specifies the treatment of claims asserted against the debtor. 11 U.S.C. § 1123 (1988). The debtor's ultimate relief is confirmation of the reorganization plan which "discharges the debtor from any debt that arose before the date of such confirmation." *Id.* § 1141(d)(1)(A).

29. WEINTRAUB & RESNICK, *supra* note 26, ¶ 8.23[5].

30. 11 U.S.C. § 1141(b) (1988).

31. *Id.* § 1141(d).

32. *Id.* § 101(5) (Supp. II 1990).

In light of this expansive definition, the Code appears to encompass most types of claims[33] that may be asserted against a debtor, including some forms of contingent and equitable claims. By drawing all claims that include a right to monetary payment into the bankruptcy forum, the Code strives to shield the debtor from piecemeal litigation[34] while ensuring that each creditor[35] has access to the debtor's remaining assets. Essentially, the Code seeks to dispose of a debtor's pre-confirmation liabilities through a uniform and conclusive reorganization plan.[36] The Code's legislative history supports a comprehensive application of the "claim" definition, extending to all creditors who hold claims that include a right to monetary payment. "By this broadest possible definition, . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court."[37]

Section 101(5)(B) establishes that some forms of injunctive orders are to be included within the Code's definition of a claim. The key issue is whether the injunction may be converted, by right of the creditor, into a monetary obligation. If an alternative right to payment exists, then the injunction is recognized as a claim under the Code and may be discharged in bankruptcy. Conversely, where there is no alternative right to payment, the injunction will ride through the bankruptcy proceeding. In this

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33. Claims that do not fall within section 101(5) of the Code may be stated as:

> [(a)] situations in which there exists a right to an equitable remedy for breach of performance but the breach does not give rise to a right to payment.
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> [(b)] . . . situations in which there is a right to an equitable remedy for some wrong other than breach of performance, but for which there is no right to payment.
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> [(c)] . . . situations in which there is a right to an equitable remedy, as well as a right to payment, for some wrong other than breach of performance.

Timothy B. Matthews, *The Scope of Claims Under the Bankruptcy Code* (pt. 1), 57 AM. BANKR. L.J. 221, 243 (1983).

34. *See* 11 U.S.C. § 362(a) (automatic stay provision); *id.* § 362(b) (exceptions to the automatic stay).

35. A creditor is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *Id.* § 101(10)(A).

36. *See supra* note 28 and accompanying text.

37. H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

situation, the injunction does not fall within the Code's definition of a claim and remains fully enforceable against a reorganized debtor. Congress explained this distinction by use of the following example, concerning the equitable remedy of specific performance:

> [I]n some States, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under title II.
>
> On the other hand, rights to an equitable remedy for a breach of performance with respect to which such breach does not give rise to a right to payment are not "claims" and would therefore not be susceptible to discharge in bankruptcy.[38]

Although the Code defines a claim for purposes of bankruptcy, it is not informative as to when, temporally, a claim arises.[39] The analysis of whether a CERCLA injunction is a dischargeable claim requires the determination of when those elements giving rise to the injunction came into existence.[40] Under section 101(5)(B) of the Code it is unnecessary that the injunctive claim be matured, or presently enforceable, for the claim to be ripe for adjudication in bankruptcy. Therefore, the analysis rests upon determining when the acts creating the contingency of the injunctive claim first occurred.[41] The resolution of this question depends on the non-bankruptcy substantive law, such as CERCLA, upon which the injunction is based.[42]

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38. 124 Cong. Rec. 32,393 (1978) (statement of Rep. Edwards) (referring to title II of the House amendment to H.R. 8200); *id.* at 33,992 (statement of Sen. DeConcini) (same).

39. *See, e.g., In re* Credit Indus. Corp., 366 F.2d 402, 407 (2d Cir. 1966) ("Bankruptcy . . . serves only as a forum for the recognition of rights already acquired.").

40. *See, e.g., In re* A.H. Robins Co., 63 B.R. 986 (Bankr. E.D. Va. 1986). The court found that a claim "arises when the acts giving rise to the alleged liability were performed." *Id.* at 944 (footnote omitted).

41. *See, e.g., In re* Chateaugay Corp., 112 B.R. 513, 521 (Bankr. S.D.N.Y. 1990) ("before a contingent claim can be discharged, it must result from pre-petition conduct fairly giving rise to that contingent claim").

42. *See, e.g., In re* Combustion Equip. Assocs., Inc., 67 B.R. 709, 713 (Bankr. S.D.N.Y. 1986) ("'substantial and material' consideration of the CERCLA statute is indeed necessary to resolve the question when causes of action . . . arise").

B. CERCLA's Restriction on Prospective Claims

The Code seeks to place all of a debtor's outstanding liabilities under the bankruptcy umbrella by including unmatured or contingent claims. The statutory language of CERCLA, however, avoids recognition of unmatured or contingent claims. CERCLA is designed to preclude claims litigation, whether initiated by EPA or another party, until cleanup operations are underway or completed. This statutory design allows EPA the opportunity to begin removal[43] or remedial[44] actions before litigation prevents a timely response. Thus, CERCLA prohibits prospective cost recovery or cost estimation suits and requires that EPA's claim be initiated after the incurrence of response costs. Not surprisingly, CERCLA's narrow definition of a claim contrasts the Code's broad claim language. Under CERCLA, a claim "means a demand in writing for a sum certain."[45]

CERCLA authorizes EPA to advance cost recovery claims for initiated response actions.[46] Additionally, EPA is authorized to issue injunctive orders against a PRP. Section 106(a) of CERCLA provides, in part:

> [When EPA] determines that there may be an imminent and substantial endangerment to the public health or welfare or

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43. The terms "remove" or "removal" means [sic] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

42 U.S.C. § 9601(23) (1988).

44. The terms "remedy" or "remedial action" means [sic] those actions consistent with permanent remedy taken instead of or in addition to removal action in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id. § 9601(24).

45. *Id.* § 9601(4).

46. *Id.* § 9607.

> the environment because of an actual or threatened release of a hazardous substance from a facility, [EPA] may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat . . . . [EPA] may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.[47]

CERCLA thus grants EPA broad injunctive authority once the predicate determination of "imminent and substantial endangerment"[48] has been made. Under section 106(a), EPA's abatement order may compel a PRP to remedy an actual or threatened release of a hazardous substance. In this situation, EPA alternatively could have exercised its statutory authority to enter and clean up the site[49] and, subsequently, sue the PRP for cost reimbursement.[50] Therefore, EPA's affirmative injunction would fall within the Code's claim definition because the injunction is an equitable remedy that *gives rise to a right to payment.*

An EPA injunction also may require a PRP to institute appropriate measures ensuring compliance with environmental laws and the cessation of ongoing or impending hazardous releases.[51] In this case, EPA has no corresponding right to payment in lieu of its negative injunction, since a PRP may not reimburse EPA for the continued ability to pollute.[52] Without the alternative right to payment, EPA's injunction falls outside of the Code's claim definition. Typically, however, CERCLA abatement orders include both affirmative elements (i.e., the removal of hazardous waste) and negative elements (i.e., the cessation of ongoing hazardous releases).[53] The distinction between forms of injunctive remedies is discussed throughout part

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47. *Id.* § 9606(a) (1988).

48. *See, e.g.*, United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985) (construing CERCLA's "imminent and substantial endangerment" standard); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (same).

49. 42 U.S.C. § 9604 (1988).

50. *Id.* § 9607.

51. *Id.* § 9606(a).

52. *See In re* Chateaugay Corp., 944 F.2d at 1008.

53. *Id.* at 1007.

III of this note, which highlights recent judicial decisions regarding CERCLA's operation under the Bankruptcy Code.

