Part I

ARTICLES

A. The Effect of Bankruptcy on Obligations to Clean Up Contaminated Properties: Recent Developments and Open Issues Two Decades After *Kovacs* and *Midlantic*

By Joel M. Gross[1]

Introduction

Over the past quarter-century, an enormous amount of economic and legal resources have been devoted in the United States to the environmental risks posed by contaminated sites. The seminal event was the passage, in December 1980, of the federal Superfund law, called the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[2] CERCLA created both a federal mechanism for responding to a wide range of contaminated sites, most frequently under the direction of the United States Environmental Protection Agency ("EPA"), and also a broad liability scheme for the often massive costs of such response. Under that liability scheme, specified categories of persons who owned and operated the contaminated sites, or sent waste there, have strict, often joint and several liability, for the costs of clean up.

Much has happened since CERCLA was enacted. Many sites have been cleaned up under the Superfund program CERCLA created, and more await clean up.[3] There has been an avalanche of litigation, which has slowed in recent years as key legal issues have been decided and settlement rather than litigation has been viewed as increasingly prudent. CERCLA has been amended several times, once fairly

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[1]Joel M. Gross is a partner in the law firm of Arnold & Porter in Washington, D.C., where he is a member of the Firm's Environmental and Bankruptcy Practice Groups. From 1983-2000, he worked for the Environmental Enforcement Section of the United States Department of Justice. He served as Chief of that Section from 1995-2000. While at the Department of Justice, Mr. Gross was involved with the litigation of several of the cases discussed in this article.

[2]42 U.S.C. § 9601 et seq.

[3]As of the end of fiscal year 2000, EPA reported that it had taken 6400 removal actions, typically shorter-term actions to address more imminent threats. There were also 1450 sites on EPA's National Priorities List of the most serious sites in the country. Of these, the construction phase of clean up had been completed at 757 sites. At that time, 59 sites had been proposed for addition to the National Priorities List. http://www.epa.gov/superfund/action/process/mgmtrpt.htm.

comprehensively in 1986,[4] and in more piecemeal ways since then, including recently, to address perceived inequities or inefficiencies created by the statute. CERCLA has spawned a large number of state statutes, some modeled on CERCLA and some significantly different, to address contaminated sites. And CERCLA has affected many other areas of law. For example, commercial real estate transactions now routinely utilize environmental assessments so the parties can understand and address any liability risks associated with the property.[5]

Another area of law that has been significantly affected by CERCLA, and other laws addressing contaminated sites, is bankruptcy. From the early days of CERCLA's existence, there has been much litigation and commentary about how responsibility for contaminated properties would be affected by bankruptcy. The magnitude of litigation in this area is largely a result of the fact that neither of the principal statutes addresses the other. CERCLA does not deal with what happens when a liable party files for bankruptcy, and the Bankruptcy Code does not even refer to environmental claims. Because Congress has not addressed the wide range of issues relating to bankruptcy and contaminated properties, the courts have had to do so. But here too, the way in which this litigation has progressed has tended to encourage more litigation. In particular, the Supreme Court addressed bankruptcy/contaminated-site issues twice in the mid-1980s, issued decisions that raised more questions than they answered,[6] and has not come back to these issues in 17 years.

The result has been that while certain of the issues in this area have now been largely resolved through the voluminous litigation that has taken place, there remain several important open issues. This article, in addition to discussing several of the more resolved issues, will principally address two of the open ones: the extent to which injunctive-type obligations to clean up contaminated sites can be discharged in bankruptcy (discussed in Section III); and the extent to which abandonment of contaminated sites under Section 554 can be effective in Chapter 11 cases (Section IV). Before addressing these issues, the paper provides an overview of CERCLA (including some recent amendments intended to encourage revitalization of contaminated properties) and other contaminated site laws (Section 1), and discusses recent changes to the Bankruptcy Rules to require routine disclosure of information concerning environmental liabilities and contaminated sites (Section II).

I. An Overview of Contaminated Sites Law

It has been suggested that one of the reasons that there is so much confusion in the intersection of environmental law and bankruptcy law

[4]Superfund Amendments and Reauthorization Act, Pub. L. 99-499.

[5]See Allan Topol and Rebecca Snow, Superfund Law and Procedure, § 13.1 (1992).

[6]Ohio v. Kovacs, 469 U.S. 274 (1985); Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 1174 U.S. 494 (1996). Both of these decisions are discussed in this Article.

is that the scholars who write and the lawyers who practice in this area tend to be expert in one or the other of these two areas, but not generally both. Each area has its own language, and even when environmental lawyers and bankruptcy lawyers use the same word, it can mean very different things. "Discharge," for example, means something very different in bankruptcy law than it does in environmental law.

Because of the fact that those interested in these issues may be more familiar with one of the areas of law than the other, it has become almost customary for those writing in this area to provide a brief overview of one or the other the area of law, and this Section is that overview. Because this article is written for a bankruptcy publication, this Section contains a brief overview of CERCLA, including significant new amendments that may reduce the liability of certain purchasers of contaminated property. It also discussed briefly other laws addressing contaminated sites. Those already familiar with these subjects may wish to move directly to Section II.

A. CERCLA[7]

CERCLA was enacted in 1980 to allow the federal government to address comprehensively the threats to public health and the environmental from the historical (and continuing) disposal of toxic chemicals at locations around the country. Section 104 of CERCLA[8] gives EPA the authority to take response actions, using the Hazardous Substances Superfund,[9] to respond to releases and threatened releases of hazardous substances. The response actions must be consistent with the National Contingency Plan, essentially CERCLA's implementing regulations.[10] "Release" and "hazardous substances", both key concepts, are both defined broadly. "Release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, dumping or disposing into the environment."[11] "Hazardous substance" is defined to include substances identified under a number of other federal laws, including "hazardous wastes" under the Resource Conservation and Recovery Act, but it does not include petroleum.[12]

EPA's response actions at a site may take place over many years, and

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[7]For more extensive discussions about CERCLA, see Carole Ster Switzer and Lynn A. Bulan, Basic Practice Series, CERCLA (2002); Michael Gerrard, Environmental Law Practice Guide; Richard Mays, CERCLA Litigation Enforcement and Compliance (1993).

[8]42 U.S.C. § 9604.

[9]The Superfund was conceived and initially created as a trust fund, funded by special taxes on segments of industry. How the taxes work has been one of the most controversial issues in the history of Superfund. The taxing authority expired in 1995, and has not been reauthorized. Since then, EPA has utilized cost recoveries from liable parties and general appropriations.

[10]The National Contingency Plan is premulgated pursuant to 42 U.S.C. § 9605 and is codified at 40 CFR Part 300.

[11]42 U.S.C. § 9601(22).

[12]42 U.S.C. § 9601(14).

involve a number of different steps. EPA will perform removal actions,[13] typically shorter-term responses, to address more urgent threats, such as the threat of fire or explosion. If EPA determines that the site requires more long-term response, it will usually list the Site on its National Priorities List of the most serious sites in the country.[14] For sites on the National Priorities List, EPA will perform detailed studies-called remedial investigations and feasibility studies-to ascertain the full extent of the contamination and to explore and evaluate remedial alternatives.[15] Following the conclusion of these studies, and a public input process, EPA will select a remedial action[16] to be implemented at the site.[17] These remedies often involve massive construction projects at the cost of millions or tens of millions of dollars.[18] At large sites, remedial actions are often done in phases called operable units. The types of remedial actions EPA selects may range from massive excavation of contaminated soils, to attempts to address contaminated ground water through pumping and treating the water, to sometimes leaving contamination in place and putting elaborate covers over the site, to a myriad of other technologies. As mentioned above, implementing remedial action can take decades, often because it is very hard and slow to get contamination out of the ground. If the EPA's remedy allows contamination to remain on site, EPA is required to reevaluate the remedy every five years to make sure that it remains effective.[19]

CERCLA not only creates broad response authority; it also creates broad and extensive liability, reflecting the "polluter pays" principal underpinning of CERCLA. These liabilities are enforced in two ways. First, EPA can clean up a site, and then recover the costs of its clean up under Section 107 of CERCLA[20] from four specified categories of liable parties (often referred to as "PRPs" or potentially responsible parties). The four are the present owner and operator of a facility from which there is a release of hazardous substance, past owners and operators of such facilities at the time hazardous substances were disposed of there, generators of hazardous substances who arranged for disposal of their wastes at the facility, and certain transporters who took wastes to the site.[21] This liability is strict: it does not matter whether any applicable

[13]"Removal" is defined in 42 U.S.C. § 9601(23).

