Chapter **12**

The Intersection of Environmental and Bankruptcy Laws

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I. Introduction

An inherent conflict exists between the policies underlying environmental and bankruptcy laws. Environmental laws, on the one hand, are designed to protect public health and safety by providing for liability, compensation, cleanup, and emergency response to the release or disposal of hazardous substances. The goals of our bankruptcy laws, on the other hand, are to provide debtors with a fresh start by preserving their assets for equitable distribution to creditors, and by discharging debts and obligations through the confirmation and consummation of a plan of reorganization.

For generations, debtors facing environmental liability have sought to use the protections afforded by the U.S. Bankruptcy Code (the "Bankruptcy Code") to avoid or defer environmental obligations, including, among others, compliance with cleanup orders, injunctions, and liabilities arising out of cost recovery or contribution actions filed by other potentially responsible parties (PRPs). Both bankruptcy courts and appellate courts have struggled to reconcile, most often on a case-by-case basis, the competing policy considerations of environmental and bankruptcy statutes, primarily because

the enforcement of environmental liability may deplete a debtor's assets—to the detriment of its creditors—and threaten its prospects for a successful reorganization.

The Bankruptcy Code contains numerous provisions and mechanisms designed to enable a debtor to reorganize. Of particular relevance in the environmental context, however, are: (i) the automatic stay; (ii) the ability of the debtor or trustee to abandon property, (iii) the administrative priority afforded certain types of claims, (iv) provisions governing asset sales by debtors, and (v) the discharge of claims and other obligations.

First, the filing of a bankruptcy petition gives rise to the automatic stay of section 362 of the Bankruptcy Code.[1] To prevent the piecemeal dismemberment of the debtor's bankruptcy estate and preserve its assets until confirmation of a plan of reorganization, the automatic stay temporarily halts, among other things, all actions to enforce a judgment or lien, collection activities, litigation, foreclosure actions, repossessions of property, and any other creditor action unless permitted under the Bankruptcy Code.

The automatic stay provides the debtor with a so-called "breathing spell" during which it can sell assets, reduce expenses, change or restructure business operations, borrow money, obtain new infusions of capital, or otherwise negotiate a resolution of the financial difficulties that led to its bankruptcy filing. In short, the stay preserves the status quo until claims against the estate are settled and the estate's assets are distributed to creditors in accordance with the Bankruptcy Code's priority scheme.

Next, the Bankruptcy Code permits a debtor to abandon property that is burdensome or of inconsequential value and benefit to the estate.[2] While this provision applies to all asset categories, it provides the debtor with a potential, and perhaps powerful, means of shedding environmentally impaired assets and avoiding the associated obligations.

The Bankruptcy Code also grants so-called "administrative expense priority" (i.e., a priority in right of payment) to certain post-filing expenses if they are considered "actual, necessary costs and expenses of preserving the estate."[3] Generally, claims for reimbursement of amounts expended for environmental cleanup costs relating to pre-petition activities are considered general unsecured claims, which will be treated under the debtor's plan together with all similar claims, such as the claims of unsecured bondholders or the claims of providers of goods and services. If post-filing claims are afforded administrative expense status, they will have priority over all other unsecured claims, including pre-petition priority unsecured claims and general unsecured claims.[4] In particular, to confirm a reorganization plan, the debtor

1. 11 U.S.C. § 362.
2. 11 U.S.C. § 554.
3. 11 U.S.C. § 503(b)(1)(A).
4. 11 U.S.C. § 507.

must pay all administrative expense claims in full, rather than at a fraction of the claim amount generally afforded to unsecured claims.

Further, as part of the reorganization process, the Bankruptcy Code provides a debtor the opportunity, if certain conditions are met, to sell property free and clear of all liens, claims, interests, and encumbrances in, on, or against such property. These "outside the ordinary course of business" asset sales are intended to maximize the value of the debtor's assets for the benefit of all creditors, as "free and clear" sales generally garner top dollar. Successor liability concerns with regard to the debtor's potential environmental liability may depress asset values in the context of such sales, however.

Finally, as a general matter, the confirmation of a Chapter 11 reorganization plan discharges the debtor of any debt that arose before confirmation, except as otherwise provided for in the plan.[5] A debtor's ability to discharge environmental liabilities under a Chapter 11 plan, however, is a complex issue. There are few bright-line rules and, in many instances, resolution of the dischargeability issues will require inquiry into the specific facts and circumstances of, among other things, the type of environmental obligation in question, the then-existing conditions at the site or facility that is the subject of the obligation, and the status of prior or ongoing cleanup efforts (if any) at the site or facility.

II. Overview of the Chapter 11 Bankruptcy Process

A debtor engaged in business may file for relief under Chapter 11 of the Bankruptcy Code to allow it to continue its operations and attempt to reorganize with a fresh start. A Chapter 11 case begins with the filing of a petition with the bankruptcy court in the district in which the debtor is incorporated or has its principal place of business or domicile or residence. Upon the filing of a voluntary petition for relief—or in an involuntary Chapter 11 case, upon the entry of an order of relief by the bankruptcy court—the debtor automatically becomes a "debtor-in-possession."[6] In most cases, the debtor-in-possession's existing management continues to operate the business and maintains possession and control of the debtor's assets until a plan of reorganization is confirmed, the case is dismissed or converted to a Chapter 7, or a Chapter 11 trustee is appointed for the debtor. The debtor-in-possession has most of the powers and

5. 11 U.S.C. § 1141(d).
6. 11 U.S.C. § 1101.

duties of a trustee in bankruptcy and has a fiduciary obligation to maximize the value of its assets for, and protect the interests of, its creditors.[7]

The filing of a petition creates the legal fiction of a "bankruptcy estate," in which is vested the debtor's right, title, and interest in and to all of its property, wherever located.[8] The bankruptcy court possesses statutory jurisdiction over the bankruptcy estate, and any actions outside of the ordinary course of business, including, among others, any distribution of assets, is subject to bankruptcy court approval. To assist the bankruptcy court in this task, the debtor must file with the court schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs.

Generally, a creditor whose claim is not listed on the debtor's schedule of assets and liabilities, or is scheduled as disputed, unliquidated, or contingent, must timely file a proof of claim to preserve its right to vote on, and receive distributions under, the debtor's plan of reorganization.[9] The proof of claim must include the basis of the claim, the claim classification (e.g., secured, unsecured, priority, or nonpriority), and the claim amount, as well as all supporting documentation.

If a creditor that is required to do so fails to file a proof of claim by the bar date, the creditor will be deemed to have waived its rights and will be precluded from participating in distributions under the debtor's reorganization plan, and its claim will be discharged."[10] A known creditor (even one holding a disputed, contingent, or unliquidated claim) may not be deemed to have waived its claim for failure to have filed a proof of claim if it was not listed as a creditor in the debtor's schedules and did not receive actual notice of the bar date. Contingent or unknown creditors need only receive constructive notice of the bar date, such as notice by publication in newspapers or other appropriate periodicals.[11]

As soon as practicable after the commencement of a Chapter 11 case, the Office of the United States Trustee for the district in which the case is pending will appoint a statutory committee of unsecured creditors (generally, the creditors holding the three to nine largest unsecured claims against the debtor).[12] The creditors' committee is charged with representing the interests of all unsecured creditors of the debtor. To enable the creditors' committee to meet this obligation, the Bankruptcy Code prescribes many rights and duties, including, but not limited to, consulting with the debtor regarding case administration matters, investigating the debtor's conduct, financial

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7. 11 U.S.C. § 1107(a).

8. 11 U.S.C. § 541.

9. 11 U.S.C. § 1111(a). The bankruptcy court will establish a "claims bar date," or deadline for creditors to file proofs of claims.

10. 11 U.S.C. § 1141(d).

11. *See*, *e.g.*, *Waterville Indus. v. First Hartford Corp.*, 124 B.R. 411, 413 (D. Me. 1991); *cf. PacifiCorp and Van Cott Bagley Cornwall & McCarthy v. W.R. Grace*, 2006 WL 2375371 (D. Del. 16, 2006).

12. 11 U.S.C. § 1102.

condition, and business operations, and participating in all aspects of the case, most notably plan formulation.[13]

As part of the Chapter 11 process, the debtor also may be authorized to sell property "free and clear of any interest in such property" if: (i) applicable nonbankruptcy law permits sale of such property free and clear of such interest, (ii) the holder of the interest consents to the sale, (iii) the interest is a lien and the sale price is greater than the aggregate value of all liens on the property, (iv) there is a bona fide dispute regarding the validity of the interest or (v) the interest holder could be lawfully forced to accept money in satisfaction of the interest.[14]

The bankruptcy court's ability to approve a sale of property free and clear of any interest is particularly important to a purchaser concerned about successor liability issues.[15] While protection of the purchaser of a debtor's assets is not an express goal of the Bankruptcy Code, some commentators suggest that it is essential to maximize the value of the debtor's assets, thereby making more resources available for distribution to creditors.[16] Otherwise, the specter of successor liability would discourage purchasers from participating in bankruptcy sales. On the other hand, many courts have found that the "free and clear" nature of bankruptcy asset sales does not per se preclude future successor liability claims against the purchaser.[17] Often, as discussed below, one of the most problematic issues that arises is whether the asset sale "cleanses" the property of any associated environmental liability.

The petition date (i.e., the date of commencement of the case) also marks the beginning of the initial 120-day and 180-day periods during which the debtor has the exclusive right to file and solicit acceptances of a plan of reorganization.[18] No other party in interest may file a plan during the debtor's "exclusive period" unless a trustee has been appointed, the debtor fails to timely file a plan, or its plan has not been timely accepted.[19] The bankruptcy court may extend or reduce these time periods, but the 120-day exclusive period for filing a plan may not be extended beyond a date that is 18 months after the petition date, and the 180-day exclusive solicitation period may not be extended beyond 20 months after the petition date.[20] After the exclusivity period expires, any party in interest except the United States

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13. 11 U.S.C. § 1103.

14. 11 U.S.C. § 363(f).

15. *See, e.g., United States v. Knox-Schillinger (In re Trans World Airlines)*, 322 F.3d 283, 293 (3d Cir. 2003).

16. *See* J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand that Relief Be Afforded Unknown and Unknowable Claimants*, 12 Bankr. Dev. J. 1, 99 (1995); Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability on Asset Purchasers*, 4 Envtl. Law. 435, 493 n.401 (1998).

17. *See*, *e.g.*, *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc*., 59 F.3d 48, 51 (7th Cir. 1995).