C. Applicability of Chapter 7 Cases

The Code's definition of a claim does not distinguish between Chapter 11 reorganization and Chapter 7 liquidation bankruptcies. Therefore, if under a particular set of facts a reorganizing debtor's environmental liability is held to fall within section 101(5) of the Code, then technically the debtor's liability also should be a dischargeable claim in the event that the bankruptcy is converted into a liquidation. Similarly, a non-claim should be adjudged consistently whether the debtor petitions for Chapter 11 or Chapter 7 relief.

The caselaw discussed in part III.B includes both forms of bankruptcies, but the distinction is irrelevant to the definition of a claim under the Code. Nonetheless, the resolution of whether an environmental injunction is or is not a claim has two important implications. First, in Chapter 11 proceedings a nondischargeable environmental injunction will ride through the bankruptcy and remain enforceable against the reorganized debtor. Therefore, EPA would have good reason to contend that a CERCLA injunction is *not* a claim dischargeable in Chapter 11, since EPA could then enforce the injunction after the debtor emerges from bankruptcy.[54] In contrast, following a Chapter 7 liquidation the business debtor usually ceases to exist as an entity with sufficient resources to carry out the environmental cleanup order.[55] In the Chapter 7 case, EPA might argue that the injunction *is* an equitable remedy within the meaning of section 101(5)(B) of the Code, and that the cost of the environmental cleanup should be paid, pro rata, from the debtor's pre-bankruptcy assets.[56]

Second, the specter of substantial post-bankruptcy cleanup costs possibly would preclude an ailing business from reorganizing at all.[57] Rather than reorganize under Chapter 11, the debtor

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54. *See id.* at 1005.

55. Ohio v. Kovacs, 469 U.S. 274, 286 (1985) (O'Connor, J., concurring).

56. *Id.*

57. *In re* Chateaugay Corp., 944 F.2d at 1005.

facing a nondischargeable CERCLA injunction may be forced to liquidate under Chapter 7 to manage its environmental liability.[58] Whether this result is desirable is, of course, a public policy consideration that should not bear on the consistent application of the Code's definition of a claim. The conclusion of this note considers the policy consequences of determining the status of environmental remedies in the bankruptcy forum.

III. DEVELOPING A STANDARD THROUGH RELEVANT CASE LAW

A. Identifying the Analytical Framework

Since the enactment of CERCLA in 1980, the federal judiciary has struggled to develop an effective standard with which to analyze equitable environmental remedies in the bankruptcy context. The relevant case law reveals four non-exclusive criteria that the courts have used to support their decisions. Although a particular decision may not formally address each of the four criteria, the court's analysis, nevertheless, generally will depend upon one or more of the following factors.

First, a court's decision may be based upon the point in time at which an environmental claim is determined to originate. The status of a CERCLA injunction in bankruptcy may change decisively depending upon when the right to an injunctive remedy is held to have come into existence. Although the courts have not reached a consensus on this issue, at least three points along the temporal spectrum have triggered the right to a claim in bankruptcy, depending upon a particular court's interpretation of the law.[59] These include:

> (1) The origination of a claim may be based solely upon the behavior of the debtor. In this case, EPA's right to assert a contingent claim in bankruptcy arises at the moment of an actual or threatened release of a hazardous substance into the environment.

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58. *Id.* at 1002.

59. *See In re* Jensen, 127 B.R. 27, 30-33 (Bankr. 9th Cir. 1991), *rev'g* 114 B.R. 700 (Bankr. E.D. Cal. 1990).

(2) The origination of a claim may be based upon the establishment of a relationship between the debtor and the third party. This view presupposes an awareness, on the part of EPA, of the debtor as a PRP. This would be the case, for example, if EPA was listed on the debtor's schedule of creditors. Notice to EPA—that the debtor is seeking to discharge its *potential* environmental liability—would establish a relationship between the two parties sufficient to trigger the right to a claim.

(3) The origination of a claim may be based upon the creditor's present right to payment or equitable remedy under non-bankruptcy substantive law. Under this theory, EPA would have a cognizable cost recovery claim[60] only after the agency incurred response costs. Similarly, EPA's right to issue an injunctive order would arise only after the agency determines that there may be an endangerment to the public or the environment because of an actual or threatened release of a hazardous substance.[61]

As a second basis for analysis, a court's decision may depend upon whether the CERCLA order takes the form of an affirmative injunction, a negative injunction, or includes elements of both forms of remedy.[62] An affirmative injunction includes, for example, an EPA order obliging a PRP to clean up a site where a hazardous release is threatened. In lieu of issuing the injunction, EPA could have performed the cleanup itself and then sued the PRP to recover incurred response costs.[63] Since EPA possessed an unmatured right to payment as an alternative to its cleanup order, the affirmative injunction meets the Code's claim definition. If, however, EPA issued a negative injunction requiring only that the PRP cease continued or future pollution, then EPA would not possess a corresponding right to payment for the breach of its injunctive order.[64] Since CERCLA does not authorize EPA to accept payment from a PRP as an alternative to continued pollution, the negative injunction should not be included within

60. 42 U.S.C. § 9607 (1988).

61. *Id.* § 9606.

62. *See supra* part II.B (discussing affirmative and negative injunctions).

63. *In re* Chateaugay Corp., 944 F.2d at 1008.

64. *Id.*

the Code's definition of a claim. Courts have declined to bifurcate environmental injunctions which include both affirmative and negative orders.[65]

Third, a court's decision may be based upon whether the bankruptcy proceeding is ongoing, thereby allowing EPA to file a claim, or whether the PRP-debtor's reorganization plan has been confirmed. Where EPA has newly acquired knowledge of a PRP but is precluded from filing a timely CERCLA claim due to confirmation of the bankruptcy plan, the court may hold the CERCLA injunction to be nondischargeable. Under this approach, the court weighs the competing policy concerns of CERCLA and the Code.

Finally, a decision may be based upon a court's predisposition to the social policies promoted by either CERCLA or the Code. Both statutes reflect important, though sometimes conflicting, national policies. "The conflict begins at a basic level, since the goal of CERCLA—cleaning up toxic waste sites promptly and holding liable those responsible for the pollution—is at odds with the premise of bankruptcy, which is to allow debtors a fresh start by freeing them of liability."[66] Although courts may frame their holdings in terms of adhering to the literal letter of the law, the fact remains that courts have broad discretion in deciding which of the two congressional mandates to follow.[67] The status of a CERCLA action in bankruptcy often depends upon which statute's definition of a claim is given priority by the court. This is not a criticism of the judiciary, since most decisions involving the claim status of a CERCLA action in bankruptcy require the court to travel down one statutory path or the other. In light of this conflict, Congress should clarify CERCLA's operation in the bankruptcy context.[68]

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65. *See infra* notes 201-17 and accompanying text.

66. *In re* Combustion Equip. Assocs., Inc., 838 F.2d 35, 37 (2d Cir. 1988).

67. *Compare In re* Chicago, Milwaukee, St. Paul & Pacific R.R., 130 B.R. 521 (Bankr. N.D. Ill. 1991), *aff'd sub nom., In re* CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992) (emphasizing the policies of CERCLA) *with In re* Jensen, 127 B.R. 27 (Bankr. 9th Cir. 1991) (emphasizing the policies of the Bankruptcy Code).