[14]See 42 U.S.C. § 9605.

[15]40 CFR § 300.430(a)(2).

[16]"Remedial" is defined in 42 U.S.C. § 9601(24).

[17]40 CFR § 300.430(f).

[18]For example, at one Superfund site in California, the Iron Mountain Mine Site, EPA has estimated that future clean-up costs could approach a billion dollars and the first phase of clean up will take 30 years. http://www.epa.gov/region09/features/ironmountain.html

[19]42 U.S.C. § 9621(c).

[20]42 U.S.C. § 9607(a).

[21]42 U.S.C. § 9607(a).

laws or regulations were violated.[22] It is subject to very limited defenses set forth in Section 107(b):[23] an otherwise liable party would have to show that the releases and resulting damages were caused solely by an act of God, an act of war, or acts of contractually unrelated third-parties, or some combination thereof. Liable parties are liable for response costs incurred by EPA or other governmental and private parties, and damages to natural resources.[24]

The second way in which liability under CERCLA can arise is through EPA's requiring liable parties to perform clean up themselves. EPA does not have to clean up itself and then cost recover. It can, and often does, issue orders under Section 106 of CERCLA[25] to require liable parties to undertake clean up. Section 106 allows EPA to issue an order whenever it finds that as a result of releases at a site "there may be an imminent and substantial endangerment to the public health or welfare or the environment."[26] EPA has interpreted the imminent and substantial endangerment requirement broadly, and typically finds that such an endangerment exists at almost all sites requiring extensive response action.[27]

The issuance of clean up orders to PRPs has been favored by EPA, as part of what it calls "enforcement first,"[28] because it avoids the Agency's having to utilize scarce Superfund resources in the first instance. PRPs often prefer to do the clean up themselves, because they think they can do it cheaper than the government. Often, rather than having EPA issue an order requiring clean up, they will enter into a consent decree, approved by a federal district court judge, under which they agree to

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[22]CERCLA itself does not use the word "strict" but rather incorporates the standard of liability under a provision of the Clean Water Act that had been interpreted to impose strict liability. See 42 U.S.C. § 9601(32). Courts have uniformly interpreted CERCLA as imposing strict liability. See Allan Topol and Rebecca Snow, Superfund Law and Practice, § 4.2; United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988).

[23]42 U.S.C. § 9607(b).

[24]42 U.S.C. § 9607(a).

[25]42 U.S.C. § 9606(a).

[26]42 U.S.C. § 9606(a).

[27]See EPA OSWER Directive Number 9833.0-1a, Guidance on CERCLA Section 106 Unilateral Administrative Orders for Remedial Design and Remedial Action, dated March 13, 1990, http://www.epa.gov/Compliance/resources/policies/clean-up/superfund/cerc106-uao-rpt.pdf. EPA states at pages 9-10 of this guidance that "[a]n endangerment is a threatened or potential harm. An endangerment is imminent if the conditions that give rise to it are present, even though the harm might not be realized for years. An endangerment is substantial if there is reasonable cause to believe that someone or something may be exposed to a risk of harm from a release or threatened release. This statutory element has been judicially interpreted to require only a limited showing. The mere threat of harm or potential harm to public health, public welfare, or the environment is sufficient. The endangerment need not be immediate to be imminent."

[28]EPA recently reaffirmed its commitment to the "enforcement first" approach of seeking to have PRPs perform clean up. Memorandum from John Peter Suarez and Marianne Lamont Horinko, Enforcement First for Remedial Action at Superfund Sites, September 20, 2002. This memorandum explained that the "policy promotes the [polluter pays] principle and helps to conserve the resources of the Hazardous Substance Trust Fund (Fund) for the clean-up of those sites where viable responsible parties do not exist."

implement clean up.[29]

It is often the case that there are multiple parties, sometimes very numerous, liable for a particular site. In such situations EPA usually asserts that the liability is joint and several, and the courts for the most part have supported EPA's position.[30] Liable parties are explicitly authorized to seek contribution from other liable parties.[31]

One issue that has received a great deal of attention is the liability of someone who purchases contaminated property after is has already been contaminated. It has generally been the case that such purchasers are liable for the preexisting contamination. They cannot assert the defense that the harm was caused by prior owners because they are contractually related to everyone in their chain of title.[32] CERCLA has had, since the 1986 SARA amendment, an "innocent landowner" provision, which might help purchasers avoid liability, but it could only be utilized if the purchaser bought without knowledge of the contamination.[33] Since today virtually all commercial purchasers of real estate routinely do environmental assessments before they purchase, it has been difficult for purchasers to qualify as innocent landowners.

To address this concern, and to encourage the redevelopment of contaminated properties, Congress recently created a new defense to liability called the "bona fide prospective purchaser" defense.[34] The Brownfields Revitalization and Environmental Restoration Act of 2001[35] creates this defense, which can be utilized even if the purchaser knew about the contamination when it purchased. To establish this defense, a purchaser would need to show that it had "made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial standards and practices." The purchaser must not have a family or business affiliation with any PRP for the facility and all disposal must have occurred before it acquired the property.[36] The purchaser must meet a number of other criteria including, among others providing all legally required notices for the

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[29]In response to criticism of settlements that EPA entered into during the early years of CERCLA, Congress enacted in 1986 a new provision, Section 122, 42 U.S.C. § 9622, which governs how EPA enters into settlements. Section 122(d) requires settlements for implementation of remedial actions to be set forth in judicial consent decrees.

[30]See generally, Allan Topol and Rebecca Snow, Superfund Law and Procedure § 4.4; John Hyson, "Fairness" and Joint and Several Liability in Government Cost Recovery Actions Under CERCLA, 21 Harv. Env. L.R. 137 (1997).

[31]42 U.S.C. § 9613(g).

[32]A "contractual relationship," which forecloses an argument that the other party to the relationship caused the releases, includes "instruments transferring title or possession." 42 U.S.C. § 101(35).

[33]42 U.S.C. § 9601(35)(A).

[34]"Bona fide prospective purchaser" is defined in 42 U.S.C. § 9601(40). Section 107(r) of CERCLA, 42 U.S.C. § 9607(r), provides that a bona fide prospective purchaser will not be liable as an owner or operator, although in some situations EPA may get a lien on the property being purchased.

[35]H.R. 2869, 107th Cong. (2001).

[36]H.R. 2869, 107th Cong. (2001).

property, taking appropriate care at the facility to stop continuing releases, preventing future releases, and preventing exposure to previous releases, and providing cooperation, assistance, and access to persons taking response actions at the facility.[37]

B. Other Statutes Dealing with Contaminated Sites

Although CERCLA is the most well known and most widely applicable statue dealing with contaminated sites, it is not the only one. Many other federal and state statues deal with contaminated sites. At the federal level, another important statute that addresses contaminated sites is the Resource Conservation and Recovery Act ("RCRA"),[38] which deals primarily with the regulation of ongoing generation, treatment, storage and disposal of hazardous wastes, through standards intended to insure that no new Superfund sites are created. RCRA contains a number of mechanisms under which EPA can require private parties to clean up contaminated sites. EPA can require that "corrective action" be taken at facilities subject to RCRA's regulatory scheme.[39] And it can take action against specified liable parties (owners, operators, generators and transporters) whenever the "handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to public health or the environment."[40] Unlike CERCLA, RCRA for the most part does not give EPA the authority to undertake clean up actions itself and then seek cost recovery. Many other federal environmental statues have provisions that create clean up liabilities in specified situations.[41]

Almost all states have now enacted laws relating to investigation and clean up of hazardous waste sites, and most contaminated sites are now cleaned up under State programs.[42] Although these laws differ greatly from one to the next, they typically provide both authority for the State to undertake investigation and clean up (although the funds for that are often limited) and also impose liability on responsible parties. Some liability schemes are modeled on CERCLA's, some are broader, and some are narrower. States that perform clean up often have the option

[37]EPA has issued "Interim Guidance" addressing the elements of the bona fide prospective purchaser defense. See Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability, March 6, 2003, at http://http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf

[38]42 U.S.C. § 6901 et seq.

[39]42 U.S.C. § 6924(u), 6928(h).