18. 11 U.S.C. § 1121(b).

19. 11 U.S.C. § 1121(c).

20. 11 U.S.C. § 1121(d).

Trustee may propose a reorganization plan. These time restrictions provide incentives for the timely resolution of the case.[21]

The reorganization plan serves as the blueprint for restructuring the debtor's affairs. It will provide the structure and means for the debtor to emerge from bankruptcy, sell itself as a going concern, or liquidate its assets and distribute the proceeds. The plan will designate different classes of creditors and interest holders based on the nature of their claims or interests (e.g., secured, administrative, priority unsecured, nonpriority unsecured, etc.), and will describe the proposed treatment of the claims or interests within each such class (e.g., some classes may be paid in full, some may be paid only a fraction of the asserted claim amount, and others may receive nothing).

In addition, the debtor may propose to pay some classes of creditors with cash while offering payment to others in the form of stock or other consideration. (Regardless of the consideration offered, unless the creditors agree otherwise, distributions under a plan must conform with the Bankruptcy Code's priority scheme.)[22] Significantly, unless otherwise provided in the plan, the debtor's property addressed in the plan will revest in the reorganized debtor free and clear of all claims and interests of creditors, equity security holders, and general partners in the debtor.[23] A confirmed plan discharges all debts that arose before confirmation and may also include a permanent injunction against persons with claims, including, for example, PRPs, asserting such claims against the reorganized debtor or its property.[24]

Before a reorganization plan can be disseminated to the debtor's creditors for a vote, the debtor (or other plan proponent) must file a written disclosure statement in connection with the proposed plan. The disclosure statement

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21. The exclusive period provides the debtor with leverage not only in terms of time to negotiate with creditors but also an informational advantage over other parties. The debtor can make it extremely difficult for creditors or hostile parties-in-interest to obtain the due diligence materials that are necessary to evaluate the company and to prepare the disclosure statement that is required to accompany a proposed plan of reorganization. In fact, hostile or recalcitrant creditors or suitors may have to file discovery motions with the bankruptcy court to obtain the materials. Debtors will often argue the diligence materials are confidential or that the value of the estate will be damaged if the materials are disclosed to the requesting party. In particular, the debtor and its creditors may not want information about environmental conditions to be released since distressed debt traders who buy claims against troubled companies may use the environmental issues to sharply reduce the price they are willing to pay for the claims.

22. 11 U.S.C. §§ 1129 and 507.

23. Assets may also be sold pursuant to a reorganization plan. Section 1141 provides that any property of the estate addressed by the plan shall be free and clear of all claims and interests of creditors, equity holders, and general partners of the debtor. This provision is more likely to cut off successor liability for pre-confirmation conduct of the debtor. Some courts have argued that state laws imposing successor liability frustrate the purposes of the Bankruptcy Code and therefore are preempted when the underlying liability has been discharged under a plan of reorganization. *See In re White Motor Credit Corp.*, 75 B.R. 944, 950–51 (Bankr. N.D. Ohio 1987).

24. Plans can include a channeling injunction, which channels future claims not subject to discharge away from the debtor into a trust that resolves the claims. This mechanism serves the competing goals of protecting the debtor and allowing reorganization by providing comprehensive resolution of their liabilities while protecting the interests of future claimants. *See*, *e.g.*, *In re Johns-Manville Corp.*, 68 B.R. 618, 626 (Bankr. S.D.N.Y. 1986); *Williams v. Pegnato & Pegnato Roof Mgmt.*, 2008 U.S. Dist. LEXIS 102084 at *11 (N. D. Ohio Dec. 1, 2008).

must provide creditors with "adequate information" regarding the debtor's historical, current, and future affairs to enable creditors to make informed decisions regarding the plan.[25] Once the court approves the disclosure statement, the debtor may solicit acceptances of the plan.[26] A class of claims accepts the plan if it is accepted by creditors holding at least two-thirds in amount and a majority in number of the allowed claims in the class that actually vote on the plan.[27]

If confirmation is consensual, and the court finds that the plan otherwise satisfies the requirements of the Bankruptcy Code, the court will then issue an order confirming the plan.[28] Even if a class of creditors objects to the plan, the court may confirm the plan if it satisfies the "cram down" provision of the Bankruptcy Code, i.e., if the plan does not unfairly discriminate against dissenting classes and the treatment of the dissenting classes is fair and equitable.[29] Once the plan is confirmed, the creditors will receive their distributions and the reorganized debtor will receive its discharge of pre-confirmation debts.[30]

If the debtor is unable to confirm a Chapter 11 plan or becomes "administratively insolvent" (i.e., unable to pay all administrative expense claims in full, as required for confirmation of a reorganization plan), its case may be converted to a Chapter 7 liquidation case. In a Chapter 7 liquidation, the debtor ceases operations and a trustee is appointed to liquidate the assets of the bankruptcy estate and distribute the proceeds of the liquidation to the debtor's creditors.[31] Liquidation proceeds generally are not sufficient to satisfy the claims of all creditors; accordingly, creditors must establish their entitlement to the proceeds based on the priorities established under the Bankruptcy Code and state and nonbankruptcy laws recognized by the Bankruptcy Code.[32]

25. 11 U.S.C. § 1125(a).
26. 11 U.S.C. § 1125.
27. 11 U.S.C. § 1126(c).
28. 11 U.S.C. § 1129(a).
29. 11 U.S.C. § 1129(b).
30. 11 U.S.C. § 1141(d)(1).
31. 11 U.S.C. §§ 704, 726.
32. The claims of secured creditors who have claims in specific assets of the debtor are satisfied from the proceeds of the liquidation before the claims of the unsecured or general creditors. To the extent that the claim of a secured creditor is not satisfied by the proceeds from the sale of the debtor's assets, the secured creditor will be an unsecured creditor for the amount of the unsatisfied claim. 11 U.S.C. §§ 506(a), 725. The claims of unsecured creditors are satisfied out of the debtor's remaining assets on a pro rata basis, although the Bankruptcy Code establishes a priority system for unsecured claims in which the claims of certain unsecured creditors are satisfied before those of others. 11 U.S.C. §§ 507(a), 726.

III. Automatic Stay of Governmental Proceedings

A. The Automatic Stay of the Bankruptcy Code

The automatic stay provision of the Bankruptcy Code is codified in section 362.[33] It prohibits, among other things, "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of a case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title."[34] The automatic stay applies nationwide against all entities, including governmental units.[35]

The automatic stay protects the interested parties in a bankruptcy estate. As to the debtor,

> [T]he automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.[36]

The automatic stay also provides protection to the debtor's creditors:

> [W]ithout it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.[37]

33. 11 U.S.C. § 362.

34. 11 U.S.C. § 362(a)(1).

35. "With respect to . . . the application of the automatic stay, to government actions, this section . . . [is] intended to be an express waiver of sovereign immunity of the Federal Government, and an assertion of the bankruptcy power over State governments under the supremacy clause notwithstanding a State's sovereign immunity." S. Rep. No. 95–989, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838.

36. H. Rep. No. 95-595 at 340–41, *reprinted in* 1978 U.S.C.C.A.N. 5969, 6296–97.

37. H. Rep. No. 95-595 at 341, *reprinted in* 1978 U.S.C.C.A.N. 5969, 6297.

B. The Exception to the Automatic Stay

Recognizing the importance of governmental enforcement of environmental laws and regulations, Congress included in the Bankruptcy Code an exception to the automatic stay provision. That provision, as amended in 1998, provides:

> The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay --- (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization or authority under the convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.[38]

Courts generally, though not universally, read the exception to the automatic stay broadly,[39] a reading supported by the exception's legislative history.[40]

C. The "Exception to the Exception" of the Automatic Stay

The "exception to the exception," as courts have termed it,[41] limits the exception under section 362(b)(4) of the Bankruptcy Code prohibiting governmental units from enforcing money judgments. The purpose of the "exception to

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38. 11 U.S.C. § 362(b)(4). Although the statutory language seems (strangely) to suggest that a governmental unit would have to be operating under the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction to be eligible for the exception to the stay, that was not Congress's intent: "[S]ome may assert that governmental units may now be required to seek relief from stay in order to enforce their pales for regulatory powers . . . , except in the instance when the governmental units' activities involves [sic] action under the Convention . . . . I do not believe that this new requirement was intended . . . ." Statement of Rep. John Conyers, Jr., Oct. 21, 1998, 144 Cong. Rec. E 2305.

39. *See generally Penn Terra Limited v. Dep't of Envt'l Res.*, 733 F.2d 267, 273 (3d Cir. 1984) ("Congress intentionally used such a broad term as 'police and regulatory powers,' [and] we find that the exception to the automatic stay provision . . . should itself be construed broadly, and no unnatural efforts be made to limit its scope."). *But see In re Goodwin*, 163 B.R. 825, 827 (Bankr. D. Idaho 1993) (citing *Hillis Motors, Inc. v. Hawaii Automobile Dealer's Ass'n*, 997 F.2d 581, 590 (9th Cir. 1993)) ("Exceptions to the automatic stay should be read narrowly.").

40. H. Rep. No. 95-595 at 343, *reprinted in* 1978 U.S.C.C.A.N. 5969, 6299 ("the exception extends to permit an injunction and enforcement of that injunction, and to permit the entry of a money judgment . . . .").

41. *Penn Terra*, 733 F.2d at 272 ("Subsection 362(b)(5) . . . creates a further 'exception to the exception,' in that actions to enforce money judgments are affected by the automatic stay, even if they otherwise were in furtherance of the State's police powers.").

the exception" is to prevent a governmental unit from receiving preferential treatment of its claims vis-à-vis the claims of other creditors.

D. Environmental Actions Not Stayed

The Third Circuit Court of Appeals' decision in *Penn Terra Limited v. Department of Environmental Resources,* though decided in 1984, remains the leading authority on the scope of the police and regulatory powers exception to the automatic stay in the context of enforcement of environmental obligations.[42] In *Penn Terra*, the Pennsylvania Department of Environmental Resources (DER) brought an action to force Penn Terra to comply with a consent decree it had entered into before the petition date. The consent decree described Penn Terra's environmental violations as well as the mandated corrective measures. After the DER filed an action in state court to compel Penn Terra's compliance, debtor sought an order from the bankruptcy court holding the DER in contempt for a violation of the automatic stay. The DER countered, arguing that its actions came within the scope of the exception to the stay.