68. For further discussion on this point see *infra* Conclusion.

B. Bankruptcy Case Law—Environmental Injunctions and the Code

1. *Ohio v. Kovacs*

An analysis of relevant case law must begin with the U.S. Supreme Court's statement in *Ohio v. Kovacs*.[69] In *Kovacs*, the State of Ohio entered into a stipulation which, among other things, enjoined the polluter, Kovacs, from causing continued pollution and from introducing additional waste onto the site, and also required that Kovacs clean up the site.[70] When Kovacs failed to meet his obligations under the state injunction, a receiver was appointed to take possession of and to clean up the site.[71] Subsequently, Kovacs petitioned for a Chapter 7 liquidation bankruptcy.[72]

The Supreme Court granted certiorari to the Court of Appeals for the Sixth Circuit to determine whether the affirmative injunction, obliging Kovacs to clean up the site, was a debt[73] dischargeable in bankruptcy. The Supreme Court held that the state's affirmative injunction "had been converted into an obligation to pay money,"[74] thereby falling within the Code's definition of a claim under section 101(5)(B). Thus, that element of the injunction requiring Kovacs to clean up the site "was dischargeable in bankruptcy."[75] The Court reasoned that the pre-petition appointment of a receiver over the site had disabled Kovacs "from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs."[76]

The instruction of *Kovacs* is limited. Although the Court held that an affirmative environmental injunction could be reduced to

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69. Ohio v. Kovacs, 469 U.S. 274 (1985).
70. *Id.* at 276.
71. *Id.*
72. *Id.*
73. A "debt" means liability on a claim. 11 U.S.C. § 101(12) (Supp. II 1990).
74. *Kovacs*, 469 U.S. at 283.
75. *Id.* (footnote omitted).
76. *Id.*

a dischargeable claim, the Court did not determine when a claim originates in bankruptcy.[77] Furthermore, since the State's injunction had been fully converted into a monetary obligation, it was unnecessary for the Court to analyze the affirmative and negative elements of the order to decide which obligations gave rise to a claim in bankruptcy. The Court, however, expressly concluded that "we do not question that anyone in possession of the site . . . must comply with the environmental laws . . . . Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions."[78] Thus, the Court intimated that a negative injunction, requiring the cessation of ongoing pollution, would not constitute a dischargeable claim. Finally, the State's injunctive order was obtained under state environmental law. Therefore, the national policies expressed in CERCLA were not before the Court.

2. *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*

Citing *Kovacs* as authority, the U.S. District Court for the Northern District of Illinois recently held a reorganized PRP to be strictly liable.[79] This CERCLA section 106[80] action was based solely upon the PRP's post-confirmation ownership of an inoperative hazardous waste site.[81] In *In re Chicago, Milwaukee, St. Paul & Pacific Railroad*, EPA issued an order requiring the PRP to implement remedial action at the contaminated site, notwithstanding the fact that the PRP had emerged from reorganization five and one-half years earlier. The site was not operating as a waste disposal area when EPA issued its order, nor had it been used as a disposal area during the previous seventeen years. Moreover, EPA had been aware of the site's potential contamination both prior to and throughout the PRP's bankruptcy proceed-

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77. *Id.* at 284.

78. *Id.* at 285; *see also* Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 502 (1986) (trustee in bankruptcy has no right to "abandon property in contravention of state or local laws designed to protect public health or safety").

79. "The language [of 42 U.S.C. § 9607] indicates that persons may be held strictly liable on the basis of present ownership alone." *In re* Chicago, Milwaukee, St. Paul & Pacific R.R., 130 B.R. at 523.

80. 42 U.S.C. § 9606 (1988).

81. "The Supreme Court has recognized that anyone in possession of a hazardous waste site is liable for remedying the situation." *In re* Chicago, Milwaukee, St. Paul & Pacific R.R., 130 B.R. at 523.

ing,[82] though, consistent with the operation of CERCLA, the agency did not file a claim.[83] In light of this factual background, the court held that EPA's injunctive order was not dischargeable and that the PRP was not exempt "from post-reorganization liability under . . . CERCLA as the present owner of the . . . site."[84]

Finding the PRP to be strictly liable as the current site owner,[85] the court was not persuaded by the fact that all waste was deposited at the site prior to confirmation of the PRP's reorganization plan.[86] By basing liability on site ownership alone, the court found it unnecessary to decide whether a CERCLA claim in bankruptcy arises at the time the actual or threatened release occurs, or when EPA becomes aware of an imminent endangerment to the public or the environment, or when EPA initiates a response action.[87] Nor did the court analyze whether, or under what conditions, a CERCLA injunctive order could be discharged in bankruptcy.[88] The court held these questions to be mooted by the PRP's present status as the site owner.[89] Furthermore, the imposition of strict liability under CERCLA made the question of causation irrelevant to the court's analysis. It was unnecessary to establish that the PRP "created, triggered or exacerbated the environmental conditions"[90] following bankruptcy, since CERCLA "unequivocally imposes strict

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82. During the period of the PRP's reorganization proceedings, EPA had incurred response costs at the site and had placed the site on the National Priorities List. *Id.* at 522.

83. *Id.* at 522-23.

84. *Id.* at 524.

85. *But see In re* Chicago, Milwaukee, St. Paul & Pacific R.R., No. 77B8999, 1991 WL 66187 (N.D. Ill. Apr. 24, 1991). The U.S. District Court for the Northern District of Illinois prohibited the Washington State Department of Transportation from pursuing a post-confirmation CERCLA claim against the reorganized PRP. Although the PRP owned the site when the hazardous release occurred, it had sold the site prior to reorganization. The court concluded that the state's claim was untimely, since the PRP was not being sued as the present site owner and the state had failed to assert its claim during the reorganization proceedings. *Id.*

86. *In re* Chicago, Milwaukee, St. Paul & Pacific R.R., 130 B.R. at 523.

87. *Id.* at 524.

88. *Id.*

89. *Id.*

90. *Id.* at 523.

liability on the current owner of a facility from which there is a release or threat of release, without regard to causation."[91]

Had the court held the CERCLA order to be dischargeable, EPA would have been precluded from filing a post-confirmation claim against the PRP. Under certain circumstances[92] this could create a windfall for the PRP, since the privately owned site would be remedied using publicly financed Superfund monies. Finally, the district court focused on the substantive provisions of CERCLA and did not comment on the Code's policy of providing a fresh start for the debtor.

To summarize, *Kovacs* established that where an environmental injunction is converted into nothing more than a right to payment in an ongoing bankruptcy, that right to payment is a claim subject to discharge under section 101(5)(B) of the Code.[93] Yet, where the debtor has present control over the contaminated site, the debtor remains amenable to enforcement orders requiring the removal of hazardous substances from the site and the cessation of further pollution.[94] *Chicago Railroad* went a step further, holding that present ownership of a contaminated site creates post-confirmation CERCLA liability, regardless of whether a corresponding claim existed during the period of the debtor's reorganization proceeding.[95]

3. *In re M. Frenville Co.*

In a controversial interpretive decision, the U.S. Court of Appeals for the Third Circuit held that the existence of a claim in bankruptcy depends upon the non-bankruptcy substantive law giving rise to the action against the debtor. In *In re M. Frenville Co.*,[96] a New York accounting firm sought relief from the Code's

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91. *In re* Chicago, Milwaukee, St. Paul & Pacific R.R., 130 B.R. at 523 (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985)).

92. In *Chicago R.R.*, EPA's order required both the site owner and the waste generator to implement the remedial action. *Id.* The waste generator, however, was not a party in the proceeding.

93. *Kovacs*, 469 U.S. at 283.

94. *Id.* at 285.

95. *In re* Chicago, Milwaukee, St. Paul & Pacific R.R., 130 B.R. at 523-24.

96. *In re* M. Frenville Co., 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

automatic stay provision[97] to include a Chapter 7 debtor as a third-party defendant in a separate suit against the accounting firm.[98] The firm, relying on New York state law, sought indemnification or contribution from the debtor.[99] According to the court, it was undisputed that the debtor's acts which ultimately led to the third-party suit occurred pre-petition.[100] Nevertheless, the court held that pre-petition acts by a debtor are insufficient to trigger the Code's automatic stay provision unless those acts gave rise to a corresponding pre-petition claim.[101] The court reasoned that the Code's "threshold requirement" of a right to payment[102] must be met *before* a claim arises in bankruptcy.[103] Thus, "[t]he crucial issue . . . is when did . . . [the] right to payment arise, for the automatic stay provision applies only to claims that arise pre-petition."[104]

The court referred to New York law to ascertain the earliest point in time at which the accounting firm's claim for indemnification or contribution against the debtor arose.[105] Looking beyond the Code to determine the origination of a claim, the court stated:

> Although "claim" is defined by § 101[(5)], the Code does not define when a right to payment arises. Thus, while federal law controls which claims are cognizable under the Code, the threshold question of when a right to payment arises, absent overriding federal law, "is to be determined by reference to state law."[106]

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97. 11 U.S.C. § 362(a) (1988).