[40]42 U.S.C. § 6973(a).

[41]See e.g., Section 311 of the Clean Water Act, 33 U.S.C. § 1321 (pertaining to discharges of oil and hazardous substances to waters of the United States); Section 504 of the Clean Water Act, 33 U.S.C. § 1364 (dealing with endangerments from water pollution); Section 7 of the Toxic Substances Control Act, 15 U.S.C. § 2606 (authorizing relief for an imminently hazardous chemical substance or mixture). See generally Michael Gerrard, Brownfield Law and Practice, § 5.101.

[42]See Michael Gerrard, Brownfield Law and Practice: The Clean-up and Redevelopment of Contaminated Land, § 5.02.

of seeking cost recovery under CERCLA or under their state statute.

II. Amendments to the Bankruptcy Rules: New Environmental Disclosure Requirements

Although Congress has not enacted any amendments to the Bankruptcy Code or CERCLA to address how contaminated sites should be treated in and affected by bankruptcy, there have been recent amendments to the Bankruptcy Rules that for the first time impose fairly extensive environmental disclosure requirements on all bankruptcy debtors. These requirements will necessitate debtors' evaluation of their contaminated site liabilities and disclosing them during the early part of the case. These changes, which were in response to governmental proposals, come in two parts.

The first is Exhibit C to the Voluntary Petition, which became effective in September 2001.[43] A debtor is now required to prepare Exhibit C if "to the best of the debtor's knowledge, the debtor owns or has possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety."[44] If there are such dangerous properties, the debtor is required to identify them, and describe the dangerous condition presented. This requirement is not limited to environmental dangers, although it is likely to come up most often in the environmental context.

The second new requirement is part of Official Form 7, the Statement of Financial Affairs, which all debtors are required to prepare within 15 days after the filing of the petition.[45] Question 17 is entitled Environmental Information and requires a debtor to list every site for which it has received notice by a governmental unit that it may have environmental liability, every site for which the debtor has provided notice to a governmental unit of a release of a Hazardous Material (a broadly defined term), and every judicial or administrative proceeding under any environmental law that the debtor has been a party to.[46]

Interestingly, Question 17 only requires by its terms that the debtor disclose information that either has been provided to it previously by the government, or that it has previously provided to the government,

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[43]Fed. R. Bankr. P., Official Form No. 1.

[44]The "imminent and identifiable harm" standard comes from the Supreme Court's Midlantic National Bank decision discussed in Section IV.

[45]See Fed. R. Bankr. P. 1007(a)(1) and (c).

[46]Question 17 after broadly defining Environmental Law, Site and Hazardous Material, contains these questions: "(1) List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law. (2) List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice. (3) List all judicial or administrative proceedings, including settlements and orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number."

or about ongoing litigation. There is essentially no new and independent requirement that the debtor disclose all of its contaminated sites. If a contaminated site presents an imminent and identifiable harm, it will have been disclosed on Exhibit C to the petition. But if the contaminated site has not previously been disclosed to the government or identified by the government, if there is no pending litigation or administrative proceeding over it, and if it does nor present an imminent danger, there would appear to be no disclosure obligations created by these new bankruptcy requirements.[47]

That said, a debtor will often want to make the broadest possible environmental disclosure to the government to bolster its argument that its environmental obligations should be discharged. This issue is discussed further in the next Section.

III. Discharge of Injunctive Type-Clean up Obligations

Given the broad and potentially costly liability imposed by CERCLA and other statutes dealing with contaminated sites, a bankruptcy debtor with contaminated site liability has a strong interest in having that liability discharged in its bankruptcy (which in this context is typically a Chapter 11 proceeding). As discussed below, it is likely that such liability can be discharged to the extent that the government or a private party seeks reimbursement of clean up costs incurred post-bankruptcy on property no longer owned by the reorganized debtor, and that the claim was within the parties' fair contemplation during the bankruptcy. Further, it is likely that the debtor's clean up liability will *not* be discharged if the debtor continues to own the contaminated site post-bankruptcy.

The law on both of these issues appears fairly well settled, although arguments could be made to the contrary. These issued are discussed in Parts A and B, respectively.

The harder question, and the primary focus of this section, relates to attempts by the government to require, through an administrative order or a judicial injunction, a reorganized debtor to clean up itself property it no longer owns. Can such an obligation be discharged? This issue turn on whether the clean up obligation is considered a "claim," as defined in the Bankruptcy Code, and on this issue the law is far from clear. This issue is discussed in Part C.

A. Discharge of Cost Recovery Claims

One of the core provisions of Chapter 11 of the Bankruptcy Code declares that the confirmation of a plan of reorganization "discharges the debtor from any debt that arose before the date of such confirmation."[48] This discharge is quite broad and, in the case of

[47]There are, however, various requirements of federal and state law that, under specified conditions, could require such disclosure. See e.g., CERCLA § 103, 42 U.S.C. § 9603.

[48]11 U.S.C. § 1141(d)(1).

corporate debtors, not subject to the exceptions to discharge that apply to individual debtors.[49] In determining whether an obligation is discharged, the two key inquiries are whether the obligation is a "debt" and whether it "arose before the date" of confirmation.

"Debt" is defined as "liability on a claim."[50] "Claim" thus becomes the pivotal defined term with respect to discharge, and it is defined very broadly as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, 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 is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured.[51]

To the extent that the debtor's obligation is to reimburse the government or a private party for clean up costs that have been incurred by the government or the private party, such an obligation is certainly a claim because the government or private party has a "right to payment," it has the right to be reimbursed for costs it has incurred.[52]

The sometimes more difficult analysis in connection with cost recovery claims will be the temporal issue of whether the claim arose prior to or after plan confirmation. If the clean up costs were already incurred pre-confirmation, there should be no question but that the cost reimbursement obligation was a pre-confirmation claim and discharged. What if, however, the contaminated site in question is in need of clean up at the time of confirmation, but the clean up does not take place until later? Put another way, when does a cost recovery claim under CERCLA or other statutes arise for bankruptcy purposes?

This timing issue was at one time subject to much dispute. Debtors, wanting an early trigger and a broad discharge, typically argued that the claim arose at the time of their acts that gave rise to liability. If the liability arose from waste disposal, then a claim existed for bankruptcy purposes when the disposal had taken place. If the clean up had not taken place, that might make the claim contingent (on future clean up) but the Bankruptcy Code was clear (in the above-quoted definition of "claim") that contingency alone did not mean there was no claim.

The government, in contrast, wanted a much later trigger and a nar-

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[49]See 11 U.S.C. § 523. A Chapter 11 discharge is only subject to the Section 523 exceptions in the case of an "individual debtor." 11 U.S.C. § 1141(d)(2).

[50]11 U.S.C. § 101(12).

[51]11 U.S.C. § 101(5).

[52]See, e.g., CERCLA 107(a), 42 U.S.C. 9607(a).

rower discharge, and so it initially argued that a cost recovery claim only arose when the costs seeking to be recovered had been incurred. This approach had the benefit of avoiding the need for the Bankruptcy Court to predict what the future clean up costs might at a site so as to quantify a claim, but it also potentially allowed the government to determine the dischargeability of its own cost recovery claim by slowing down the pace of its clean up.

Both of these arguments-with the debtor arguing for the earliest possible trigger and the government arguing for the latest-were made in the first LTV bankruptcy proceeding, and the Second Circuit (in a case referred to as *Chateaugay*), not surprisingly, chose a trigger between the two, although closer to the one the debtor wanted.[53] The Court held that a "claim" arose for bankruptcy purposes when there was a release of hazardous substances at the site, meaning not when the site became contaminated but when it started to pose an environmental risk. This standard was subject to criticism on the basis that it was very difficult to apply — it might be impossible years after the fact to know when a site started to have releases-and was unrelated to what the parties knew at the time of the bankruptcy.[54]

Most courts have not adopted the Second Circuit "release" trigger, and instead have adopted an approach that a clean up claim will exist if it was within the "fair contemplation" of the parties during the bankruptcy.[55] In other words, if the contaminated site is already on EPA's radar screen at the time of the bankruptcy-for example if it is listed on the debtors Statement of Financial Affairs under Question 17-it will likely be deemed to have arisen pre-confirmation and be discharged. This standard has met with fairly wide acceptance,[56] and the federal government no longer argues for an earlier trigger.