The bankruptcy court enjoined the DER from enforcing the consent decree, and the district court affirmed, finding enforcement of the decree tantamount to collection of a money judgment. Reversing, the Court of Appeals held that the DER's actions were precisely the types of actions contemplated by the exception to the automatic stay. The court explained that the common understanding of enforcement of a money judgment differed from the actions taken by the DER, so the "exception to the exception" did not apply. Penn Terra tried to argue further that if not the form, then the substance, of the DER's actions was to enforce a money judgment, as Penn Terra would be forced to expend money to comply with the consent decree. The Court of Appeals was not swayed, and allowed the consent decree to be enforced.

Twenty-five years later, *Penn Terra's* reasoning remains relevant. For example, in *In re Mystic Tank Lines Corp.*, the State of New York won a default judgment for contamination cleanup damages in state court against a defendant petroleum shipper that had been acquired previously by the debtor.[43] The State of New York filed a claim against the debtor based on the default judgment, to which the debtor objected and argued that obtaining the default judgment post-petition was a violation of the automatic stay and was an attempt to enforce a money judgment, which is expressly excluded from the police power exception to the automatic stay. Relying on *Penn Terra*, the Third Circuit Court of Appeals rejected this argument, explaining that the automatic stay proscribes enforcement of a money judgment by a seizure or attempted seizure of a debtor's property. Because the mere entry

42. 733 F.2d 267 (3d Cir. 1984).

43. 544 F.3d 524 (3d Cir. 2008). The debtor had previously acquired the named defendant. The state court action, brought by the State of New York, alleged that a gas tank on the defendant's property had leaked, contaminating the groundwater. The state court action was commenced before the debtor had filed for bankruptcy protection, but the judgment was not obtained until after the filing. *Id.* at 525.

of the default judgment did not involve seizure or attempted seizure of the debtor's property, the Third Circuit held that the state's action fell into the exception to the automatic stay, not the "exception to the exception."[44] In the same vein, courts also have held that the continuation of enforcement actions falls under the exception to the automatic stay.[45]

Courts also have addressed the issue of whether the enforcement of certain bonding requirements against a debtor is excepted from the automatic stay, and have held that the exception applies. For example, in *Safety-Kleen, Inc. v. South Carolina*,[46] prior to commencing its Chapter 11 case, Safety-Kleen was required to be bonded by a federally approved bonding company to secure the closure and post-closure costs related to one of its properties, a commercial hazardous waste landfill. Safety-Kleen's bonding company encountered financial difficulties and was removed from the federal list, after which the South Carolina Department of Health and Environmental Control (DHEC) ordered Safety-Kleen to secure new bonding or cease accepting new hazardous waste at the facility. Safety-Kleen could not afford to comply with the DHEC order and, for that and various unrelated reasons, soon thereafter filed for Chapter 11 protection. Once in Chapter 11, the debtor filed an adversary proceeding against DHEC seeking to preclude DHEC from enforcing the bonding requirement.

The district court ruled that DHEC could not proceed with the bonding requirement order without violating the automatic stay. Reversing, the Fourth Circuit Court of Appeals held that DHEC's enforcement of the bonding requirement was an exercise of the state's police and regulatory power, drawing a distinction between such an exercise and circumstances in which a state is merely protecting its pecuniary interest. The Court reasoned that a court should look to the purpose of the law being enforced by the governmental agency, and that if the primary purpose of the law is to promote public safety and welfare or to "effectuate public policy," then the exception to the automatic stay applies.[47]

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44. *Id. See also United States v. LTV Steel Co., Inc.*, 269 B.R. 576 (W.D. Pa. 2001) (a civil action brought to recover civil penalties for prior environmental violations not stayed under the automatic stay because it was deemed an exercise of police powers and not actually an enforcement of a money judgment).

45. *See City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir. 1991) (*held*, "inclusion of damage actions for reimbursement together with injunctive relief . . . furthers the purpose of the automatic stay's regulatory exception."); *United States v. Nicolet, Inc.*, 857 F.2d 202, 209 (3d Cir. 1988) (*held*, enforcement action against hazardous waste site operator-debtor allowed to proceed to trial, so that damages may be fixed: "By permitting the government's claim to be reduced to a judgment, no seizure of property takes place. Moreover, that Congress carefully made only enforcement of a money judgment subject to the automatic stay indicates strongly that mere entry of a judgment was not intended to be proscribed."); *Commonwealth Oil Refining Co., Inc. v. United States Envt'l Prot. Agency (In re Commonwealth Oil Refining Co.)*, 805 F.2d 1175 (5th Cir. 1986) (EPA administrative action to bring the debtor-in-possession into compliance with environmental laws falls under the exception); *New York v. Mirant New York*, 300 B.R. 174 (S.D.N.Y. 2003) (State of New York allowed to enter consent decree against power plant operator-debtor to bring debtor into compliance with environmental laws).

46. 274 F.3d 846 (4th Cir. 2001).

47. *Id.* at 865 (internal citation omitted).

In contrast, "if the purpose of the law relates to the protection of the government's pecuniary interest in the government's property, . . . or to adjudicate private rights, then the exception is inapplicable."[48] Applying this test, the Court found that financial assurance requirements are within the regulatory exception to the automatic stay because the primary purpose of the bonding requirement "serve[s] to promote environmental safety in the design and operation of hazardous waste facilities."[49]

Other courts have similarly found that enforcing a bonding requirement is a "clear exercise of the state's regulatory power"[50] and thus except such actions from the automatic stay.[51]

E. Environmental Actions Stayed

Rare are the cases in which courts have held that a governmental unit's action falls within the "exception to the exception" to the automatic stay. Nevertheless, some courts have held that recovery of costs or associated fines laid out by the government are part of the "exception to the exception" category. For example, in *In re W.R. Grace & Co.*,[52] the debtor filed for declaratory and injunctive relief against the New Jersey Department of Environmental Protection (NJDEP) after the NJDEP brought a civil action in state court seeking recovery of a substantial fine because of false filings made with the NJDEP. Contrasting *Penn Terra*, the bankruptcy court found that the NJDEP action, brought four years after the debtor filed for Chapter 11 protection, did not have the purpose of protecting public health and safety, but instead, "the purpose of the NJDEP action is solely to liquidate its monetary claim for penalties . . . ."[53] The court went on to hold that the action "seeking a fine with respect to an allegedly false report . . ., where the action is not to address a risk to public health, safety or welfare, and

48. *Id.* (internal citations omitted) ("[T]he inquiry is objective: we examine the purpose of the law that the state seeks to enforce rather than the state's intent in enforcing the law in a particular case."). This is the "pecuniary purpose" test.

49. *Id.* at 866 ("[T]he primary purpose of South Carolina's financial assurance regulations is to deter environmental misconduct and to encourage the safe design and operations of hazardous waste facilities.").

50. *Id.*

51. *See, e.g.*, *Bickford v. Lodestar Energy, Inc.*, 310 B.R. 70, 77 (E.D. Ky. 2004) (*held*, Kentucky Natural Resources and Environmental Cabinet's enforcement of requirement that surface mine operator-debtor secure reclamation bonds falls under the exception to the automatic stay, and that, "while it may well be that the effect and even a purpose of the bonding requirement is to ensure that funds will be available for reclamation of land mined in the Commonwealth, . . . the Court is not convinced that the bonding requirement primarily serves a primarily pecuniary end."); *see also In re War Eagle Construction Co., Inc.*, 283 B.R. 193 (S.D. W. Va. 2002) (*held*, declaration of forfeiture of bonding requirement is excepted under the automatic stay, drawing the distinction between declaration of forfeiture and actual collection of the bond, drawing a parallel to declaring a performance bond in default and seeking to collect on the bond).

52. 384 B.R. 678 (Bankr. D. Del. 2008).

53. *Id.* at 681. EPA had already cleaned up the contaminated site and filed a proof of claim in the case.

where a risk no longer exists, does not fall under the § 362(b)(4) exception to the automatic stay."[54]

Other courts have found that enforcement of an order against a debtor that requires the debtor to expend estate assets is subject to the automatic stay. In *In re Thomas Solvent Co.*, the debtor, a chemical and solvent storage distributor, sought an injunction against the State of Michigan to prevent enforcement of an order that would require the debtor to spend estate assets, arguing that "the action of the State is to enforce a money judgment."[55] The State had brought a suit against the company in state court, where the debtor was found liable for groundwater contamination and ordered to take remedial and protective action. Soon thereafter, the debtor filed a Chapter 11 petition, and within several months proposed a liquidating plan. The bankruptcy court attempted to balance systematic administration and disposition of estate assets with environmental concerns, holding that the state was enjoined from enforcing the judgment, but the injunction would be revoked if the debtor had not filed a liquidating plan within 90 days.[56]

Still other cases have turned on the type of power the governmental unit is wielding. In one such case, *In re Royal*, a county board of supervisors sought to use its power of eminent domain to decommission a debtor's wells to avoid a costly cleanup, arguing that this action was exempt under the automatic stay.[57] The Fourth Circuit Court of Appeals held that to qualify for the exemption, "the county must demonstrate that it is 1) enforcing 2) its police and regulatory power."[58] Finding that the county was not actually "enforcing" anything, it held that the county's eminent domain action was not exempt from the stay and could not go forward.[59]

54. *Id.* at 682 (holding that the action was null and void since violations of the automatic stay are without effect). *See also In re FV Steel and Wire Co.*, 324 B.R. 701, 705 (Bankr. E.D. Wisc. 2005) (*held*, EPA's action to enforce a consent decree requiring debtor to continue monitoring and maintenance of a groundwater treatment system was the enforcement of a money judgment and thus subject to the automatic stay: "To hold that enforcement of the Debtor's remaining obligations under the Consent Decree is not the collection of a money judgment, would, in this Court's opinion, eviscerate the money judgment exception."); *United States v. Mattiace Indus., Inc.* 73 B.R. 816, 818 (E.D.N.Y. 1987) (EPA's action to recover civil penalties and costs incurred from packager/seller of chemicals for a one-time spill found to be "punitive," and stayed under the pecuniary purpose test).

55. 44 B.R. 83, 84 (Bankr. W.D. Mich. 1984).

56. *Id. See also United States v. Johns-Manville Sales Corp.*, 13 ELR 20310 (D.N.H. Nov. 15, 1982) (EPA action to require debtor to prepare and implement a plan to contain asbestos contamination held stayed by the automatic stay because it would require expenditure of estate assets); *In re Goodwin*, 163 B.R. 825 (Bankr. D. Idaho 1993) (Idaho Department of Health and Welfare denied injunction requiring debtor to clean up environmental contamination denied pursuant to the pecuniary purpose test).