98. *In re* M. Frenville Co., 744 F.2d at 333-34. The debtor's bankruptcy was administered by the Bankruptcy Court for the District of New Jersey. The suit against the accounting firm—alleging that the firm had negligently and recklessly prepared the debtor's financial statements, that the financial statements were false, and that certain banks had suffered losses because of their reliance on the statements—was commenced in New York state court. *Id.* at 333.

99. *Id.* at 334-35.

100. *Id.* at 335.

101. *Id.*

102. 11 U.S.C. § 101(5) (Supp. II 1990).

103. *In re* M. Frenville Co., 744 F.2d at 336.

104. *Id.*

105. *Id.* at 337.

106. *Id.* (quoting Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946)).

The court found that under New York law[107] a defendant's right to institute a third-party claim for indemnification or contribution accrues only after service of the defendant's answer.[108] Because the suit against the accounting firm was instituted "some fourteen months after the filing of the [debtor's bankruptcy],"[109] the court concluded that the firm's "claim, as well as its cause of action, arose post-petition. . . . Thus, . . . the automatic stay provision of [the Code] is inapplicable to [the present] suit."[110] The court stated that its decision was "in keeping with the policy of the Code. . . . Since claims arising post-petition are not dischargeable, there is no compelling reason to stay judicial proceedings predicated on such claims."[111]

Frenville stands for the proposition that a claim in bankruptcy originates at the time a right to payment accrues under non-bankruptcy substantive law.[112] If the creditor's right to payment arises after the debtor's bankruptcy petition, then the claim is nondischargeable regardless of whether the behavior that ultimately led to the claim occurred pre-petition. Significantly, the court did not emphasize the Code's broad definition of a claim,[113] nor did the court consider the Code's fresh start policy to be an overriding factor. As one court recently commented, "under *Frenville* . . . we can perceive no difference between claims inside or outside bankruptcy."[114]

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107. N.Y. CIV. PRAC. L. & R. 1007 (McKinney 1976 & Supp. 1992).

108. *In re* M. Frenville Co., 744 F.2d at 337.

109. *Id.*

110. *Id.*

111. *Id.* at 337-38.

112. The court noted two exceptions to this rule. First, a surety contract between the creditor and the debtor would create a contingent right to payment "exist[ing] as of the signing of the agreement, but . . . dependent on the occurrence of a future event." *Id.* at 336-37. Second, "overriding federal policy" could determine the status of a claim. Where a claim is based upon state law, federal policy may indicate the application of federal law. *Id.* at 337 n.8.

113. A claim includes a right to payment that has not been reduced to judgment, or a right to payment that is contingent, unmatured, disputed, or unsecured. 11 U.S.C. § 101(5) (Supp. II 1990).

114. *In re* Jensen, 127 B.R. at 30-31.

> [Other courts] have declined to accept the *Frenville* reasoning and its failure to accord full breadth to the term "claim," and have taken particular exception to *Frenville*'s focus on the *maturation* or *accrual* of an indemnification claim. . . . These courts have found no indication in the language or legislative history of Bankruptcy Code § 101(4) [sic] that Congress intended Code "claim"

Courts applying the Third Circuit's analysis will look beyond the Code to determine when a statutory right to payment arises under CERCLA. In a cost recovery action under section 107 of CERCLA,[115] *Frenville* implies that a right to payment is predicated on the incurrence of response costs. Similarly, the status of an injunctive order under section 106[116] would depend upon whether a corresponding right to payment exists and, if so, whether that alternative right originated prior or subsequent to the PRP's bankruptcy petition. Under section 106, an order that may give rise to an alternative right to payment cannot be issued before EPA determines that there may be an endangerment to the public or the environment because of an actual or threatened release of a hazardous substance. Therefore, *Frenville* leads to the conclusion that a pre-petition hazardous release, by itself, is insufficient to create an alternative or contingent right to payment. At the very least, EPA must have pre-petition knowledge of the actual or threatened release and the identity of the PRP to create such a right to payment.

4. *United States v. Hubler*

The Third Circuit's reasoning was followed recently by the U.S. District Court for the Western District of Pennsylvania in *United States v. Hubler*.[117] In *Hubler*, the Secretary of the Interior issued a Cessation Order requiring the operators of a surface coal mine to perform environmental remedial actions.[118] Subsequently, the mine operators' debts were discharged in Chapter 7 bankruptcy. The United States then sought an injunction compelling the debtors to comply with their environmental obligations under the Cessation Order.[119] The district court held that the debtors' obligations had not been converted

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criteria to turn on the peculiarities of state law, the timing of a lawsuit, or the claimant's failure to anticipate specific future contingencies.

In re Hemingway Transp., Inc., 954 F.2d 1, 9 n.9 (1st Cir. 1992) (citations omitted).

115. 42 U.S.C. § 9607 (1988).

116. *Id.* § 9606.

117. United States v. Hubler, 117 B.R. 160 (Bankr. W.D. Pa. 1990), *aff'd mem.*, 928 F.2d 1131 (3d Cir. 1991).

118. The Secretary determined that the mine site was being operated in violation of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1272(e)(4) (1988). *Id.* at 162.

119. *Id.* at 163.

into a corresponding "monetary liability" subject to discharge in bankruptcy.[120]

In *Hubler*, the threshold requirement of an alternative right to payment had not been met. The Cessation Order imposed a performance obligation on the debtors which the government had no statutory authority to convert into a monetary claim.[121] The court concluded that "a clean-up order does not constitute a right to a money payment merely because the enjoined party will be forced to expend money when fulfilling its clean-up obligations."[122] Thus, where an equitable remedy does not give rise to a right to payment, that remedy falls outside the Code's definition of a claim and is not dischargeable.[123] *Hubler* follows the Supreme Court's rationale in *Kovacs*, finding that environmental injunctions "which cannot be satisfied merely by making a monetary payment to the governmental body which issued the order" are not dischargeable under the Code.[124]

5. *United States v. Union Scrap Iron & Metal*

The U.S. District Court for the District of Minnesota addressed the issue of whether a debtor's CERCLA liabilities are discharged in bankruptcy when the environmental damage occurred pre-petition, but EPA identified the debtor as a PRP after the bankruptcy reorganization was confirmed. In *United States v. Union Scrap Iron & Metal*,[125] the court referred to

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120. *Id.* at 165.

121. *Id.* at 164.

122. *Id.* The court cited as authority Ohio v. Kovacs, 469 U.S. 274 (1985) (see *supra* this section), and Penn Terra Ltd. v. Department of Envtl. Resources, 733 F.2d 267 (3d Cir. 1984). In *Penn Terra Ltd.*, an environmental injunction was unaffected by the Code's automatic stay provision (11 U.S.C. § 362) because the injunction did not give rise to a money judgment. *Id.* The payment of money could not satisfy the defendant's obligations under the injunction which "was meant to prevent future harm to, and to restore, the environment." *Id.* (quoting *Penn Terra Ltd.*, 733 F.2d at 278). Furthermore, the *Hubler* court expressly rejected the holding in United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988), that an environmental injunction requiring the expenditure of money constitutes a debt dischargeable in bankruptcy. *Id.* at 164 n.1.

123. *Hubler*, 117 B.R. at 165.

124. *Id.* at 163.