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[53]In re Chateaugay Corp, 944 F.2d 997 (2d Cir. 1991).

[54]See e.g., In re National Gypsum Co., 139 B.R. 397, 407 (N.D. Tex. 1992).

[55]This standard was first utilized in National Gypsum Co., 139 B.R. 397, 407 (N.D. Tex. 1992). In that case, the District Court rejected the Second Circuit "release" trigger explaining that it was "not willing to favor the Code's objective of a 'fresh start' over CERCLA's objective of environmental clean-up to the extent exhibited by Chateaugay." National Gypsum, 139 B.R. 397, 407. Instead the Court adopted a "fair contemplation" standard. The Court held that future response costs "based on pre-petition conduct that can be fairly contemplated by the parties at the time of the Debtors' bankruptcy are claims under the Code." National Gypsum, 139 B.R. 397, 1109. The Court enumerated factors that would guide the standard's application. These included knowledge by the parties of a contaminated site for which the debtor may be liable, listing of the site on EPA's National Priorities List, notification by EPA to the debtor of potential liability, "commencement of investigation and clean-up activities, and incurrence of response costs." National Gypsum, 139 B.R. 397, 408.

[56]Cases that have utilized a "fair contemplation" standard or a close variant include In re Jensen, 995 F.2d 925 (9th Cir. 1993); In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 974 F.2d 775 (7th Cir. 1992) ("Chicago I"); In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 3 F.3d 300 (7th Cir. 1993); AM International, Inc. v. Datacard Corp., 106 F.3d 1342 (7th Cir. 1997); and In re Crystal Oil Co. v. Louisiana Department of Environmental Analysis, 158 F.3d 291, 296 (5th Cir. 1998). In Crystal Oil, the Fifth Circuit discussed various articulations of appropriate trigger standards, and adopted

The "fair contemplation" standard makes much sense in this context. It allows the bankruptcy discharge to protect the reorganized debtor from a broad class of clean up claims that the parties, including the government, were cognizant of at the time of the bankruptcy. If those claims were excepted from discharge, that could circumvent the fresh start goals of Chapter 11. But by limiting to discharge to claims within the parties' fair contemplation, it avoids the possibility of claims being discharged that could not fairly have been addressed during the bankruptcy. And it encourages the debtor to make full disclosure of what it knows about contaminated sites during the bankruptcy proceeding.

B. Contaminated Property Owned by a Reorganized Debtor

A bankruptcy debtor may have potential cost recovery liability for a contaminated site it does not own. For example, under CERCLA the debtor may be liable as the former owner or operator of the contaminated site at the time of disposal of hazardous substances, or as a generator which arranged for disposal if its wastes at the site. In such a situation, the debtor's cost recovery liability will likely be discharged if it was within the parties' fair contemplation at the time of the bankruptcy. But what if the debtor still owns the property and will continue to do so after it emerges from bankruptcy?

There are two reasons why a reorganizing debtor would continue to own property that it has reason to believe is contaminated. First, the property may be necessary for continued operations. A debtor whose business revolves around the operation of a factory will need to continue to own that factory even it sits on contaminated land. Second, a reorganizing debtor may not be able to easily rid itself of contaminated property.[57] If the property is sufficiently contaminated, and clean up will be more expensive that the property is worth, it just may not be possible to find anyone to take title to the property, and the debtor may find itself emerging from bankruptcy still owning the contaminated property.[58]

If a reorganizing debtor does continue to own contaminated property,

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the Seventh Circuit standard from Chicago I, namely that a claim will arise when "a potential. . . claimant can tie the bankruptcy debtor to a known release of a hazardous substance." Crystal Oil, 158 F.3d 291, 296, quoting Chicago I, 974 F.2d 775, 786. For a further discussion of this issue, see Karyn Pepper and Alison Zern, The Bottomless Pit: The Struggle to Achieve Judicial Consistency in the Application of CERCLA in Bankruptcy Proceedings, 687 PLI/Comm 253 (1994), Joel Gross and Suzanne Lacampagne, Bankruptcy Estimation of CERCLA claims, 12 Va. Envtl. L.J. 235 (1993).

[57]For a further discussion of the difficulties of divesting contaminated properties, see Michael Gerrard, Brownfield Law and Practice, The Clean up and Redevelopment of Contaminated Land, Chapter 21.

[58]Another possible avenue for a debtor seeking to divest itself of contaminated property is to seek to abandon the property under Section 554 of the Bankruptcy code. As discussed in Section IV of this Article, that is unlikely to be a successful strategy in a Chapter 11 case.

it is likely to obtain little benefit from its discharge. That is because the discharge only covers claims arising *prior* to confirmation, and the government and other claimants will argue that the new claim will arise, under CERCLA and similar statutes, from the reorganized debtor's continued ownership of the property after confirmation. Inasmuch as ownership alone is sufficient under CERCLA and similar statutes to create liability, the reorganized debtor will likely be liable solely based on that continuing ownership irrespective of any prior discharge.[59] And the reorganized debtor cannot argue that it is a "bona fide prospective purchaser" under the new amendments to CERCLA, because that defense is not available to an entity that is "the result of a reorganization of a business entity that was potentially liable."[60]

C. Injunctive-type Clean up Claims for Non-Owned Properties

One of the most confused issues relating to the effect of bankruptcy on contaminated properties has been the issue of whether injunctive type clean up obligations are "claims" that can be discharged. Before turning to the caselaw on this issue, which turns on whether the obligation will be viewed as giving rise to a "right to payment" and meeting the statutory definition of "claim," it is helpful to summarize how both sides approach this issue.[61]

Debtors typically will argue that clean ups cost money, that debtors do not do clean ups themselves, especially where they do not even own the property, but hire and pay other people to do them, and that the government often has the option of doing the clean up and then seeking reimbursement. Why, debtors ask, should the dischargeability of a claim depend on the option the government chooses to clean up the contaminated site? Why will the claim be deemed to have been discharged if the

[59]In re CMC Heartlands Partners, 966 F.2d 1143 (7th Cir. 1992) is the lead case on this issue. The debtor was a railroad that owned a property that had been used as a disposal location, and continued to own the property post-bankruptcy. EPA sought to require the reorganized debtor to clean-up the property, the debtor argued that the claim had been discharged, and the Seventh Circuit held that it had not been discharged because the continued ownership of the property by the reorganized debtor was sufficient to give rise to liability. The Court stated that "a statutory obligation attached to current ownership of the land survives bankruptcy." CMC Heartlands, 966 F.2d 1143, 1147. Accord In re Industrial Salvage, Inc., 196 B.R. 784, 789-90 (S.D. Ill. 1996); In re Flood, 234 B.R. 286 (Bankr. W.D.N.Y. 1999).

[60]42 U.S.C. § 9601 (40)(H).

[61]It is also helpful to keep in mind that there are cases that deal with the related issue of whether clean-up orders during the Chapter 11 proceeding violate the automatic stay of Section 362. E.g., Penn Terra Ltd. v. Dept. of Environmental Resources, 733 F.2d 267 (3d Cir. 1984); In re Thomas Solvent Co., 44 B.R. 83 (Bankr. W.D. Mich. 1984). That stay is subject to the well-known exceptions in Section 362(b)(4) for exercise of governmental policy or regulatory power. And that exception is in turn subject to an exception for enforcement of "money judgments." In other words, a clean-up order will be stayed if it is characterized as a money judgment. The analysis of what is a "money judgment" for automatic stay purposes is similar to that of "right to payment" for discharge purposes. But the standards are not the same, and the existence of two similar, but different standards, has contributed to confusion in this area.

government later does the clean up itself, and seeks cost recovery, but not if the government issues an order requiring the reorganized debtor to do the clean up? Moreover, debtors argue that the discharge they receive will be substantially undermined, and the promised fresh start eroded, if the reorganized debtor can be required to spend large amounts of money to clean up someone else's property for liabilities that all arose pre-confirmation (and most often pre-petition). And debtors argue that if the specter of a large clean-up obligation hangs over them, they may have no choice but to liquidate, which will not in any way help the government's clean-up efforts: when the government gets around to issuing its clean-up order, no entity will be left to respond it.

In contrast, the government argues that the obligation to clean up contaminated sites that a debtor may have contributed to is an equitable obligation, and the debtor cannot simply satisfy it by paying money. Often, outside of bankruptcy, recipients of clean-up orders might well prefer to just write a check, and not have to concern themselves with the actual clean up. But they do not have that option. And neither, the government asserts, should reorganized debtors.