57. 137 Fed. Appx. 537 (4th Cir. 2005).

58. *Id.* at 540 (*citing* 11 U.S.C. § 362(b)(4)).

59. *Id.*

IV. Abandonment and Lease Rejection

A. Abandonment Power Under Section 554 of the Bankruptcy Code

Section 554(a) of the Bankruptcy Code provides that "after notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."[60] Abandonment is a divestiture of the debtor's estate's interest in the abandoned property. Once abandoned by the trustee (or the debtor-in-possession), the property reverts to any party with a possessory interest in the property, such as the debtor, a lender, tenant, receiver, or relevant taxing authority.

In a Chapter 7 case, to abandon property, the trustee merely has to demonstrate to the bankruptcy court that the property in question is burdensome or of inconsequential value. In a Chapter 11 reorganization case, however, courts may require the trustee (or debtor) to show also that there is a "good business reason" or "articulated business justification" for the proposed abandonment.[61] Once the trustee (or debtor) makes this showing, the burden of proof shifts to any objecting party seeking to apply the judicially-created exception (discussed below) to the abandonment power.[62]

1. *Abandonment Prohibited*

The seminal case regarding the exception to the abandonment power is *Midlantic National Bank v. New Jersey Department of Environmental Protection*.[63] In *Midlantic*, the debtor Quanta was a waste oil processor that operated facilities in New Jersey and New York. The New Jersey Department of Environmental Protection discovered Quanta's environmental violations, and during negotiations for the cleanup of the New Jersey site, Quanta filed for bankruptcy protection. An investigation revealed that similar violations had occurred at the New York site. The trustee sought to abandon both properties pursuant to section 554 of the Bankruptcy Code, arguing that compliance with the states' cleanup demands would deplete the assets of the estate. The bankruptcy court authorized the abandonment of both properties, and the states appealed through the district and circuit court of appeals, and ultimately, to the U.S. Supreme Court.

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60. 11 U.S.C. § 554(a).

61. *In re Beker Industries Corp.*, 64 B.R. 900 (Bankr. S.D.N.Y. 1986) (applying test for sales of property out of ordinary course of business, as set forth *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983), to the trustee's (or debtor's) abandonment power).

62. *In re St. Lawrence Corp.*, 248 B.R. 734, 741 (D.N.J. 2000).

63. 474 U.S. 494 (1986).

The Supreme Court found that the bankruptcy court had erred in permitting abandonment of the contaminated properties. Observing that the abandonment of the sites had aggravated existing dangers, the Court held that a bankruptcy court may not authorize abandonment without formulating conditions to adequately protect the public health and safety. The Court thus created an exception to the trustee's abandonment power, holding that the trustee may not abandon property in contravention of a state statute or regulation reasonably designed to protect public health or safety from identified hazards.

The *Midlantic* Court emphasized the narrowness of its holding, however, noting that the abandonment power is not to be restricted by laws or regulations not reasonably calculated to protect the public health or safety from "imminent and identifiable harm" or by state laws "so onerous as to interfere with the bankruptcy" process.[64] Other language in the opinion suggests that a bankruptcy court could fulfill its obligations by conditioning abandonment on "relatively minor steps to reduce imminent danger."[65]

2. Abandonment Permitted

Cases decided subsequent to *Midlantic* have focused on the limitations of the *Midlantic* decision and, not surprisingly, bankruptcy courts have reached inconsistent results.[66] In several cases, courts have explored the contours of the opinion, have distinguished *Midlantic,* and have authorized abandonment.

For example, in *In re Smith-Douglas*, the Fourth Circuit Court of Appeals upheld the trustee's abandonment of a fertilizer plant based on (i) the estate's lack of unencumbered assets with which to finance cleanup and (ii) the absence of any imminent harm or danger to public.[67] In a narrow interpretation of *Midlantic*, the *Smith-Douglas* court noted that the Bankruptcy Code preempts "[s]tate laws which obstruct expeditious and equitable distribution" of estate assets.[68] Despite existing environmental violations at the plant, the state had failed to take any enforcement action. Citing the state's inaction, the

64. Specifically, the Court did not reach the issue of whether abandonment is permissible where "certain state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself…." *Id.* at 507.

65. *Id.* at 499 n.3.

66. Indeed, some courts have disallowed abandonment where a continuing violation of state environmental laws or regulations would occur, without regard for whether an imminent and identifiable threat was posed to human health and safety. *See*, *e.g.*, *In re Wall Tube & Metal Products, Inc.*, 831 F.2d 118 (6th Cir. 1987); *In re Peerless Plating Co*., 70 B.R. 943, 946–47 (Bankr. W.D.Mich. 1987).

67. 856 F.2d 12, 17 (4th Cir. 1988). Originally filed as a Chapter 11 reorganization case, the case was converted to a Chapter 7 liquidation subsequent to the bankruptcy court's abandonment decision. *Id.* at 13 n.1.

68. *Id.* at 15-16.

court found no existing threat to public safety.[69] In addition, explaining the relevance of the debtor's financial condition, the court noted that if the estate had unencumbered assets, stricter compliance with state environmental laws would be appropriate. However, because the debtor had no unencumbered assets and no serious public health risk existed, unconditional abandonment was appropriate.

In *In re L.F. Jennings Oil Co.*,[70] the Tenth Circuit Court of Appeals similarly held that a Chapter 7 trustee's abandonment of three contaminated properties that were former gas stations belonging to the debtor was not improper because the properties at issue did not present an immediate and identifiable harm to public health or safety. In affirming the courts below, the Court of Appeals reasoned that the property was not listed on the state's list of contaminated sites, the state's own expert failed to provide evidence that a present threat existed, and the trustee's only violation of state environmental law at the time of abandonment was his failure to file timely reports.

3. Abandonment Prohibited, and Later Permitted

In one case, *In re Guterl Special Steel Corp.*, the Bankruptcy Court for the Western District of Pennsylvania actually faced the abandonment issue twice—in two separate proceedings during the course of the Chapter 7 case—with the result being a split decision (denying abandonment once, and later permitting it) with respect to the same property.[71] In 1982, Guterl Special Steel Corporation and Guterl Steel Corporation filed for Chapter 11,[72] and their cases were substantively consolidated (i.e., their respective assets and liabilities were combined to form a single pool of assets and liabilities) at a later time. The primary assets of the estate included real property suited for industrial use, a substantial portion of which was contaminated with radioactive waste. A third party purchased the uncontaminated portion in 1984, but the trustee was unable to sell the remaining portion for several years. In 1996, preliminary inspections of the property revealed the existence of more than 200 drums, containers and above-ground storage tanks, some of which were

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69. *Id.* at 16. Other courts similarly have viewed the government's failure to act upon or enforce environmental violations as a significant factor indicating an absence of imminent public harm. *See*, *e.g.*, *In re McCrory Corp.*, 188 B.R. 763, 769 (Bankr. S.D.N.Y. 1995) (holding that *Midlantic* analysis would not have precluded debtor from abandoning contaminated property in determining administrative priority of environmental cleanup costs); *N.J. Dept. of Envtl. Prot. v. North Am. Prods. Acquisition Corp.*, 137 B.R. 8, 12 (D.N.J. 1992) (noting that the bankruptcy court hearing record reflected the state's primary concern was payment of site cleanup, not public welfare); *In re H.F. Radandt, Inc.*, 160 B.R. 323, 328 (Bankr. W.D. Wis. 1993) (stating in dicta that the state environmental agency's failure to take any remedial steps with regard to the property itself was persuasive evidence that the contamination posed no imminent danger); *In re Shore Co., Inc.*, 134 B.R. 572, 579 (Bankr. E.D.Tex. 1991) (placing "great weight" on the state agency's lack of enforcement regarding environmental violations and manner of investigation to support finding of no immediate danger).

70. 4 F.3d 887 (10th Cir. 1993).

71. *See* 198 B.R. 128 (Bankr. W.D.Pa. 1996); *see also* 316 B.R. 843 (Bankr. W.D.Pa. 2004).

72. The cases were converted to a Chapter 7 liquidation in 1990.

leaking toxic chemicals, and various other hazardous conditions, including excessive radioactive emissions, all of which had the potential for serious harm to humans with prolonged exposure. Notably, a residential area was located one quarter of a mile south of the site, and immediately north of the property was agricultural land.

In the first proceeding, the Chapter 7 trustee moved to abandon the property and the New York State Department of Environmental Conservation (NYDEC) objected, arguing that the property posed a danger to human health and safety. The bankruptcy court sided with NYDEC and held that the Chapter 7 trustee could not abandon the contaminated property because the abandonment would pose continuing and serious, identifiable threats to public health and safety, all in violation of New York law.[73] The court also granted NYDEC's motion to require the U.S. Environmental Protection Agency (EPA) to clean up the site.

EPA removed the drums containing hazardous chemicals from the site, but took no steps to remediate the radioactive contamination.[74] Disputes regarding cleanup responsibility and availability of funding for the project left the court-ordered remediation incomplete more than eight years later. In a second proceeding, the Chapter 7 trustee again moved to abandon the now partially remediated property, and NYDEC again objected. This time the bankruptcy court held that the abandonment of the contaminated property was proper. Applying the *Midlantic* analysis, the court reasoned that abandonment may be permitted despite violations of state law because there no longer existed an imminent threat to public health or safety. Further, the court noted that requiring strict compliance with New York law would contravene the Bankruptcy Code's purpose of efficient administration and distribution of estate assets. In fact, the court likened the 22-year-old bankruptcy case to the possible scenario left open and unaddressed by the *Midlantic* court—i.e., where abandonment may be permissible when compliance with state laws would be so "onerous" as to interfere with the bankruptcy process itself.

Most courts facing the issue have narrowly interpreted the scope of the *Midlantic* holding. In so doing, they have allowed abandonment most often because the objecting party failed to demonstrate the existence of an "imminent and identifiable harm" and the trustee had shown a lack of unencumbered funds in the estate with which to continue remediation.

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73. *See id.* at 134–35 (The trustee conceded at the evidentiary hearing that the proposed abandonment would violate New York's public health and safety laws.).

74. *In re Guterl Special Steel Corp.*, 316 B.R. 843, 849 (Bankr. W.D.Pa. 2004).