125. United States v. Union Scrap Iron & Metal, 123 B.R. 831 (Bankr. D. Minn. 1990).

CERCLA as the substantive law defining the origination of a legal relationship between EPA and the PRP.[126] The court held that:

> [T]he mere release of a hazardous substance is [insufficient] to create a legal obligation constituting a claim in bankruptcy. . . . Because the EPA had incurred no response costs at the time of [the bankruptcy] confirmation, the EPA could have no claim in the bankruptcy proceedings—there was no legal obligation under CERCLA.[127]

Because it found CERCLA liability to be predicated on an actual EPA response action, the court rejected the PRP's argument that a pre-petition hazardous release gave rise to a contingent claim dischargeable in bankruptcy.[128] Moreover, the court reasoned, in dictum, that CERCLA liability does not arise prior to the time EPA has knowledge of the PRP's involvement with the hazardous site. "Whether [the PRP] might have a stronger argument if it had made a more complete disclosure of its liabilities, including the present claim, during its bankruptcy proceedings—or if the EPA had had knowledge of its involvement in the site—need not be decided on this motion."[129] Thus, the court suggested that its policy considerations might be different in the context of an ongoing bankruptcy proceeding where EPA had prior notice of the debtor's environmental violations.

According to the court, the goals of CERCLA would be undermined if the court found that an actual or threatened release, by itself, gave rise to a claim in bankruptcy.[130] Under CERCLA, courts are prohibited from reviewing any challenges to section 104[131] or section 106[132] enforcement measures until

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126. The court concluded:

> To establish a legal obligation under CERCLA, four elements must be established: (1) there must be a facility; (2) there must be a release or threatened release of a hazardous substance at the facility; (3) there must be a responsible person (as defined by the statute); and (4) the United States must have incurred necessary costs in responding to the release at the facility.

Id. at 835 (citation omitted).

127. *Id.* at 835-36.

128. *Id.* at 836.

129. *Id.*

130. *Id.* at 837.

131. 42 U.S.C. § 9604 (1988).

132. *Id.* § 9606.

after EPA (or a third party) has initiated a removal, remedial, or cost recovery action.[133] The court stated that adopting the position that a claim in bankruptcy originates at the time of a release, rather than at the time of an enforcement action, "would effectively require pre-enforcement CERCLA litigation by forcing the EPA to investigate and assess its potential CERCLA claims every time a conceivable potentially responsible party filed for bankruptcy. This would reverse the CERCLA scheme and threaten the effectiveness of EPA action."[134] Thus, the court broadly interpreted CERCLA's bar to pre-enforcement judicial review. In *Union Scrap*, however, the court was presented with the single issue of when a CERCLA claim arises in bankruptcy, and, therefore, was not required to review any challenges to a particular CERCLA enforcement measure.[135]

6. *Sylvester Bros. Development Co. v. Burlington Northern Railroad*

The rationale expressed in *Union Scrap* has not been universally accepted. Both the Second Circuit[136] and the Ninth Circuit[137] have followed a different line of reasoning. Nevertheless, the U.S. District Court for the District of Minnesota has recently confirmed and restated its position in the case of *Sylvester Bros. Development Co. v. Burlington Northern Railroad*.[138]

In *Sylvester Bros.*, the PRP was impleaded as a third-party defendant in a private cost recovery action, brought under CERCLA and state environmental law, following the cleanup of a landfill site. The PRP had received confirmation of its Chapter 11 reorganization plan prior to learning of its possible relationship

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133. *Id.* § 9613(h).

134. *Union Scrap Iron & Metal*, 123 B.R. at 837.

135. *See In re* Chateaugay Corp., 944 F.2d at 1006 ("CERCLA's prohibition of pre-enforcement review is . . . inapplicable[where t]he [c]ourt is not being called upon to 'review any challenges to removal or remedial action selected under section 9604 . . . or to review any order issued under section 9606(a) . . . .'"); Manville Corp. v. United States, 139 B.R. 97, 103-05 (S.D.N.Y. 1992) (same).

136. *See, e.g., In re* Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991).

137. *See, e.g., In re* Jensen, 127 B.R. 27 (Bankr. 9th Cir. 1991).

138. Sylvester Bros. Dev. Co. v. Burlington N. R.R., 133 B.R. 648 (D. Minn. 1991).

to the site.[139] In regard to unrelated environmental obligations, the PRP had listed both the state Pollution Control Agency and EPA as creditors in the bankruptcy.[140] Neither agency, however, was provided information regarding any possible link between the PRP and the landfill site[141] and, thus, no corresponding claim was filed during the bankruptcy proceedings.[142] In light of these facts, the PRP moved for summary judgment dismissing it as a third-party defendant in the cost recovery action.[143]

The PRP argued that any pre-confirmation liabilities were discharged as a result of its bankruptcy reorganization. Since the state "had actual knowledge of its role as a creditor in [the] bankruptcy proceedings but failed to file a claim, any claim by the [state] . . . relat[ing] to . . . the site has been discharged."[144] The PRP contended that with no underlying debt to the state any contribution claim based upon cleanup activities at the site must fail.[145] Additionally, the PRP argued that "the 'fresh start' intended under the Bankruptcy Code supports its dismissal from this case and that with over 100 other parties still potentially responsible for the cleanup, its dismissal would not force taxpayers to bear any of the cleanup costs."[146] Finally, the PRP contended that "even if there are continuing releases of hazardous substances at the site post-confirmation, the definition of a contingent claim in bankruptcy is meant to include (and thus discharge) such liabilities."[147] Since it is up to the creditor, once notified of its status, to determine the extent of its claim, the PRP argued that listing the state as a creditor gave rise to a dischargeable contingent claim.[148] If the state could no longer assert a timely claim against the PRP for cleanup activities at the site,

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139. *Id.* at 651.

140. *Id.*

141. The site owner had notified the state of the PRP's identity prior to the bankruptcy confirmation. Nevertheless, the court found that this knowledge "came too late in the fast-paced bankruptcy proceedings reasonably to permit [the state] to file a claim." *Id.* at 653.

142. *Id.* at 651.

143. *Sylvester Bros.*, 133 B.R. at 650-51.

144. *Id.* at 651.

145. *Id.*

146. *Id.*

147. *Id.* at 652.

148. *Sylvester Bros.*, 133 B.R. at 652.

neither could other parties seek contribution for costs stemming from those same cleanup activities.[149]

The court considered whether the distinguishing facts of this case called for a different conclusion than that reached in *Union Scrap*. Specifically, the court found that in the present case EPA and the state environmental agency had been listed as creditors in the PRP's bankruptcy proceedings, but that neither agency had sufficient notice of the nexus between the debtor and the hazardous site.[150] Moreover, the state had been informed by the site owner that the debtor was a PRP, but not in time for the state to act realistically before confirmation of the debtor's bankruptcy.[151] The court concluded that these findings did not support a retreat from *Union Scrap*.[152] Stating a bright line rule, the court held that "[w]hen the debtor has not disclosed its potential CERCLA/MERLA[153] liabilities in long-since closed bankruptcy proceedings, and the governmental agency has not had actual knowledge of the potential claim in sufficient time to file a claim in those proceedings, the potential CERCLA/MERLA liability is not discharged."[154]

The court found that CERCLA provided the applicable substantive law.[155] Furthermore, the purposes of CERCLA would be thwarted by a contrary result. The court stated that "[a]mong the purposes of CERCLA are the prompt cleanup of hazardous waste sites, the protection of health and the environment, and making those who pollute pay for the cleanup of that pollution."[156] In a forceful policy statement, the court concluded that a debtor's fresh start under the Code must yield to the goals of CERCLA:

> The court is aware that these CERCLA goals conflict with the goal of the Bankruptcy Code to provide debtors with a fresh

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149. *Id.* at 651.

150. *Id.* at 652.

151. *Id.* at 653.

152. *Id.*

153. Minnesota Environmental Response and Liability Act, MINN. STAT. ANN. §§ 115B.01-.37 (West Supp. 1992).

154. *Sylvester Bros.*, 133 B.R. at 653 (footnote omitted).

155. *Id.*

156. *Id.* (citation omitted).