Moreover, the government asserts that it often does not have the option of doing the clean up itself, and seeking cost recovery. That option is dependent on the existence of a governmental clean-up fund, and the availability of money in that fund. And the government may sometimes not even have the legal authority to do the clean up itself. If it does not have the authority, then characterizing a clean-up obligation as a claim would mean that the government could file a proof of claim in the bankruptcy, receive a recovery, probably discounted, with other creditors, and then have no ability to use that money to effectuate clean up.

This issue was considered 18 years ago in one of the two relevant Supreme Court decisions. In *Ohio v. Kovacs*,[62] Ohio had obtained a clean-up order against William Kovacs, the CEO and stockholder of a corporation that had operated an industrial and hazardous waste disposal facility. The State obtained a state court injunction requiring Kovacs, among other things, to remove specified wastes from the property. Kovacs failed to comply, and the State had a receiver appointed to clean up the Site. Before the receiver could finish his work, Kovacs filed for personal bankruptcy. The State sought a determination in the bankruptcy that Kovacs' clean-up obligation was not a "claim" and could therefore not be discharged. The Supreme Court disagreed and found that the obligation was a "claim" and could be discharged.

The Supreme Court focused on the three key phrases in the definition of claim: "equitable remedy, " "breach of performance," and "right to payment," and observed that none were defined and that there was sparse legislative history on what they meant. The Court therefore focused on the nature of the obligation Ohio was seeking to enforce, and found that the obligation was a monetary one. Ohio was in actuality

[62]Ohio v. Kovacs, 469 U.S. 274 (1985).

looking to Kovacs to pay money, not to clean up the site himself. "[W]ith the receiver in control of the site. . . the clean up order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy."[63]

The Court in *Kovacs* emphasized what it was not deciding. It stated, in language that has been quoted often, that it did "not question that anyone in possession of the Site. . . must comply with the environmental laws of the State of Ohio"[64] and may neither maintain a nuisance nor "refuse to remove the source of such conditions."[65] Thus, *Kovacs* can be read as turning on the fact that Kovacs was not going to be in possession of the contaminated site post-bankruptcy, and as such his obligation was viewed as monetary only. But *Kovacs* did not provide clear guidance on when clean-up orders would be considered "claims" and when they would not be.

One of the first cases to consider the reach and limits of *Kovacs* was the 1988 decision of the United States Court of Appeals for Sixth Circuit in *United States v. Whizco, Inc.*,[66] which did not involve a hazardous waste site, but rather an abandoned coal mine. The United States Department of Interior sought to require Donavan Lueking, the sole shareholder of a corporation that had operated the coal mine, to reclaim the mine. Subsequent to operating the mine, Lueking has been through Chapter 7 bankruptcy, and argued that his reclamation obligation had been discharged. The government argued that it was not seeking money, that it "was seeking a purely equitable remedy" and that it did not have a legal right to payment.[67] The Court rejected the government's argument. It focused on the fact that Lueking did not have the physical ability to reclaim the mine himself, but would have to hire, and pay money to, others to perform the reclamation. "[W]hen we look at the substance of what the [government] seeks, rather than the form of the relief sought, we wee that the [government] is really seeking payment."[68] To the extent that Lueking had to spend money to comply, the claim was discharged. But the court also noted that if in the future Lueking were somehow to come by the equipment needed to reclaim the mine himself, he could be required to do so.[69]

Thus, in *Whizco*, the court focused on the question of whether the clean-up order would require the expenditure of money. It was also a case where the debtor did not have possession or ownership of the property to be reclaimed. That said, the Court's distinction between what

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[63]Kovacs, 469 U.S. 274, 285

[64]The Court relied in this regard on 28 U.S.C. § 959(b) which requires a trustee or debtor in possession to "manage and operate the property in his possession according to the requirements of the valid laws of the State in which such property is located."

[65]Kovacs, 469 U.S. 274, 285.

[66]U.S. v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988).

[67]Whizco, 841 F.2d 147, 150.

[68]Whizco, 841 F.2d 147.

[69]Whizco, 841 F.2d 147, 151.

Lueking could do himself and what he had to pay others to do would be hard to apply to a corporate debtor, which can only act through paying people — employees or contractors — to do things. Would there be a distinction between the situations where the corporation could perform a clean up through its own employees and where it would have to pay outside contractors?[70]

The issue of whether clean-up orders are "claims" was addressed again in *Chateaugay*,[71] in which the Second Circuit considered whether potential future clean-up orders that might be issued under CERCLA by EPA post-bankruptcy were "claims" that would have been discharged. The Second Circuit's decision on this point is confusing, to say the least, and it is important to keep in mind that the Court was not addressing any specific clean-up orders, but was rather providing guidance on which potential future clean-up orders would be "claims." The Court focused on the dual aspects of clean-up orders: "removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes."[72] The Court explained that if all EPA were seeking was to remove accumulated wastes, that would be viewed as a claim because CERCLA gives EPA the power to the do the clean up itself and sue for response costs. But to the extent the order seeks to stop ongoing pollution from the wastes, it was not a "claim." The Court explained:

> Since 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 to payment and is for that reason not a "claim."[73]

The Court explicitly recognized that "most environmental injunctions will fall on the non-'claim' side of the line."[74]

Several observations can be made about this analysis in *Chateaugay*. First, the distinction between removing wastes and stopping ongoing pollution is a hard one to follow. The reason that EPA or other governmental agencies seek to have wastes removed is to stop ongoing pollution from those wastes, or the threat of such pollution. If there were no threat from the wastes, there would be no reason to remove them. The Court appeared to recognize this fact by its statement that, under its analysis, most clean-up orders would not be "claims." Second, it is unclear the extent to which the analysis in *Chateaugay* contemplated a situation where the debtor owns the contaminated site, although the Court does suggest that it is talking about debtor-owned

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[70]The holding in Whizco was explicitly rejected in another coal reclamation case. United States v. Hubler, 117 B.R. 160 (W.D. Pa. 1990), aff'd without opinion, 928 F.2d 1131 (3d Cir. 1991).

[71]In re Chateaugay, 944 F.2d 997 (2d Cir. 1991).

[72]Chateaugay, 944 F.2d 997, 1008.

[73]Chateaugay, 944 F.2d 997, 1008.

[74]Chateaugay, 944 F.2d 997.

sites.[75] And third, to the extent it deemed any clean-up orders dischargeable, the Court's analysis seemed premised on the fact that EPA could have done the clean ups itself and sued under CERCLA for cost recovery. If the government did not have that authority, the analysis would apparently have been different.

Two years after *Chateaugay*, the Third Circuit entered the fray on this issue in the *Torwico Electronics* case.[76] As opposed to *Chateaugay*, which involved hypothetical future orders under CERCLA, *Torwico Electronics* involved an actual clean up order issued under State law, and issued to a debtor that did not own the property to be cleaned up.

Torwico Electronics had, until 1985, conducted a manufacturing business at a facility it leased from the facility's owner. In 1985 it moved to a new location. In 1989, the company filed for chapter 11 bankruptcy. The next month, the New Jersey Department of Environmental Protection and Energy ("NJDEPE") inspected the formerly leased facility and found a pit containing hazardous wastes, which wastes were allegedly moving toward local waters. NJDEPE did not file a proof of claim by the established bar date in the bankruptcy, but instead issued an order directing Torwico to clean up the pit. The Order self-servingly noted that its obligations were not intended to constitute a "debt, damage claim, penalty or other civil action which should be limited or discharged in a bankruptcy proceeding."[77] Torwico and NJDEPE then proceeded to litigate the issue of whether the clean up order issued by the State constituted a "claim."