4. *Implications of Abandonment Decisions in Chapter 11 Context*

All of the abandonment cases discussed in the previous section involved Chapter 7 trustees or Chapter 11 reorganization cases that subsequently were converted to Chapter 7 liquidation cases. Although the factors relevant to the abandonment determination by a Chapter 7 trustee should apply equally to a Chapter 11 debtor-in-possession, as a practical matter the utility of the abandonment power in a Chapter 11 reorganization is much more limited.

The Bankruptcy Code does not specify *to whom* the estate property is abandoned when it is abandoned. Case law suggests, however, that the property may be abandoned to any party with a possessory interest in the property,[75] which is typically the debtor. In a Chapter 7 liquidation, abandonment of contaminated property to the debtor frees the trustee of cleanup obligations.[76] In a Chapter 11 liquidation, because the debtor lacks resources to fund cleanup operations, filing a claim against the debtor for remediation costs may be the limited recourse available to a claimant.[77] On the other hand, in a Chapter 11 reorganization, unless there exists a specific third party with a possessory interest in the contaminated property, such as a secured lender or taxing authority with a lien on the property, abandonment by the debtor-in-possession simply would saddle the reorganized debtor with the contaminated property.[78] In other words, the reorganized debtor would emerge from Chapter 11 holding the same property that, as a debtor-in-possession, it had been authorized to abandon—and likely with the same environmental obligations and liabilities.[79]

One alternative to abandonment would be for the Chapter 11 debtor-in-possession, as part of its reorganization plan, to transfer the contaminated property to a trust created to own, manage, and clean up the property.[80] This would permit the estate to dispose of contaminated property without the reorganized company ever taking title to the property. The debtor-in-possession could establish the trust in good faith and provide an amount of initial funding reasonably believed to be sufficient to satisfy cleanup and/

75. *See*, *e.g.*, *In re Dewsnup*, 908 F.2d 588, 590 (10th Cir. 1990).

76. Eric R. Wilson and Mark Page, *A Quagmire of Obligations: Making Sense of the Intersection of CERCLA and the Bankruptcy Code*, 25 The Bankruptcy Strategist 1 (May 2008).

77. *Id.*

78. Joel M. Gross, *Chapter 11 and Environmental Law*, 26 Am. Bankr. L.J. 32 (June 2007).

79. *Cf. In re CMC Heartland Partners*, 966 F.2d 1143, 1146–47 (7th Cir. 1992) (holding that liability under CERCLA based on reorganized debtor's current ownership of hazardous waste site was claim running with land, and survived reorganization). However, some commentators suggest that abandonment in the Chapter 11 context is not without potential benefits. For example, the debtor-in-possession could argue that it did not own the property during the bankruptcy, and that the clean-up obligations are not administrative expenses of the estate. In turn, the debtor-in-possession could characterize cleanup liability as a post-bankruptcy issue that does not need to be addressed as part of plan confirmation. *See* Joel M. Gross, *The Effect of Bankruptcy on Obligations to Clean Up Contaminated Properties: Recent Developments and Open Issues Two Decades After Kovacs and Midlantic*, Norton Annual Survey of bankruptcy Law (2003).

80. Joel M. Gross, *Chapter 11 and Environmental Law*, 26 Am. Bankr. L.J. 32 (June 2007).

or closure/post-closure obligations, or the bankruptcy court could determine an appropriate funding source and amount and/or the conditions for clean up. In these circumstances, if a dispute later arose regarding the payment of environmental claims or obligations related to the property, the reorganized debtor could argue that it no longer owns the property and has been discharged of further liability.

The debtor in *In re National Gypsum Co.* used an analogous structure to protect its reorganized successor against post-reorganization liability.[81] Under the debtor's reorganization plan, a new entity was formed to purchase a portion of the operating assets of the debtor, a manufacturer of asbestos-containing products, and a trust was created to assume sole post-reorganization responsibility for all asbestos claims. The plan also included an order channeling all asbestos claims to the trust and barring any claims against the newly created entity pending exhaustion of trust remedies.

The trust later brought suit against the new entity, alleging that the trust's assets were insufficient to pay full tort values to all claimants and seeking a determination that the new entity should be liable for unknown asbestos claims unable to be satisfied by the trust. The bankruptcy court agreed with the trust, and the district court affirmed. Reversing, the Fifth Circuit Court of Appeals held that both the language in the plan establishing the trust for purposes of payment of asbestos claims and in the trust agreement providing that the trust would assume any and all liability of debtor to asbestos claimants supported (i) limited liability of the new entity only to the extent provided under nonbankruptcy, state successor liability laws, and (ii) that the trust, not the new entity, had to be regarded as the reorganized debtor following confirmation.[82]

B. Rejection of Leases

The abandonment of contaminated property is not limited to property owners. It may also occur in the context of debtor-lessee's proposal to reject a lease. Pursuant to section 365 of the Bankruptcy Code, debtors may reject executory contracts and unexpired leases that are burdensome to the estate, subject to certain limitations.[83] In the environmental context, this right may allow debtors to vacate contaminated property and leave the landlord with the burden of remediation.

81. 219 F.3d 478 (5th Cir. 2000).

82. *Id.* at 493. While the case was on remand, the trust terminated its participation in the claims resolution process, which in turn triggered plan provisions requiring the trust and the new entity to submit to the court an alternative claims resolution facility. The bankruptcy court modified and adopted an alternative claims facility, which required the new entity to provide funding to the trust to maintain the channeling order, which the court would otherwise terminate if the new entity declined to provide the funding. 257 B.R. 184, 222–23 (Bankr. N.D. Tex. 2000).

83. 11 U.S.C. § 365(a).

For example, *In re Circle K Corp.*[84] involved a debtor-lessee that had operated small stores and sold gas at various locations. The debtor-in-possession ceased operations at several stores containing leaking underground storage tanks, secured the tanks at these sites, and sought to reject the leases for these closed stores. The Bankruptcy Court for the District of Arizona permitted the debtor-lessee to reject the leases, despite various landlords' objections that the debtor should first perform environmental assessments and cleanups at the sites. Distinguishing the scheme of section 365 of the Bankruptcy Code, which governs lessor-lessee relations, from section 554 regarding abandonment of property, the court applied the business judgment rule applicable to lease rejections and found the debtor's request appropriate. The court's decision was expressly premised on the assumption that the tanks did not pose an immediate threat to the environment because no agencies had taken any action to date, and subject to any evidence to the contrary to be produced by any party in interest for the court's consideration.[85]

V. Administrative Expense Priority of Environmental Claims

A. Sections 503 and 507 of the Bankruptcy Code

Pursuant to Bankruptcy Code sections 503(b)(1)(A) and 507(a)(2), administrative expense status may be afforded to "actual, necessary costs and expenses of preserving the estate," with priority over other unsecured claims.[86] Allowance of a claim as an administrative expense can have significant ramifications, particularly in cases in which general unsecured claims will be paid only a fraction of their face value, if at all.

Once it has been determined that an environmental claim (or any other claim) should be deemed allowed, the next determination is how that claim will be treated for purposes of participating in the distribution of the debtor's assets. As described in Section I above, the Bankruptcy Code prescribes a priority scheme for distributing assets to creditors.[87] Under that scheme, secured creditors (i.e., creditors with perfected liens on the debtor's property) are afforded the highest priority, followed by administrative (post-petition) claims, priority pre-petition claims (e.g., certain employee and tax claims), nonpriority general unsecured claims (e.g., trade claims, contract/lease claims,

84. 1991 WL 349900 (Bankr. D.Ariz. 1991).
85. *Id.* at 18.
86. 11 U.S.C. §§ 507, 726.
87. 11 U.S.C. § 507.

deficiency claims of secured creditors), contractually subordinated claims, statutory subordinated claims, and equity interests.

In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, the Supreme Court declined to decide the issue of whether environmental cleanup claims are entitled to administrative expense priority.[88] As discussed below, the lower courts are split on this issue.

B. Allowing Cleanup Costs as Administrative Expense

Since *Midlantic*, the trend has been for courts to treat environmental claims as administrative expenses, including in the Courts of Appeals in the First, Second, Third, Fourth, Fifth, and Sixth Circuits.[89] For example, in *In re Wall Tube,* the State of Tennessee sought administrative expense priority for the costs it incurred while removing hazardous substances from the debtor's property.[90] The debtor had received notice of its environmental violations several weeks prior to filing for bankruptcy, and the trustee of the debtor's estate was duly informed of the existence of the violations. During the course of the bankruptcy case, Tennessee conducted further inspections and experiments relating to the debtor's contaminated property and unsuccessfully tried to compel the debtor to take remedial action. Only when the debtor refused to "remedy the environmental health hazard" did Tennessee step in and remedy the problem itself, after which it sought administrative expense treatment for all of its cleanup expenses. The lower court denied Tennessee's request on the grounds that its actions "neither benefited the estate nor fulfilled a legal obligation under State law."[91]

In reversing, the Sixth Circuit Court of Appeals engaged in a two-step analysis. First, the Court of Appeals examined the question of whether 28 U.S.C. § 959(b) applied to a Chapter 7 liquidating trustee and required the trustee to comply with Tennessee's hazardous waste statute. "We believe that whether a trustee is liquidating, managing or reorganizing the debtor's estate, his efforts under the Code remain the same."[92]

Second, the Court of Appeals had to determine whether the response costs taken by the state were "actual, necessary costs and expenses of preserving the estate." The Court of Appeals began its determination by citing that the Supreme Court had previously expanded the category of administrative expenses to include damages resulting from post-petition negligence. It then found support in a bankruptcy court case from the Northern District of Ohio

88. 474 U.S. 494, 498 n.2 (1986).

89. *See In re H.L.S. Energy Co.*, 151 F.3d 434, 439 (5th Cir. 1998); *Cumberland Farms v. Fla. Dep't of Envtl. Prot.*, 116 F.3d 16, 21 (1st Cir. 1997); *Dep't of Envtl. Res. v. Conroy*, 24 F.3d 568 (3d Cir. 1994); *In re Chateaugay*, 944 F. 2d 997, 1010 (2d Cir. 1991); *In re Smith-Douglass, Inc.*, 856 F.2d 12, 17 (4th Cir. 1988); and *In re Wall Tube*, 831 F.2d 118, 124 (6th Cir. 1987).

90. *In re Wall Tube*, 831 F.2d at 121.

91. *Id.*

92. *Id.* at 122.

for the proposition that a government agency's response to an environmental hazard created by a debtor was an administrative expense of the debtor's estate. This is because "those who generate, use or transport hazardous material should be required to pay the cost of damages caused by the hazardous materials" and "this liability cannot be transferred."[93] The Court of Appeals reasoned that, because federal environmental laws did not allow debtors to escape liability for violations, "it follows that the cost incurred…in discharging this liability is an actual, necessary cost of preserving the estate entitled to administrative expense priority."[94] It was not imperative to show that payment of Tennessee's expenses created a benefit to the estate; rather, benefit to the estate could be assumed from the mere payment of this actual and necessary cost.