> start. Under the circumstances presented here, however, where the bankruptcy proceedings are already complete and there was not adequate opportunity to include the debtor's potential CERCLA/MERLA liability in those proceedings, the problems posed for CERCLA enforcement by dismissing the debtor outweigh the debtor's hope for discharge.[157]

Thus, the district court's holding implies that a post-confirmation CERCLA injunction is not a dischargeable claim insofar as EPA was unaware of the debtor's relationship to the hazardous site during the bankruptcy proceedings. It is unsettled whether "actual knowledge" of the debtor as a PRP would give rise to a dischargeable claim in a situation where EPA was not yet authorized to initiate an enforcement action under the provisions of CERCLA.

These summarized cases suggest that some courts are reluctant to discharge environmental liabilities where EPA has not had a pre-confirmation awareness of the debtor as a PRP. Still, other courts have required that EPA take affirmative steps, either incurring response costs or issuing abatement orders, before a dischargeable claim will be held to exist. A third branch of case law, however, stands diametrically opposed to the concept that a dischargeable claim requires a pre-confirmation relationship between the creditor and the debtor. These cases hold that the origination of a claim in bankruptcy is based upon the debtor's unilateral behavior. This reasoning, which likely stems from the analysis of tort claims in bankruptcy,[158] expands both the Code's fresh start policy and its claim definition to their widest points.

7. *In re Jensen*

In re Jensen[159] provides a clear example of the reasoning that a debtor's unilateral behavior gives rise to a dischargeable claim. In *Jensen*, the Bankruptcy Appellate Panel for the Ninth Circuit flatly rejected the claim analysis of the *Frenville* and

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157. *Id.* at 654.

158. *See, e.g., In re* A.H. Robins Co., 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd sub nom.*, Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir.), *cert. dismissed sub nom.*, Joynes v. A.H. Robins Co., 487 U.S. 1260 (1988); *In re* Edge, 60 B.R. 690 (Bankr. M.D. Tenn. 1986).

159. *In re* Jensen, 127 B.R. 27 (Bankr. 9th Cir. 1991).

Union Scrap courts,[160] and held that "claims in bankruptcy arise based upon the debtor's conduct."[161] Essentially, the court asserted that a pre-petition release of a hazardous substance triggers a dischargeable environmental claim in bankruptcy, regardless of when the claim ultimately becomes ripe under the substantive provisions of CERCLA.[162]

The timeline of events was as follows. The debtors, sole owners of a lumber operation, petitioned for bankruptcy following notification by the state that a hazardous waste problem existed at the debtors' business site.[163] During the bankruptcy proceedings, the debtors abandoned their operation, leaving hazardous waste at the leased site.[164] The debtors' schedule of liabilities did not include any claims for environmental cleanup.[165] Prior to the debtors' discharge, the state counterpart to EPA, the Department of Health Services, investigated the site, but did not incur cleanup costs until well after completion of the bankruptcy proceedings.[166] Once cleanup activities were initiated, however, the state sought to recover its response costs under state law and CERCLA.[167] Thereafter, the PRP-debtor brought an adversary proceeding to determine that the state's cost recovery claim was discharged through bankruptcy.[168] The lower court held for the state, finding that a claim in bankruptcy requires a "right to payment," and that under both CERCLA and applicable state law this right arises with the incurrence of response costs.[169]

The Bankruptcy Appellate Panel reversed, reasoning that the Code's broad definition of a claim "includes *contingent* and *unmatured* rights to payment, as well as those having been reduced to judgments."[170] Moreover, the court concluded that

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160. *Id.* at 31.

161. *Id.* at 33.

162. *Id.* at 32 (citing *In re* Chateaugay Corp., 112 B.R. 513, 522 (Bankr. S.D.N.Y. 1990)).

163. *Id.* at 28.

164. *In re* Jensen, 127 B.R. at 28.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *In re* Jensen, 127 B.R. at 30.

170. *Id.* at 31.

basing the origination of a claim upon a statutory right to payment "contravenes the overriding goal of the Bankruptcy Code to provide a 'fresh start' for the debtor."[171] The court reasoned that a savvy creditor could frustrate the debtor's fresh start by "delay[ing] expenditures in anticipation of the . . . bankruptcy, thereby preventing discharge of the creditor's claims."[172] For example, in the present case, the state might have delayed incurring cleanup costs until after the PRP emerged from bankruptcy to avoid discharge of its environmental "claim." The state might then have sought reimbursement from the PRP's post-bankruptcy earnings since no dischargeable (i.e., pre-petition) claim had existed. Of course, under this dire scenario, hazardous substances would continue to be released into the environment while the state waited out the PRP's bankruptcy proceeding.

The court's rationale is suspect for two reasons. First, a debtor may unilaterally bring a creditor into the bankruptcy proceeding where the claim, or cause of action, is ripe but unexercised. Basing the origination of a claim upon a non-bankruptcy right to payment means that a claim arises when it accrues under substantive law, not when the creditor chooses to enforce the claim. In the example above, the PRP could have scheduled the state as a creditor, thereby enabling the bankruptcy court to estimate the PRP's environmental liability.

Second, in a case where the debtor possesses limited assets, the creditor has ample incentive to bring its claims into the bankruptcy forum. Achieving claim status in bankruptcy may be the creditor's only hope of receiving even a pro rata payment on the debt—especially when the debtor is a corporation that will cease to exist following bankruptcy. It is an unusual circumstance for the debtor to exit bankruptcy with sufficient assets to satisfy a protected claim, which the creditor may then bring to life following the bankruptcy confirmation. In those rare cases where the debtor will emerge from bankruptcy with sufficient assets to satisfy a contingent environmental claim, the debtor seeking discharge should bring the claimant into the bankruptcy proceeding so that the claim can be estimated based upon the specific triggering event (i.e., the actual hazardous release).

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171. *Id.*
172. *Id.*

The *Jensen* court's interpretation of bankruptcy's fresh start policy is problematic for other reasons as well. Much of the court's analysis relies on prior bankruptcy cases favoring the discharge of tort liability incurred while rendering services. For example, the court cited *In re A.H. Robins Co.*,[173] in which "[t]he claimant had been inserted with [an intrauterine device] prepetition, but perceived no injury until postpetition."[174] *Robins* held that the tort claim originated when the intrauterine device was inserted because "a 'right to payment,' [sic] and therefore a claim, arises at the time when the acts giving rise to the alleged liability were performed."[175] The *Jensen* court applied the *Robins* analysis in determining that a CERCLA "claim arises for purposes of discharge upon the actual or threatened release of hazardous waste by the debtor."[176] The court felt that "[t]his conclusion gives effect to the important bankruptcy goal of providing a fresh start to the debtor."[177]

The court failed to consider, however, that in *Robins*, as well as in other cited cases, there was a pre-bankruptcy relationship between the injured claimant and the debtor. In contrast, EPA's relationship with a PRP may be initiated long after the occurrence of a hazardous release. For example, in *United States v. Northeastern Pharmaceutical & Chemical Co.*,[178] a hazardous waste site was discovered, through an anonymous tip, eight years after the chemicals were dumped.[179] The *Jensen* court held that a claim arises at the time of a hazardous release, regardless of when the government becomes aware of the PRP's link to the site. In doing so, the court appears unconcerned with the PRP evading environmental liability in bankruptcy so long as the polluted site remains undiscovered through confirmation. As a result, under the *Jensen* analysis, EPA is charged with investigating every debtor in bankruptcy to determine the debtor's potential environmental liability. Otherwise, the total burden of cleanup will

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173. *In re* A.H. Robins Co., 63 B.R. 986 (Bankr. E.D. Va. 1986).

174. *In re* Jensen, 127 B.R. at 32.

175. *Id.* (citing *In re* A.H. Robins Co., 63 B.R. at 993).

176. *Id.* at 33.

177. *Id.*

178. United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984).

179. Brief for the United States at 11-12 n.***, *In re* Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991) (No. 90-5024(L)).

inequitably fall upon other parties who are linked to the site or, alternatively, upon the taxpayer. Nowhere does the Code state that a debtor's fresh start should be achieved at any social cost.