Torwico argued that the clean up order was a "claim" under *Kovacs* and emphasized the fact that, like in *Kovacs*, it was not in possession of the contaminated property, and therefore the *Kovacs* admonition that one in possession of property could not refuse to clean it up did not apply. The State argued that it was not seeking a monetary payment at all but rather "to remedy ongoing pollution by forcing Torwico to clean up the site."[78]

The Third Circuit agreed with the State and found that the clean up

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[75]The Court of Appeals noted that the Government had understood the District Court's opinion being appealed from 112 B.R. 513 (S.D.N.Y. 1990), which was affirmed, as leaving "unaffected by discharge all injunction ordering the estate 'to clean up its property.'" Chateaugay, 944 F.2d 997, 1001, quoting Reply Brief for United States. Later in its decision, the Court discussed the Supreme Court's Kovacs decision in explaining why it was rejecting an alternative approach that would have characterized as non-"claims" only those injunctions that sought to stop activities that add to pollution, while characterizing as "claims" injunction that seek to clean up hazardous substances previously deposited. The Court of Appeals said it was rejecting this alternative approach because "[i]t is difficult to understand how any injunction directing a property owner to remedy ongoing pollution could be a dischargeable 'claim' if, as Kovacs instructs, the owner 'may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions." Chateaugay, 944 F.2d 997, 1009 (emphasis added), quoting 469 U.S. at 285.

[76]In re Torwico Electronics, Inc., 8 F.3d 146, 24 Bankr. Ct. Dec. (CRR) 1394, 30 Collier Bankr. Cas. 2d (MB) 86, 37 Env't. Rep. Cas. (BNA) 1809, Bankr. L. Rep. (CCH) ¶ 75487, 24 Envtl. L. Rep. 20016 (3d Cir. 1993).

[77]Torwico Electronics, 8 F.3d 146, 148.

[78]Torwico Electronics, 8 F.3d 146, 149.

order was not a "claim" even though it required the expenditure of money. The Court relied heavily on the analysis in *Chateaugay* and held that the State's Order was addressing an ongoing threat. It explained that "[t]he state has no 'right to payment' here. What is has is a right to force the debtor to comply with applicable environmental laws by remedying an existing hazard."[79]

The Court addressed Torwico's argument that it did not have possession of the property and explained that Torwico had access to the site, the State had not performed any clean up, that Torwico as a generator of hazardous wastes had responsibility under State law for those wastes, and was still responsible for the nuisance it had created. The Court noted that the order was issued under a statutory section that did not allow the state to perform the clean up and cost recover. Torwico therefore did not have the option "to pay for the right to allow its wastes to continue to seep into the environment."[80] Finally, the Court observed that since Torwico did not own the land, its obligations were not ones that ran with the land; rather "they run with the waste."[81]

Like *Kovacs* and *Chateaugay*, *Torwico* left many questions unanswered. First, under what conditions would a clean up order ever be considered a claim? Again, almost all clean-up orders are issued to stop ongoing pollution emanating from the contamination that is to be cleaned up. And if the case turned on the fact that Torwico could obtain access to the contaminated property to do the clean up, any governmental authority issuing a clean-up order could satisfy this concern by also ordering the property owner to provide such access. These questions aside, *Torwico* is probably the single most helpful case to the government when dealing with contaminated sites and bankruptcy, because it strongly supports the proposition that clean-up orders are not dischargeable obligations. And for that reason, it has been widely criticized.[82]

There have been other decisions addressing the issue of when a clean-up order is a "claim." The common thread of those decisions is that there is no common thread. Some courts look at costly clean-up orders and see "rights to payment," other courts see nothing of the

[79]Torwico Electronics, 8 F.3d 146, 150.

[80]Torwico Electronics, 8 F.3d 146, 151 n.6.

[81]Torwico Electronics, 8 F.3d 146.

[82]For example, Professor Kathryn Heidt, who has written widely in this area and published a treatise entitled Environmental Obligations in Bankruptcy, submitted an amicus curiae brief on her own behalf to the Supreme Court in support of Torwico's petition for certiorari. In that brief, Professor Heidt asserted (at p. 18) that the Third Circuit's decision "disregards the express provisions of the Bankruptcy Code. This rule now in effect in the third circuit (clean-up obligation are not 'claims') will apply to deny the individual debtor a fresh start and to deny a corporation that does reorganize the ability to effectively reorganize." She also argued that the effect of the decision was "to require that assets of the estate be used to satisfy the government's obligation first, before all other obligations." (Brief at 19). The Supreme Court denied the petition for certiorari. See also Marcia Goldstein and Debra Dandeneau, The Treatment of Environmental Claims in Bankruptcy Cases, SE 71 ALI-ABA 449, 490 (2000) ("The Torwico decision runs completely counter to the Supreme Court's decision in Kovacs and undermines the Bankruptcy Code's fresh start policy.").

sort.[83]

The uncertainty as to just when environmental clean up orders will be characterized as "claims" may have been exacerbated by the recent decision of the Supreme Court in a non-environmental case, *FCC v. NextWave Personal Communications Inc.*[84] The decision addressed the legality of the FCC's cancellation of communications licenses that had been granted to NextWave. NextWave had filed for bankruptcy, and stopped paying amounts it owed the FCC for the licenses. The Supreme Court held that the FCC had acted in violation of the anti-discrimination provisions of Section 525,[85] because it had acted because of NextWave's failure to pay a dischargeable debt. The Court therefore had to consider whether NextWave's obligations were in fact dischargeable debts. The Supreme Court held that they were.

The Supreme Court cited earlier cases for the propositions that "'claim' has the broadest possible definition"[86] and that "the plain meaning of a 'right to payment' is nothing more nor less that an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation."[87] After citing *Kovacs* without explanation, the Court concluded that "a debt is a debt, even when the obligation to pay it is also a regulatory condition."[88]

Debtors that receive clean-up orders will likely cite *NextWave* for each of these propositions, and argue that, especially where they do not own the contaminated property, a clean-up obligation, which can only be satisfied by paying money to a clean-up contractor, was within the broad definition of "claim" inasmuch as there was an enforceable obligation, and the government's regulatory purpose in preventing further pollution did not change the monetary nature of the obligations.

Governmental parties will no doubt argue that *NextWave* is simply not relevant to the clean-up context, because in *NextWave* it was not disputed that the obligation at issue was monetary. NextWave had been

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[83]Compare AM International, Inc. v. Datacard Corp., 106 F.3d 1342, 1348 (1997) (RCRA clean-up order was not a "claim" because the plaintiff could not convert the order into a right to payment); In re Industrial Salvage, Inc., 196 B.R. 784 (S.D. Ill. 1996) (State order to close landfills and abate environmental damage was not a claim because State had no right to collect money), with In re Goodwin, 163 B.R. 825 (Bankr. D. Idaho 1993) (State order to clean-up contaminated auto service station was a claim, where State could have performed clean-up and cost recovered; Court states that "[p]erformance by paying another to clean up the property is indistinguishable from performance by paying the state to clean up the property.")

[84]F.C.C. v. NextWave Personal Communications Inc., 537 U.S. 293, 123 S. Ct. 832, 154 L. Ed. 2d 863, 40 Bankr. Ct. Dec. (CRR) 200, 49 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) ¶ 78785 (2003).

[85]11 U.S.C. § 525.

[86]NextWave, 123 S. Ct. 832, 839, quoting Johnson v. Home State Bank, 501 U.S. 78, 83 (1991).

[87]NextWave, 123 S. Ct. 832, 839, quoting Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 522, 595 (1990). In Davenport, the Court had ruled that restitution obligations imposed in criminal proceedings as conditions of probation were debts dischargeable in chapter 13 proceedings.

[88]NextWave, 123 S. Ct. 832, 839.

obligated to pay money to the FCC. In contrast, it would be argued that the linchpin of the non-dischargeability of clean-up orders is precisely the fact that they are simply not monetary obligations at all. The government would point to the above quoted language that there is a debt "even when the obligation *to pay it*" also is a regulatory condition, and assert that to be a debt there has to be an obligation "to pay" and not an obligation to clean up.

In short, the uncertainty that began with *Kovacs* and that has grown since was not resolved by *NextWave*. It appears that it will take another Supreme Court decision or action by Congress to bring clarity to this issue.

IV. Abandonment in Chapter 11 Cases

Of all the issues the courts have dealt with relating to contaminated sites in bankruptcy, the one that has probably gotten the most attention is the issue of the abandonment of contaminated property under Section 554 of the Bankruptcy Code. Section 554 allows the trustee after notice and hearing, "to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."[89]

In connection with contaminated sites, abandonment under Section 554 raises several issues. First, can a trustee in a Chapter 7 proceeding abandon a contaminated site without first addressing the environmental risks presented, i.e. before first cleaning it up. Second, if the property is abandoned, to whom would it be abandoned and what happens with the property thereafter? Third, can property be abandoned during a corporate Chapter 11 proceeding?