The Fifth Circuit Court of Appeals similarly held that a Texas state agency's costs of satisfying a debtor's post-petition environmental obligations were entitled to administrative priority because they were "actual, necessary costs and expenses of preserving the estate" under Bankruptcy Code section 503(b)(1)(A).[95] *In re H.L.S. Energy Co.* involved a debtor's estate that included several oil and gas wells, some of which were no longer active. State law required that all inactive wells be plugged, and because the estate did not have sufficient funds to plug the wells itself, the state and the bankruptcy trustee reached an agreement under which the state would plug the wells and charge the costs associated with compliance to the estate. During the liquidation of the estate, the state contended that its claims were entitled to administrative expense treatment, and the court agreed. The court explained that the state's work in plugging the wells was, indeed, a benefit to the estate and that "the state's action resembles the sort of 'salvage' work that lies at the heart of the administrative expense priority."[96]

The courts that have afforded cleanup costs administrative expense status have generally done so on at least one of two grounds. First, because 28 U.S.C.§ 959(b) requires a debtor-in-possession or a trustee to comply with applicable state laws, including environmental laws, any cleanup must necessarily benefit the estate as it permits the estate to remain in compliance.[97] Most courts, having considered the issue, appear to believe that debtors-in-possession or Chapter 11 trustees must comply with state environmental laws and cleanup orders as a condition to continued operations, even where the costs would be burdensome to the estate or the contamination may be attributable to historical or pre-petition discharges. The rationale behind these decisions is that a company should not be able to avoid compliance with environmental laws and gain a competitive advantage simply by filing for

93. *Id*. at 123 (intermal citations omitted).

94. *Id.* at 124 (internal citations omitted).

95. *In re H.L.S. Energy Co*, 151 F.3d at 436.

96. *Id.* at 438.

97. *See In re Stevens*, 68 B.R. 774, 778 (Bankr. D. Me. 1987); *In re Laurinburg Oil Co*., 49 B.R. 652, 654 (Bankr. M.D.N.C. 1984); *cf. In re Allen Care Centers,* 175 B.R. 397, 299 (D. Or. 1994).

bankruptcy. The courts are split, however, on whether 28 U.S.C. § 959(b) applies to liquidating estates.[98]

Second, where courts have interpreted *Midlantic* to prohibit trustees from abandoning contaminated property, the estate cannot avoid the liability for the cleanup of hazardous wastes.[99] The costs incurred by the government thus are a necessary expense of preserving the estate, and the resulting environmental claims are afforded administrative expense priority.

A more difficult question is the proper treatment of cleanup costs that are assessed post-petition but that relate to pre-petition releases. Much of the administrative expense inquiry thus focuses on *when* the environmental claim arises, an issue that also has split the courts.[100] Some courts have ruled that these types of claims should be treated as pre-petition general unsecured claims, either because the release or the indemnification claim related to the release occurred or arose pre-petition.[101] The majority view, however, appears to be to grant administrative expense priority for cleanup costs assessed post-petition, regardless of when the discharge took place, because the cleanup enables the estate to maintain itself in compliance with applicable environmental law and is thus an actual, necessary cost of preserving the estate.[102]

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98. *Compare In re Corona Plastics, Inc*., 99 B.R. 231, 235–36 (Bankr. D.N.J. 1989), *and In re Security Gas & Oil, Inc*., 70 B.R. 786, 796 (Bankr. N.D. Cal 1987), *and In re Thomas Solvent Co*., 44 B.R. 83, 88 (Bankr. W.D. Mich. 1984) (holding 28 U.S.C. § 959(b) does not apply to liquidating entities) *with In re Wall Tube*, 831 F.2d 118, 122 (6th Cir. 1987), *and In re Stevens*, 68 B.R. at 781, *and In re Commercial Oil Serv., Inc*., 58 B.R. 311, 317 (Bankr. N.D. Ohio 1986).

99. *See In re Chateaugay Corp*., 944 F.2d 997, 1009 (2d Cir. 1991); *In re Smith-Douglass, Inc*., 856 F.2d 12; 16–17 (4th Cir. 1988); *In re Better-Brite Plating, Inc*., 105 B.R. 912, 917 (Bankr. E.D. Wis. 1989); *vacated*, 136 B.R. 526 (Bankr. E.D. Wis. 1990); *In re Microfab, Inc*., 105 B.R. 161, 163 n. 8 (Bankr. D. Mass. 1989); *In re FCX, Inc.*, 96 B.R. 49, 54 (Bankr. E.D.N.C. 1989); *In re Peerless Plating, Co.*, 70 B.R. 943, 946 (Bankr. W.D. Mich. 1987).

100. *Compare In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 787 (7th Cir. 1992) (measuring from when parties first become aware of the environmental problem) *with In re Jensen*, 127 B.R. 27, 32 (B.A.P. 9th Cir. 1991) (measuring from the debtor's first contaminating acts); *and In re Chateaugay Corp.*, 944 F.2d at 1005 (measuring from when the contaminant is released into the environment).

101. *In re Dant & Russell, Inc.,* 853 F.2d 700, 708–709 (9th Cir. 1988); *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d 137, 141–42 (3d Cir. 1985); *In re Hudson Oil Co*., 100 B.R. 72, 74 (Bankr. D. Kan. 1989); *In re Hemingway Transp., Inc*., 73 B.R. 494 (Bankr. D. Mass. 1987); *In re Security Gas & Oil, Inc.,* 70 B.R. 786, 795 (Bankr. N.D. Cal. 1987).

102. *In re Smith-Douglass, Inc.,* 856 F.2d at 17; *In re Wall Tube & Metal Prods. Co*., 831 F.2d 118, 123–124 (6th Cir. 1987); *In re Kent Holland Die Casting & Plating, Inc*., 125 B.R. 493, 498 (Bankr. W.D. Mich. 1991); *In re Better-Brite Plating, Inc*., 105 B.R. at 916; *In re FCX, Inc.*, 96 B.R. at 55; *In re Stevens*, 68 B.R. at 780; *In re Mowbray Eng'g. Co.,* 67 B.R. 34, 36 (Bankr. M.D. Ala. 1986); *In re Pierce Coal & Constr., Inc*., 65 B.R. 521, 530 (Bankr. N.D. W. Va. 1986). A similar analysis follows for fines and penalties assessed against a debtor. If the fine relates to pre-petition conduct, it usually will be considered a general unsecured claim, but if the fine or penalty relates to violations occurring post-petition, the claim will be classified as an administrative claim on the basis that the debtor is required to comply with environmental laws under 28 U.S.C. § 959(b) (2008). *In re Chateaugay Corp.*, 944 F.2d at 999; *United States Dep't of Interior v. Elliott*, 761 F.2d 168, 171 (4th Cir. 1985); *In re Wheeling-Pittsburgh Steel Corp.,* 123 B.R. 18, 22 (W.D. Pa. 1990).

C. Disallowing Cleanup Costs as Administrative Expense

As noted above, some courts continue to hold that claims for environmental cleanup costs should be treated as general unsecured claims and not be entitled to administrative priority.[103] These courts disagree that the cleanup is an actual and necessary expense of preserving the estate. Relying on Supreme Court cases like *Midlantic* and *Ohio v. Kovacs*,[104] these courts have employed the same imminent harm analysis used in the context of the abandonment of property context to determine whether cleanup costs incurred were necessary to preserve the estate.

For example, in *In re Mahoney-Troast Construction Co.*, the Bankruptcy Court for the District of New Jersey held that, because the environmental hazard in question did not pose an imminent threat to public health, a former lessor's claim against the debtor for cleanup costs related to that hazard was not entitled to administrative priority.[105] The court explained that (i) the hazardous waste was well-contained up until its removal; (ii) no regulatory authority had ordered the debtor to remove the waste; and (iii) at the time the cleanup was done, the debtor had rejected the leased property almost two years prior.

Similarly, in *In re McCrory Corp.*,[106] the Bankruptcy Court for the Southern District of New York denied a landlord's claim for cleanup costs where pollution had occurred pre-petition but cleanup occurred post-petition. In *McCrory*, the debtor had rejected the lease of the contaminated property more than two months before the landlord began the cleanup process. The court held that "if the debtor would be permitted to abandon the property, and the property in fact is no longer estate property, any clean-up cost based on pre-petition activity would not be entitled to administrative expense priority."[107]

Jurisprudence regarding the administrative priority issue suggests that courts may be influenced by the identity of the claimant in determining the status of environmental claims. Some courts seem to be more willing to grant administrative expense status to claims filed by the government but are reluctant to treat claims of private parties (particularly landlords, as evidenced above) as administrative expense priority claims. Those courts refusing to grant administrative priority to cleanup costs incurred by landlords have reasoned that because the leased property is not owned by the debtor, the cleanup costs are not a necessary expense for preserving the debtor's estate.[108]

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103. *See In re Dant & Russell, Inc.*, 853 F.2d at 709; *Southern Ry. Co. v. Johnson Bronze Co.*, 758 F.2d at 143; *In re McCrory Corp.*, 188 B.R. 763, 770 (Bankr. S.D.N.Y. 1995).

104. *Ohio v. Kovacs*, 469 U.S. 274 (1985).

105. *In re Mahoney-Troast Construction Co.*, 189 B.R. 57, 62 (Bankr. D. N.J. 1995).

106. *In re McCrory Corp.*, 188 B.R. at 770.

107. *Id.* at 767.

108. *In re Synfax Mfg., Inc.*, 126 B.R. 30, 34 (Bankr. D. N.J. 1990); *In re Dant & Russell, Inc.,* 853 F.2d 700, 709 (9th Cir. 1988). *Cf. In re Nat'l Refractories & Minerals Corp.*, 297 B.R. 614, 619 (Bankr. N.D. Cal. 2003).

VI. Section 363(f) Sales and Successor Liability Issues

The recent economic downturn and tightened credit markets, which have continued to persist since mid-2008, have led to a substantial increase in the number of bankruptcy filings in the United States. Many of these recent cases reflect a growing trend away from the typical, extended Chapter 11 plan process (in large part due to the inability to procure debtor-in-possession financing) and more toward relatively fast sales of substantially all of a debtor's assets under section 363 of the Bankruptcy Code. Section 363 sales are particularly significant in the environmental claims context because section 363 allows a debtor, under certain conditions, to sell its assets free and clear of liens, claims, and other interests—which may allow a third party to purchase a debtor's assets at considerable discounts without assuming environmental liability through a more accelerated process that affords fewer protections to creditors than the normal plan solicitation and confirmation process.