8. *In re Chateaugay Corp.*

Recall the hypothetical at the beginning of this note. Recently, the Court of Appeals for the Second Circuit, in *In re Chateaugay Corp.*, addressed a situation similar to the hypothetical.[180] In *Chateaugay*, EPA sought a declaratory judgment that post-confirmation response costs and injunctive remedies are not discharged by Chapter 11 bankruptcy when EPA's response action is not linked to a pre-petition "claim."[181] EPA argued that it does not hold a dischargeable claim, within the meaning of CERCLA and the Code, until a response action is initiated.[182] In the view of the PRP-debtor, however, confirmation of its reorganization plan would discharge all environmental liabilities that are traceable to pre-petition conduct, including obligations for CERCLA actions that are initiated post-confirmation.[183] In other words, EPA essentially argued the *Union Scrap* rule; whereas, the PRP sought protection under the *Jensen* rule.

In *Chateaugay*, the named party was a subsidiary of a larger corporate entity[184] that sought to restructure its debt, and discharge its liabilities as a PRP, through Chapter 11 reorganization.[185] The PRP would survive bankruptcy as an ongoing manufacturing operation and would continue to generate hazardous substances requiring treatment and disposal.[186] At the time

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180. *In re* Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991).

181. *Id.* at 1000.

182. *Id.*

183. *Id.*

184. LTV Corporation:

> is a diversified steel, aerospace and energy company. The LTV steel [sic] group is one of the largest steel companies in the United States . . . . Indeed, the steel companies conglomerated in the LTV Steel group have participated in historic litigation. [*See*] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (separation of powers); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (commerce power).

Brief for the United States at 5, 18 n.**, *In re* Chateaugay Corp., 944 F.2d 997 (No. 90-5024(L)).

185. *In re* Chateaugay Corp., 944 F.2d at 999.

186. *Id.* at 1005.

of its bankruptcy petition the PRP's environmental liabilities were extensive, with claims "held by EPA and the environmental enforcement officers of all fifty states and the District of Columbia."[187] EPA's proof of claim, alone, totaled approximately $32 million for pre-petition response costs incurred at fourteen sites to which the PRP was linked.[188] Of these sites, "only one . . . reached the point where no further response costs [were] anticipated" at the time of the declaratory suit.[189] Furthermore, since the PRP would continue its industrial operations both during and following bankruptcy, and because the PRP may have been linked to other sites not yet investigated by EPA, it is possible that "the $32 million in incurred response costs might be only a small fraction of the [PRP's] total CERCLA liability."[190]

In its suit, EPA did not challenge the argument that response actions initiated pre-petition are dischargeable. Rather, EPA sought to enforce response actions that would arise following the PRP's bankruptcy, whether or not those actions were the result of a pre-petition triggering event.[191] Moreover, the government recognized that if the PRP could discharge its post-petition environmental liabilities it would gain a windfall, since the polluted sites would be remedied at the expense of other parties identified with the sites or at the taxpayers' expense through Superfund expenditures.

Unlike *Jensen*, the *Chateaugay* court declined to apply a tort claim analysis to determine the point in time at which a CERCLA claim arises for bankruptcy purposes. The court noted that other circuits were in disagreement in cases where a pre-petition relationship existed between the potential claimant and the tortfeasor. One line of decisions construed the Code's claim definition to require "some manifestation of injury,"[192] and other decisions recognized a contingent claim "despite the absence of manifest injury."[193] Moreover, the court acknowledged that it

187. *In re* Chateaugay Corp., 944 F.2d at 999.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 1000.
192. *Id.*
193. *Id.*

is "absurd" to expect a claim to be filed by a party who has neither had a pre-petition relationship with the tortfeasor nor realized a pre-petition injury.[194]

In rejecting a tort claim analogy, the court found that EPA's relationship with the PRP more closely resembled that of parties to "an existing though unmatured contract claim."[195] The court reasoned:

> In the context of contract claims, the Code's inclusion of "unmatured" and "contingent" claims is usually said to refer to obligations that will become due upon the happening of a future event that was "within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created."[196]

The court recognized that the amount of environmental liability ultimately to be assessed against the PRP could not be determined at the time of the case. EPA had not completed its cleanup activities at those sites where the PRP was identified. Nor could EPA know the extent of the PRP's relationship to undiscovered sites that would later fall within the CERCLA universe.[197] Nevertheless, the court held that the relationship between EPA and those subject to environmental regulation "provides sufficient 'contemplation' of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of 'claims.'"[198] Thus, the court reached a conclusion similar to the holding in *Jensen*, albeit by following a slightly different analytical path.

The *Chateaugay* holding—that a contingent claim may be based upon the pre-petition conduct of the PRP—does not sweep as broadly as *Jensen*. In *Chateaugay*, pre-petition conduct that gives rise to a contingent CERCLA claim is limited to "releases or threatened releases of hazardous substances."[199] In other

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194. *In re* Chateaugay Corp., 944 F.2d at 1003 (citations omitted).

195. *Id.* at 1005.

196. *Id.* at 1004 (quoting *In re* All Media Properties, Inc., 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd mem.*, 646 F.2d 193 (5th Cir. 1981)).

197. *Id.* at 1005.

198. *Id.*

199. *Id.*

words, conduct creating a dischargeable claim does not include "any action of the [PRP] that occurred pre-petition, such as the construction of a storage facility" for hazardous waste.[200] Rather, *Chateaugay* appears to require an actual violation of environmental law before a dischargeable claim arises. The court, however, deemed it irrelevant when EPA, or anyone else, ultimately becomes aware of the environmental violation. It should be noted that the *Chateaugay* decision was delivered in the context of ongoing bankruptcy proceedings. It remains unknown whether the court would amend its rule in a situation where the PRP's bankruptcy had long since been concluded and where EPA had no pre-confirmation knowledge of the PRP (e.g., *Union Scrap*; *Sylvester Bros.*).

Chateaugay also addressed the issue of post-confirmation injunctive remedies. The court began its analysis by distinguishing between negative and affirmative forms of injunctions. An example of the former is an injunction to cease ongoing pollution, such as "[a]n order to stop burning high-sulphur fuel."[201] An example of the latter is an injunction to clean up pre-existing sources of pollution, such as "an order to remove containers of radioactive waste . . . feared to become insecure in the future."[202] The court reasoned that an affirmative injunction would constitute a dischargeable claim in bankruptcy.[203] In a case such as this, EPA could have removed the radioactive waste itself and then sued the PRP to recover the response costs.[204] Therefore, EPA's injunction could have been converted into a right to monetary payment. This alternative right to payment falls within the Code's definition of a claim.[205] Thus, a PRP can discharge an affirmative post-confirmation CERCLA injunction, if the injunction arose from pre-petition activities.

On the other hand, the court determined that a negative injunction does not fall within the Code's claim definition, and

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200. *In re* Chateaugay Corp., 944 F.2d at 1005.

201. *Id.* at 1007.

202. *Id.*

203. *Id.* at 1008.

204. *Id.*

205. 11 U.S.C. § 101(5)(B) (Supp. II 1990) (claim includes "an equitable remedy for breach of performance if such breach gives rise to a right to payment").

therefore, is not dischargeable.[206] A negative injunction cannot confer an alternative right to payment, because EPA "has no authority to accept a payment from a responsible party as an alternative to continued pollution."[207] In the previous example, the PRP could not have paid EPA and continued to burn high-sulphur fuel in violation of the environmental laws. Because a negative injunction does not give rise to a right to payment for breach of performance, it fails to meet the Code's definition of a claim dischargeable in bankruptcy.[208] Thus, a negative post-confirmation CERCLA injunction is unaffected by the PRP's reorganization and remains enforceable. However, the distinction drawn between negative and affirmative injunctions does not end the court's analysis.