A. *Midlantic*

The Supreme Court addressed the first of these issues in the second of its two opinions in this area. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*,[90] the Court addressed the issue of whether there was an unconditional right under Section 554 to abandon burdensome property of inconsequential value or whether the right was limited by environmental law. New Jersey argued in that case that abandonment should not be allowed when the property sought to be abandoned was contaminated and the abandonment would

[89]It may be that the issue of abandonment has provoked such interest and strong reactions for semantic reasons. CERCLA was enacted in response to a problem often referred to as "abandoned hazardous waste sites." For example, one EPA document states: "By definition, a Superfund site is an abandoned hazardous waste site that poses a threat to public health and the environment." http://www.sso.org/ecos/publications/stories6.htm. Although "abandonment" in bankruptcy is a technical term, requests for abandonment may trigger strong opposition, in part, because of the use of the word "abandonment."

[90]Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env't. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) ¶ 70923, 16 Envtl. L. Rep. 20278 (1986).

contravene state law. The Supreme Court agreed, in a five to four decision, and held that the trustee's abandonment power was limited, and that abandonment should not be authorized in contravention of state statutes reasonably designed to protect public health or safety from identified hazards. The Court noted, however, that while the abandonment power was limited, so was the exception it was carving out to that power. It stated that the "abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm."[91]

Much of the caselaw and commentary since *Midlantic* have focused on the Court's use of the phrase "imminent and identifiable harm" which is not a phrase found in either the Bankruptcy Code or the environmental laws.[92] As the courts have struggled to define the limits on abandonment of contaminated sites under *Midlantic*, one threshold issue has been whether the analysis in a particular case should be only on the environmental statute. Is it enough that the statute relied on to defeat abandonment is "reasonably calculated to protect the public health and safety from imminent and unidentifiable harm?" Or does the Bankruptcy Court need to consider the particular facts of the case and whether the particular site presents an "imminent and identifiable harm?" Courts have adopted both approaches.[93] Some courts have not required a site-specific showing.[94] Most courts, however, have viewed the analysis as one that requires a case-by-case determination as to the harm presented by the property.[95]

Interestingly, many courts that have applied the "imminent and unidentifiable harm" standard have interpreted that standard as requiring a much greater showing of harm than is typically required to demonstrate "imminent and substantial endangerment" under the environmental laws. CERCLA, RCRA and other environmental laws have provisions addressing imminent and substantial endangerments to public health and the environment[96] and one might have thought that an "imminent and substantial endangerment" would connote a greater risk

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[91]Midlantic, 474 U.S. 494, 507 n.9.

[92]As discussed in Section II, it is now a phrase used in the Bankruptcy Rules, which require a debtor to include with its petition a listing of sites it owns that present an imminent and identifiable harm to public health or safety.

[93]For a comprehensive discussion of post-Midlantic abandonment cases, see Larry Schnapf, Managing Environmental Liabilities in Business Transactions and Brownfield Redevelopment, § 12.07.

[94]E.g., In re Wall Tube & Metal Products, Inc., 831 F.2d 118, 122 (6th Cir. 1987); In re Peerless Plating Co., 70 B.R. 943, 946-47 (Bankr. W.D. Mich. 1987); In re Stevens, 68 B.R. 774, 783-84 (Bankr. D. Me. 1987); In re Mowbray Engineering Co., 67 B.R. 34, 35 (Bankr. M.D. Ala. 1986).

[95]See e.g., In re St. Lawrence Corp., 239 B.R. 720 (D.N.J. 1999); In re L.F. Jennings Oil Co., 4 F.3d 887, 890 (10th Cir. 1993); In re Smith-Douglass, Inc., 856 F.2d 12, 16 (4th Cir. 1988); In re H.F. Radandt, Inc., 160 B.R. 323, 328 (Bankr. W.D. Wis. 1993); In re Better-Brite Plating, 105 B.R. 912, 917 (Bankr. E.D. Wis. 1989); In re Purco, Inc., 76 B.R. 523, 532-33 (Bankr. W.D. Pa. 1987); In re Guterl Steel, 198 B.R. 128 (Bankr. W.D. Pa. 1996) (discussing both lines of cases).

[96]E.g., 42 U.S.C. §§ 6972, 6973, 7603, 9606.

than one that was "imminent and unidentifiable." Both standards use the word "imminent." And "substantial," one would think, would be a greater risk than one that was only "identifiable." In practice, that has not been the case, and courts in the abandonment context have sometimes required a substantial degree of harm, almost an emergency situation, before denying a request for abandonment.

By way of comparison, one bankruptcy court in allowing the abandonment of a contaminated oil refinery indicated that to defeat abandonment, i.e. to show an imminent and identifiable harm, there had to be "immediate and menacing harm to public health or safety."[97] In contrast, a district court the year before found an "imminent and substantial endangerment" where a small quantity of hazardous substances were likely, over time, to enter groundwater and result in human and environmental exposure.[98] The court in that case stated that "an endangerment need not be an emergency in order for it to be 'imminent and substantial.'"[99] EPA similarly interprets an imminent and substantial endangerment as requiring a limited showing, and the "endangerment need not be immediate to be imminent." A "mere threat of potential harm" is sufficient.[100]

Midlantic and its progeny deal with the question of *when* abandonment should be allowed. A related question is *why* a trustee would want to abandon. For the most part, trustees seek to abandon contaminated property because otherwise they would be under an obligation to clean it up. *Kovacs* had made it clear that anyone in possession of contaminated property had to comply with applicable law and could not refuse to clean up the property. Moreover, most courts have held that the obligation of a trustee to clean up contaminated property that is part of the estate rises to a level of an administrative expense of the estate within the scope of Section 503 of the Bankruptcy Code. If the government satisfies that obligation, it would then have an administrative expense claim against the estate.[101] Therefore, if contaminated property is not abandoned, the cost of clean up would have to be borne by the estate, not in discounted dollars, but in full, and before any payments to other unsecured creditors.

How then does abandonment in Chapter 7 work? In a typical case,

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[97]In re Oklahoma Refining Co., 63 B.R. 562 (Bankr. W.D. Okla. 1986).

[98]United States v. Conservation Chemical Company, 619 F.Supp. 162 (W.D. Mo. 1985).

[99]Conservation Chemical, 619 F.Supp. 162, 193.

[100]See n. 27 infra.

[101]For decisions granting such an administrative expense priority, see In re Wall Tube & Metal Products, Inc., 831 F.2d 118, 122 (6th Cir. 1987); In re Chateaugay Corp. (LTV), 944 F.2d 997 (2d Cir. 1991), aff'g, 112 B.R. 513 (S.D.N.Y. 1990); In re Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993), cert. denied, 114 S.Ct. 303 (1993); In re Smith-Douglass, Inc., 856 F.2d 12 (4th Cir. 1988); Pennsylvania v. Conroy, 24 F.3d 568 (3d Cir. 1994), aff'g 153 B.R. 686 (W.D. Pa. 1993); In re H.L.S. Energy Co., 151 F.3d 434 (5th Cir. 1998). Decisions denying priority include Southern Ry. Co. v. Johnson Bronze Co., 758 F.2d 137 (3d Cir. 1985), clarified by Pennsylvania v. Conroy, 24 F.3d 568 (3d Cir. 1994); In re Security Gas & Oil, Inc., 70 B.R. 786 (Bankr. N.D. Cal. 1987); In re Corona Plastics, Inc., 99 B.R. 231 (Bankr. D.N.J. 1989); In re Hanna, 168 B.R. 386 (9th Cir. B.A.P. 1994).

abandonment would result in the property's transfer from the estate, as administered by the trustee, back to the debtor. If the debtor is a corporation, then at the conclusion of the Chapter 7 case and the liquidation of the debtor's assets, the debtor would be a shell corporation holding only the contaminated site, with no resources available to clean it up. Therefore, in a corporate Chapter 7 case, the effect of abandonment is to take away the obligation of the trustee to use estate resources to clean up the property, to allow estate resources to be distributed to other creditors, and to leave the property in the hands of an entity with no resources to clean it up.[102]

B. Abandonment in Chapter 11 Cases

With this background, we can now explore the issue of abandonment in a corporate Chapter 11 proceeding, a context in which it has not generally been used and for which there is little caselaw. Could it be used in such a situation? An initial difficulty would be that of identifying the entity to whom the property would be abandoned. Inasmuch as Chapter 7 abandonment runs from trustee to debtor, one would think that Chapter 11 abandonment would be from the debtor-in-possession to the debtor. But both are the same corporation, one in a fiduciary capacity and one in a non-fiduciary capacity. In such a situation, what would abandonment mean?[103]

While the concept of abandonment from "debtor-in-possession" to "debtor" does seem strange, there is nothing that would necessarily preclude it. Although Section 554 refers to the trustee's seeking to abandon contaminated property, debtors-in-possession are granted the same rights and powers as a trustee.[104] Moreover, the Bankruptcy Rule that sets forth the procedure for abandonment motions explicitly refers to "the trustee or debtor in possession."[105] Thus, the strangeness aside, there would be appear to be no inherent obstacle to abandonment from debtor-in-possession to debtor.[106]

The greater obstacle to abandonment in corporate Chapter 11

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[102]It is worth remembering that the abandonment fight is essentially about use of the estate resources and if there are no significant estate resources, then there really is nothing to fight about. Whether the court allows abandonment or does not, the estate simply will not have resources available to clean up the property. See In re Smith-Douglas, Inc., 856 F.2d 12 (4th Cir. 1988) (availability of estate resources is relevant to whether abandonment should be allowed).