Section 363 of the Bankruptcy Code sets forth the rules and procedures for the use, sale, or lease of property of a debtor's estate, both inside and outside the ordinary course of business.[109] Along with providing general guidelines for the sale of property, section 363(f) also provides that a "trustee may sell property … free and clear of any interest in such property of an entity other than the estate" as long as one or more of the following conditions are met:

> (1) Applicable nonbankruptcy law permits the sale of such property free and clear of such interest;
> (2) Such entity consents;
> (3) Such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) Such interest is in bona fide dispute; or
> (5) Such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

If a debtor satisfies any of the five conditions outlined in section 363(f), the debtor may sell property free and clear of liens, claims, and interests.

The general rule of law in asset sales is that the purchaser does not acquire any liabilities of the seller.[110] Some exceptions include situations where: (1) the purchaser explicitly or implicitly agrees to assume liabilities; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is a mere continuation of the

109. 11 U.S.C. § 363.
110. *See Cargo Partner AG v. Albatrans, Inc.*, 352 F.3d 41, 45 (2d Cir. 2003).

selling corporation; or (4) the parties negotiated the transaction fraudulently in order to escape liability.[111] (Because, under these circumstances, the de facto ownership and/or operation of the assets remains unchanged, these exceptions constitute grounds for asserting successor liability.)

By virtue of their policy underpinnings, as well as their structure, however, asset sales accomplished under section 363 of the Bankruptcy Code are less likely to result in a finding of successor liability (for the seller's liabilities) against the asset purchaser. Perhaps the most significant considerations militating against imposing successor liability on section 363 sale purchasers are the fear of discouraging potential buyers and frustrating the priority scheme of the Bankruptcy Code by allowing some creditors to recover (in full) against the successor while limiting others to (often partial) recoveries from the proceeds of the sale.[112]

Some courts have held that section 363 sales can extinguish pre-petition or pre-sale environmental claims, but not claims arising after the conclusion of the bankruptcy case. For example, in *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.,*[113] a remedial waste cleanup group sued a group of defendants for contribution to cleanup costs of a chemical and industrial waste disposal facility under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) on a successor liability theory.[114] One defendant previously had purchased certain assets from the debtors, including the debtors' oil refining facilities, and the purchase agreement explicitly excluded the assumption of any liability for environmental claims arising prior to the closing of the sale.[115] The sale order issued by the bankruptcy court provided that the transfer of the assets to the defendant-purchaser was to be "free and clear of all liens, claims, taxes, encumbrances, obligations, contractual commitments, and interests."[116] And the subsequent order confirming the debtors' plan of reorganization discharged the debtors of any claims arising prior to the confirmation order.

The defendant-purchaser moved to dismiss, or in the alternative for summary judgment, arguing that successor liability could not attach because its predecessor remained a viable company from which the plaintiff could recover, and that the bankruptcy court's sale order found that the sold assets would be free and clear of all claims and obligations, including CERCLA liability. The District Court for the Northern District of Indiana, denying

111. *See, e.g.., U.S. v. Mexico Feed & Seed Co., Inc.,* 980 F.2d 478, 487 (8th Cir. 1992).

112. *See In re Trans World Airlines, Inc.*, 322 F.2d 283, 292 (3d Cir. 2003) (permitting the sale of an airline's assets free and clear of employment discrimination claims because allowing successor liability claims against the purchaser "while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme.").

113. 195 B.R. 716 (N.D. Ind. 1996).

114. *Id*. at 720 (noting that the remedial group consisted of corporations that were ordered by EPA to clean up the site).

115. *Id*. ("[Defendant] shall assume no liabilities . . . including the cost of correcting or compensation for injuries of any kind, including those to persons, property, the environment, or natural resources…..").

116. *Id*. at 721 (citations omitted).

the defendant-purchaser's motion, found that material fact questions existed precluding summary judgment on the successor liability claim on "mere continuation" or "substantial continuity" theory, and that a sale free and clear does not include future claims that did not arise until after the bankruptcy case had concluded. Applying this rationale, the court found that the bankruptcy court's sale order precluded suits against the defendant-purchaser for any claims that could have been brought against the debtor-seller before or during the bankruptcy case, but not if the CERCLA claim did not arise until after the case, because a bankruptcy court could not have discharged claims that did not yet exist.

In *In re Heldor Industries, Inc.,*[117] the debtor sold substantially all of its assets pursuant to a sale agreement that permitted the debtor to sell "free and clear" and without setting aside proceeds to comply with state environmental cleanup laws.[118] In particular, the sale agreement contained no terms requiring that the debtor comply with the environmental laws and specifically allowed the purchaser to take title to the assets free and clear of any obligations to comply with environmental laws. The NJDEP received notice of the impending sale, including notice that the agreement did not require compliance with environmental laws, and had an opportunity to object to the sale, but failed to do so until after the sale order became final. Nevertheless, the NJDEP argued that the sale order could be voided because a debtor *must* comply with environmental cleanup laws. The court disagreed and held that the order became final after the NJDEP failed to object in a timely manner, having received sufficient notice, citing the need for finality of bankruptcy court orders.[119] Although *Heldor* was later vacated on unrelated procedural grounds,[120] the decision provides further evidences that environmental claims may be extinguished by a section 363 sale.

The recent Chapter 11 case of Chrysler LLC and certain of its subsidiaries and affiliates is a prime, though in many respects novel (other than, perhaps the General Motors Chapter 11 case) example of the growing trend toward "fast-track restructuring" through the use of section 363 to sell the debtors' assets free and clear of liens, claims, and interests, including environmental claims. In the Chrysler case, the bankruptcy court authorized the sale of substantially all of the debtors' operating assets free and clear of all claims and interests not expressly assumed by the purchaser, whether arising before or after the Chapter 11 filing.[121] For purposes of the sale, "claims and

117. 131 B.R. 578 (Bankr. D. N.J. 1991).

118. *Id.* at 580.

119. *Id.* ("The bankruptcy system would be severely damaged if parties could not rely on the finality of court orders entered after notice and opportunity for hearing. This is particularly true in relation to orders authorizing sale of property of the estate.") (citations omitted). The court also noted that since the sale order had become final, any objections by the NJDEP were barred by the doctrine of *res judicata*.

120. *See State of N.J. Dep't of Environmental Protection and Energy v. Heldor Industries, Inc.,* 989 F.2d 702 (3d Cir. 1993) (vacating the lower court's decision because NJDEP withdrew its objection prior to the entry of the bankruptcy court's order, thereby mooting the issue).

121. *In re Chrysler LLC, et al.*, Case No. 09-50002 (Bankr. S.D.N.Y. June 1, 2009).

interests" included, among others, all claims or rights based on successor, environmental, and products liability, with all such claims to attach to the proceeds of the sale.

The sale order explicitly enjoined third parties from asserting against the purchaser any and all claims and interests related to the sold assets, though it did provide a carve-out for governmental entities seeking to enforce environmental claims to which the purchaser would be subject as the post-closing owner or operator of property. Indeed, the sale order expressly provided that the sale order not be interpreted in any way to deem the purchaser liable under a successor liability theory for violations of environmental laws or liabilities relating to any off-site waste disposal prior to entry of the sale order.

A group of Indiana state pension funds and a coalition of consumer groups, which argued that the Chrysler sale discriminated against secured lenders and abrogated key liabilities, appealed, challenging the sweeping relief contained in the bankruptcy court's sale order. The Second Circuit Court of Appeals upheld the sale order, and the Supreme Court briefly stayed consummation of the sale before ultimately denying a substantive review of the case, which cleared the way and, perhaps, established an important precedent for fast-track section 363 sales. In fact, within weeks, the bankruptcy court in General Motors's Chapter 11 case authorized a section 363 sale for substantially all of General Motors's operating assets on substantially similar terms.[122]

VII. Dischargeability of Environmental Claims

There are a number of basic, yet critical, issues courts must resolve when confronted with environmental obligations in bankruptcy cases. Whether a debtor's obligations under CERCLA or similar state, federal, or other environmental statutes are "claims" long has been a point of contention between Chapter 11 debtors and governmental authorities. The distinction is critical because only "claims" are dischargeable; those obligations that are not "claims" cannot be discharged.

A guiding principle of the Bankruptcy Code is that upon confirmation and consummation of a reorganization plan, the debtor will be released or "discharged" from all liability for pre-confirmation "claims." A discharge voids judgments obtained against the debtor related to the discharged debt and also acts as an injunction against the commencement or continuation of an action related to the discharged debt.[123]

122. *In re General Motors Corp.*, et al., Case No. 09-50026 (Bankr. S.D.N.Y. July 5, 2009).
123. *Id.* § 524(a).

The Bankruptcy Code defines "claims" broadly to include any legal or equitable right to payment regardless of whether it is fixed, contingent, reduced to judgment, or still in dispute.[124] Congress intended the definition to have the widest possible scope, and thus courts have broadly construed the term.[125] Courts thus have little difficulty finding that cost recovery actions brought by environmental agencies or private parties seeking reimbursement for cleanup costs qualify as claims. The treatment of administrative orders or requests for injunctive relief, however, is more vexing.[126]

The Bankruptcy Code also contains a list of debts not subject to discharge.[127] For example, under section 523(a)(6), a debtor will not be discharged if the debt is due to conduct by the debtor that causes "willful and malicious injury" to an entity or property of another. Abandonment of leaking vats or containers containing hazardous chemicals has been held to constitute willful and malicious injury.[128] In addition, section 523(a)(7) provides an exception to discharges for fines or penalties,[129] although one court has ruled that this exception is only available to individuals and not corporate debtors.[130]

A. Claims Dischargeable

There is little dispute that negative orders or injunctions that simply direct a debtor to cease polluting fall outside the definition of a "claim." Courts are divided, however, when there is an affirmative order or injunction instructing the debtor to take corrective action, such as installing pollution control equipment, replenishing wetlands, or restoring a strip mine, particularly if the affirmative order or injunction mandates that the debtor expend funds in order to comply. Some courts have found that such an order is not a claim even if it requires the debtor to spend money, because the government has

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124. 11 U.S.C. § 101(5) (2008). The complete definition reads as follows:

A claim is:

(A) any 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

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

125. *See, e.g., In re Chateaugay Corp.*, 944 F.2d 997, 1005 (2d Cir. 1991).