Typically, CERCLA injunctions include both negative and affirmative orders. For example, an injunction requiring the cleanup of "a toxic waste site from which hazardous substances are leaching into nearby water supplies"[209] would fall into the category of a dual—negative and affirmative—injunction. To some extent the injunction requires the PRP "to stop the [ongoing] run-off of hazardous substances from its property,"[210] a negative order, and to some extent the injunction requires the PRP to "clean up toxic wastes that have already been deposited,"[211] an affirmative order. Surprisingly, the *Chateaugay* court held that this form of injunction is nondischargeable. The court stated that "a cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim."[212]

The court recognized that had EPA entered the site and removed the hazardous substances, both objectives of the injunction would have been accomplished.[213] Furthermore, EPA's

206. *In re* Chateaugay Corp., 944 F.2d at 1008.
207. *Id.*
208. *Id.*
209. *Id.* at 1007.
210. *Id.*
211. *In re* Chateaugay Corp., 944 F.2d at 1007.
212. *Id.* at 1008.
213. *Id.*

response action would have included a right to payment, since following cleanup EPA could have sued to recover its response costs.[214] In that situation, the right to payment would have constituted a claim under section 101(5)(A) of the Code. But the court declined to draw the line in this manner, stating: "[s]ince there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a 'claim.'"[215] Thus, the court held that the typical CERCLA injunction, which includes both negative and affirmative orders, does not give rise to a claim dischargeable in bankruptcy.[216]

The court might have bifurcated the dual injunction, whereby negative orders would be nondischargeable claims and affirmative orders would be dischargeable claims. In declining to do so, the court concluded, "we believe that placing on the non-'claim' side all injunctions that seek to remedy on-going pollution is more faithful to the Supreme Court's teachings in both *Kovacs* and *Midlantic National Bank v. N[ew] J[ersey] Dep[artmen]t of Environmental Protection.*"[217] The court correctly recognized that these precedents prohibit any individual or corporation from maintaining hazardous conditions at a site in violation of the environmental laws. Nor may a responsible party contravene these laws by abandoning its hazardous site under the protective guise of the Bankruptcy Code.

CONCLUSION

The cases discussed are representative of the struggle, now taking place in the federal courts, to define and harmonize the competing purposes of two comprehensive statutes. The Bankruptcy Code seeks to provide debtors with a fresh start, an objective made more feasible by drawing all cognizable claims into

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214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 1009 (citing Ohio v. Kovacs, 469 U.S. 274 (1985); *see supra* text accompanying notes 69-78; Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986)). A debtor may not abandon property in violation of an environmental regulation "that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic Nat'l Bank*, 474 U.S. at 507 (footnote omitted).

the bankruptcy forum, thereby maximizing the scope of a discharge.[218] CERCLA seeks to remedy environmental damage caused by the mounting misuse of hazardous substances, an objective that is served by requiring those who are responsible for toxic pollution to bear the cost of cleanup.[219] This note has proceeded under the assumption that it is worthwhile to study the variety of standards originating from those courts that have analyzed CERCLA's operation under the Code. It seems equally germane, however, to question whether national social and political policies, such as the cleanup of life-threatening toxic pollution, should be determined finally in a bankruptcy forum. Indeed, many of those courts caught in the nexus of the environmental and bankruptcy laws have acknowledged their limitation in determining—often in cases of first impression—what essentially amounts to questions of public policy. Courts are right to be wary when they must answer questions of policy by interpreting statutes that were never designed for the task. One need only refer to the disastrous asbestos litigation of the 1980s—a no-win situation for both the victims and manufacturers of asbestos—to understand that the courts cannot be expected to shoulder public policy decisions when Congress defaults.

When CERCLA intersects with the Bankruptcy Code, courts are faced with competing policy choices. The *Chateaugay* court, for example, chose the Code as the defining law, reasoning that the Code's broad application took precedent over "more focused statutes"[220] such as CERCLA. Yet, the court offered a caveat to its rationale "[i]f the Code, fairly construed, creates limits on the extent of environmental cleanup efforts, the remedy is for Congress to make exceptions to the Code to achieve other objectives that Congress chooses to reach."[221] The *Chateaugay* decision acknowledged the court's limitation in enforcing one statute over another when Congress has failed to provide adequate direction.

Jensen provides another example of a court caught between competing congressional objectives. When faced with a policy

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218. *In re* Chateaugay Corp., 944 F.2d at 1002.
219. *Id.*
220. *Id.*
221. *Id.*

argument supporting environmental cleanup as a priority claim, the court simply balked. In view of Congress' silence on the issue of CERCLA's operation in bankruptcy, the court refused to balance the purposes of the Code against either the objectives of the environmental laws or the importance of toxic cleanup to society at large. Quoting a recent Ninth Circuit case, the *Jensen* court concluded that "'[a]lthough [the creditor] asserts that public policy considerations entitle its claims for cleanup costs to . . . priority, we acknowledge that Congress alone fixes priorities. Courts are not free to formulate their own rules of super or sub-priorities . . . .'"[222] If the *Jensen* court is correct, then Congress should clarify the status of environmental liabilities in the bankruptcy context. By so doing, Congress will encourage a uniform standard by which the federal courts can analyze the Bankruptcy Code's effect upon CERCLA and other environmental laws.

In light of the mounting number of hazardous sites requiring remedial attention and the increasing use of bankruptcy to restructure corporate debt (including debt incurred as a result of environmental violations), Congress has ample reason to afford CERCLA a priority status under the Code. First, bankruptcy should not lower the cost of noncompliance with CERCLA. The enormous cost of toxic cleanup provides incentive for industry to comply with the environmental laws and disciplines those who violate the laws. By withdrawing bankruptcy as a calculated option for corporate managers to evade the environmental laws, CERCLA's primary purpose—imposing liability for cleanup on those who pollute—will be sustained.

Second, bankruptcy's objective of providing a "fresh start" to viable businesses should not forgive illegal activity. Where industry has knowingly violated the environmental laws it should be held responsible. In addition, where pollution occurred before environmental regulations were in place, industry should be expected to bring hazardous sites into compliance with present legal standards. Reorganization through bankruptcy should allow a troubled business to face its past mistakes, not escape its legal obligations. Moreover, reorganization assumes that a debtor's

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222. *In re* Jensen, 127 B.R. at 33 (citation omitted) (quoting *In re* Dant & Russell, Inc., 853 F.2d 700, 709 (9th Cir. 1988)).

assets will achieve the maximum "social utility" if left in place, rather than dispersed into other activities through liquidation. But this assumption is misplaced if scarce assets must then be transferred from other activities to relieve the debtor of its environmental obligations. The fresh start objective succeeds when a debtor's reorganization provides a social benefit; it fails when that reorganization fosters a social liability.

Third, CERCLA remedies, including injunctions, should be given a priority status because the ill effects of a hazardous release potentially threaten the population at large, not merely a discrete class of business creditors. Admittedly, the business creditors ultimately will bear the cost of cleanup—through the reduced valuation of their claims—when the debtor's limited assets are allocated for a CERCLA response action. But it is precisely upon this class of creditors, who have deliberately sought to profit through a relationship with the debtor, that the burden of CERCLA cleanup should fall. Affording CERCLA a priority status in bankruptcy will encourage potential creditors to *regulate* those businesses that generate, transport, or dispose of hazardous substances. Potential creditors prudently will seek out those businesses that comply with the environmental laws, or risk the reduction or loss of their claims in bankruptcy court.

Finally, upholding CERCLA's strict liability scheme in bankruptcy is sound economics. The enormous expense of remedial action at a contaminated site far exceeds the cost of compliance with environmental regulations. New York's infamous Love Canal disaster provides an example of the economic waste that stems from the improper disposal of hazardous substances. As one commentator noted, "the Love Canal cleanup alone has cost the government more than $30 million, whereas proper disposal practices might have amounted to only $3 to $4 million at the time of disposal."[223]

Surely, the waste in human terms was even greater.

Michael I. Shaftel

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223. Ann M. Burkhart, *Lender/Owners and CERCLA: Title and Liability*, 25 HARV. J. ON LEGIS. 317, 318 (1988) (footnote omitted).