[103]See Harvey Miller, Issues Affecting Secured Creditors Regarding Environmental Matters in Bankruptcy Cases, 826 PLI/Comm 167, 207 (2001). ("In a corporate reorganization under chapter 11, the debtor and the debtor in possession are, in effect, the same entity. Thus, little purpose would be served in abandoning the property to the debtor.")

[104]11 U.S.C. § 1107.

[105]Fed. R. Bankr. Proc. 6007.

[106]In a recent case, the Bankruptcy Court initially ruled that property could not be abandoned from debtor-in-possession to debtor because they were the same entity. The debtor sought reconsideration, which the Court granted. The debtor argued, "[i]n the event that a chapter 11 trustee was appointed and brought [an abandonment] motion, § 554 would clearly provide authority for the abandonment of the Properties, irrespective of the fact that the Properties would be abandoned to [the debtor]. Although it is under-

reorganizations is a different one. Even if the bankruptcy court were to allow abandonment from debtor-in-possession to debtor, another important issue remains: what happens to the property at the end of the case when the debtor-in-possession and the debtor are merged back together?[107] At that point, the reorganized debtor will wind up still in possession of the contaminated property and as an owner of contaminated property, will still likely be liable for clean up of that property, notwithstanding any discharge.[108]

Notwithstanding the post-bankruptcy retention problem, if abandonment to the debtor were allowed, there still could be potential benefits to the estate. The debtor-in-possession could argue that it did not own the property during the bankruptcy, so the obligation to clean it up was not an administrative expense of the estate, and so clean up did not have to be addressed as part of confirmation of a plan. Confirmation of a plan generally requires paying all administrative expenses in full.[109] If the contaminated property is abandoned, it could be argued that even if the reorganized debtor will remain liable for clean up of the property, that becomes a post-bankruptcy issue and not one that needs to be dealt with as part of plan confirmation. Of course, the government could argue that the issue of the reorganized debtor's ability to deal with the contaminated property would affect plan feasibility, and feasibility is

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standable that the court might have additional concerns where the potential recipient of the abandoned property is, in effect, the entity directing the decision to abandon the property from the estate, these concerns can be and should be alleviated by compliance with the requirements of Rule 6007. . .." In re ABC-NACO, Inc., Debtor's Motion for Reconsideration of the Denial of Their Motion to Abandon Certain Real Property Located in Ashland, Wisconsin and Superior, Wisconsin, No. 01 B 36484 (Bankr. N.D. Ill., Jan. 22, 2002).

[107]Section 1141(b) of the Bankruptcy Code provides that "unless otherwise provided in the plan or order confirming the plan, the confirmation of the plan vests all property of the estate in the debtor."

[108]Harvey Miller has suggested that in a Chapter 11 case, a debtor might abandon contaminated property to a secured creditor, including a government creditor with a lien on the property. Harvey Miller, Issues Affecting Secured Creditors Regarding Environmental Matters in Bankruptcy Cases, 826 PLI/Comm 167, 207-08 (2001). While such a maneuver would be advantageous to the debtor, it is hard to see how a court could require any secured creditor, whether private or governmental, to take possession of contaminated property involuntarily. And if the secured creditor were willing to foreclose, that could be accomplished without abandonment, as Mr. Miller notes, through an agreed upon modification to the automatic stay. The principal case Mr. Miller cites, In re A.J. Lane & Co., 133 B.R. 264, 268-69 (Bankr. D. Mass. 1991), was not an environmental case, but rather involved the imminent foreclosure by a secured lender on valuable property under the control of a Chapter 11 trustee. The lender had been granted relief from stay to foreclose. The trustee sought to abandon the property to the debtor, so the debtor and not the estate would be liable for taxes that would become due on foreclosure. The Bankruptcy Court denied the requested abandonment for many reasons. The Court observed that it would have authorized abandonment to the lender. But of course that lender was looking to foreclose and would presumably have been willing to accept an abandonment. In contrast, and notwithstanding the protection from liability afforded secured lenders by Section 101(20)(E) of CERCLA, 42 U.S.C. § 9601(20)(E), secured lenders would generally be vigorously opposed to accepting an abandonment of worthless contaminated property.

[109]11 U.S.C. § 1129(a)(9)(A).

another requirement for confirmation.[110] But, if the plan proponent can demonstrate that over time the property will be cleaned up, abandonment would potentially eliminate the need to fund the costs of clean up at the time of confirmation.

Moreover, if abandonment were allowed during a procedurally-consolidated, multiple-affiliates Chapter 11 proceeding, the debtor could attempt to deal with the issue of post-bankruptcy ownership and liability by having the property transferred to a particular debtor that is intended to be liquidated pursuant to the plan and that will not operate post-bankruptcy. The government would be sure to oppose such an effort as nothing more than a sham intended to hinder creditors, but if the court had allowed abandonment in the first instance, by finding that the property did not present an imminent and identifiable harm, then perhaps it would also find that there was nothing wrong with such a restructuring.

In addition to the obstacle of finding someone to abandon contaminated property to in a corporate Chapter 11 case, it has also been suggested that abandonment should not be permitted in a Chapter 11 case, because the early distribution of estate property would circumvent the Chapter 11 plan promulgation and confirmation process.[111] But this should not be an obstacle to abandonment. After all, while major sales of assets outside the plan process may sometimes be denied,[112] valuable property is routinely sold under Section 363 outside of the plan process. If a debtor-in-possession can transfer valuable property early in the case, it is hard to see that the integrity of the plan process will be compromised by abandonment of burdensome property.

It should be kept in mind, though, that even if abandonment was allowed and a method was devised so that the reorganized debtor did not wind up owning the contaminated property, there is still the risk that the government would order the reorganised debtor to clean up the property post-bankruptcy. Such a situation would raise the issue, discussed above, of whether such a clean up order, to the extent it was addressing ongoing pollution from the waste, would be deemed not to be a "claim" and therefore to not have been discharged during the bankruptcy.

In sum, there are difficulties, conceptual and practical issues, that would govern any attempt to abandon contaminated property in a Chapter 11 case. This issue would benefit from further consideration by the courts.

Conclusion

Twenty years ago, it was hard to know how bankruptcy would interact with CERCLA and other contaminated site law. At the time CERCLA was new, and there was little caselaw on its relationship to bankruptcy.

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[110] 11 U.S.C. § 1129(a)(11).

[111] Kathryn Heidt, Environmental Obligations in Bankruptcy § 5.05[4][b].

[112] Professor Heidt cites In re Lionel, 722 F.2d 1063 (2d Cir. 1983) for this proposition.

CERCLA is no longer new, there has been a lot of caselaw developed in this area, and, precisely because there is so much caselaw and so much of it is confusing, it is still often difficult to know how the two legal schemes interact. But this uncertainty, combined with the inherent tension between fresh starts and a clean environment, may have contributed positively to the fact that, in the author's experience, the vast majority of cases that have arisen in this area have eventually been resolved, often through the creativity of the parties and their counsel, in ways that carefully balanced the need for clean ups of contaminated sites with fresh starts for troubled businesses. That said, further clarity in this area, from Congress or the Supreme Court, would still be welcome.