126. The issue arises out of the definition of claim, which includes an equitable remedy for breach of performance if the breach creates a right to payment. 11 U.S.C. § 101(5)(B) (2008).

127. *Id.* § 523(a).

128. *In re Daniels*, 130 B.R. 239, 241 (E.D. Ky. 1991); *In re Berry*, 84 B.R. 717, 721 (Bankr. W.D. Wash. 1987).

129. *In re Tinkham*, 59 B.R. 209, 213 (Bankr. D.N.H. 1986).

130. *In re Wisconsin Barge Lines, Inc.*, 91 B.R. 65, 68 (Bankr. E.D. Mo. 1988).

no right to payment.[131] These courts suggest that categorizing injunctions as something other than dischargeable claims is consistent with the Supreme Court precedent mandating that owners of facilities comply with environmental laws.[132] The majority of courts, however, have ruled that affirmative orders or mandatory injunctions that compel a debtor to expend money do, in fact, fall within the definition of claim and, accordingly, are dischargeable.[133]

The Supreme Court addressed the dischargeability of an injunction ordering the debtor to clean up a hazardous waste site in *Ohio v. Kovacs*. The Court ruled that the injunction was a dischargeable claim based on an unusual set of facts.[134]

In *Kovacs*, the operator of a hazardous waste disposal facility was charged with polluting state waters with pesticides and industrial wastes. Pursuant to a settlement embodied in a stipulation and judgment entry, the corporate defendants and the principal stockholder were ordered to pay $75,000 for damages to natural resources and to remove the wastes stored at the site, and were enjoined from further pollution or bringing additional wastes onto the facility. When the defendants failed to comply with the terms of the judgment, the State of Ohio appointed a receiver who took possession of the judgment debtors' nonexempt property. Shortly thereafter, the judgment debtors filed a Chapter 11 petition. The state environmental authorities objected to the reorganization plan and the Chapter 11 case was converted into a liquidation proceeding as a result. The State of Ohio moved for an order declaring the cleanup obligation under the settlement to be neither a "debt" or a "claim." The bankruptcy court declined to issue the order, finding that the cleanup obligation was, in fact, a dischargeable debt.[135] The bankruptcy court's decision was affirmed by the district court and the Court of Appeals for the Sixth Circuit.[136]

Justice White, writing for a unanimous Supreme Court, summarily disposed of the state's contention.[137] He conceded that an injunction compelling a debtor to expend funds is itself insufficient to transform that obligation into a money judgment, and that, as in *Penn Terra*,[138] the state could enforce such injunction against the debtor.[139] What distinguished this case from *Penn Terra*,

131. *See, e.g.*, *United States v. Hubler*, 117 B.R. 160, 164 (W.D. Pa 1990), *aff'd*, 928 F.2d 1131 (3d Cir. 1991) (noting the split in decisions and refusing to follow *United States v. Whizco*, 841 F.2d 147, 150 (6th Cir.), which held that an affirmative injunction is a debt dischargeable in bankruptcy if the party will have to spend money to fulfill its obligations); *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985) (holding that a clean-up obligation is dischargeable only in the situation where monetary payment is the relief sought from the enjoinee).

132. *In re Chateaugay Corp.*, 944 F.2d 997, 1009 (2d Cir. 1991) (citing *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985) and *Midlantic Nat'l Bank v. NJDEP*, 474 U.S. 494, 503 (1986)).

133. *Kovacs*, 469 U.S. at 282–85; *United States v. Whizco*, 841 F.2d 147, 149 (6th Cir. 1988).

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

135. *In re Kovacs*, 29 B.R. 816, 818 (S.D. Ohio 1982).

136. *In re Kovacs*, 717 F.2d 984, 988 (6th Cir. 1983).

137. *Kovacs*, 469 U.S. at 277–79.

138. *Penn Terra Ltd. v. Dep't of Envt'l Res.*, 733 F.2d 267, 278–79 (3d Cir. 1984).

139. *Kovacs*, 469 U.S. at 277–79.

the Supreme Court said, was that the state elected to appoint a receiver who assumed authority over the site, divested Kovacs of assets that might have been used to clean up the property, and prohibited him from personally removing the wastes. Because the only remaining performance the state sought from Kovacs was the payment of money, the cleanup obligation transformed into an obligation to pay money dischargeable in bankruptcy.

The Supreme Court cautioned that its ruling was limited to only those circumstances in which a cleanup obligation is converted into an obligation to pay money and did not apply to negative injunctions prohibiting certain conduct. The Court also recognized that a possessor of the site, including a receiver or a trustee, would have to comply with the environmental laws of the state.

As a practical matter, most administrative orders or injunctions will contain a negative element to cease current discharges and an affirmative obligation to clean up previously discharged pollutants that may be contributing to the present contamination. The Second Circuit Court of Appeals ruled on the dischargeability of such an order in *In re Chateaugay Corp.* ("LTV").[140]

In *LTV*, the LTV Corporation and its 66 affiliated companies filed a Chapter 11 petition containing 24 pages of contingent environmental liabilities relating to sites presently or formerly owned or operated by LTV or which had received wastes generated by LTV. EPA filed a proof of claim for $32 million for response costs incurred at 14 waste disposal sites where LTV had been identified as a PRP.[141] EPA argued that its proof of claim did not include liability for future cleanup costs (cleanup activities had only been completed at one of the sites) and to the extent LTV was to be named as a PRP to additional sites in the future. The agency then brought an adversary proceeding seeking a declaratory judgment that post-confirmation response costs arising from prepetition conduct were not dischargeable claims. As part of the proceeding, the court had to determine if environmental claims based on injunctions were dischargeable.

LTV contended that any order or injunction requiring a debtor to expend funds was dischargeable. The district court dismissed this argument outright. The court held that if the injunctive relief did not provide EPA with an option to clean up the site and recover its response costs, the injunctive relief would not be a claim that was dischargeable; however, if EPA had the option of converting into a monetary obligation by incurring response costs and seeking reimbursement, then the injunction would constitute a dischargeable claim. The decision created some confusion because it failed to identify exactly what types of injunctions contained an option to recover response costs.

On appeal, the Second Circuit Court of Appeals recognized that CERCLA conferred on EPA the option to issue a cleanup order or to perform the

140. *In re Chateaugay Corp.*, 944 F.2d 997, 999 (2d Cir. 1991).
141. *In re Chateaugay Corp.*, 112 B.R. 513, 518 n. 6 (Bankr. S.D.N.Y. 1990).

work itself and sue for response costs.[142] Under such circumstances, if EPA ordered the debtor to remediate past contamination, the order would qualify as a dischargeable claim. However, the Court of Appeals held that an injunction requiring a debtor to cease current pollution or discharges would not be considered a claim. The court reasoned that the government could not accept payment in lieu of compliance with the portion of an order directing a debtor to stop or ameliorate current pollution. Thus, it was not an order for the breach of an obligation that created a right to payment.

The *LTV* decision suggests that when a debtor is sitting on historical contamination and it is difficult to distinguish between remediating current or historical pollution, a court may require the debtor to remediate completely. The decision injects some uncertainty in the reorganization process, however, because a debtor may be unable to project its future cash needs for complying with "non-claim" injunctions that may be issued in the future. In the face of potentially crippling environmental claims, creditors may force the company to liquidate because *LTV*'s narrow definition of "claim" would bar future EPA injunctive orders from participating in the Chapter 7 distribution.[143]

Other courts have taken a different view regarding dischargeability of environmental claims. For example, in *In re Jensen*,[144] the Ninth Circuit Court of Appeals adopted the "fair contemplation" test. Rejecting *Chateaugay*, the court held that claims based on pre-petition conduct could only be discharged if fairly contemplated by the parties at the time of bankruptcy. The court found that the state's environmental claims were dischargeable because the state had sufficient knowledge of the debtor's conduct and the potential future costs prior to the filing of the debtor's petition. The actual notice requirement of the fair contemplation test is less favorable to debtors and potential debtors because it removes the presumption of notice in *Chateaugay*. A version of the "fair contemplation" test has been adopted by several other courts, though its acceptance has not been universal.[145]

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142. *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991).

143. It appears that on its face, *LTV* may only apply to orders covering sites presently owned or leased by the debtor. The *LTV* court said that because 28 U.S.C. § 959(b) required debtors-in-possession and trustees to manage and operate a property in compliance with environmental laws, an injunction requiring cessation of ongoing pollution could not be dischargeable. *In re Chateaugay Corp.*, 112 B.R. 513, 523 (Bankr. S.D.N.Y. 1990). This rationale would not appear to apply to a waste disposal facility that simply received waste generated by the debtor nor to a property previously sold by the debtor. Such a result would also be consistent with the *Kovacs* decision where the debtor had been stripped of control over its property and the only way it could comply with the order was through the payment of money. Thus, if the government issues an order compelling a debtor to clean up a site that received hazardous wastes generated by the debtor or to remediate a site that it sold prior to the bankruptcy, the order should be dischargeable since (1) it would be seeking to remedy the cleanup or removal of wastes that were deposited in the past, and (2) the only way that the debtor could comply with the order was by a monetary payment.

144. *In re Jensen*, 995 F.2d 925, 930–31 (9th Cir. 1993).

145. *See, e.g.*, *In re Crystal Oil Co.*, 158 F.3d 291, 296 (5th Cir. 1998); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775, 786 (7th Cir. 1992); *In re Nat'l Gypsum Co.*, 139 B.R. 397, 408 (N.D. Tex. 1992).

For example, in *Boston and Maine Corp. v. Massachusetts Bay Transportation Authority*,[146] the First Circuit refused to apply the "fair contemplation" test to permit liability created under a Massachusetts state environmental statute to escape the preclusive effect of a bankruptcy discharge. In doing so, the court held that a subsequent owner of land was barred from seeking contribution for cleanup costs from the prior owner because any liability on the part of the prior owner constituted a "claim" that was discharged in its bankruptcy case.

Although the First Circuit's opinion interpreted the definition of "claim" as used in the Bankruptcy Act of 1898 (predecessor to the current Bankruptcy Code), the court found that, as a general matter, the "fair contemplation" test violates public policy because it requires government agencies "to have actually ordered remedial action before the owner of a contaminated site could be deemed to have knowledge of a potential cleanup action."[147] The court went on to hold that it was "enough in this case that the [current owner] had a contingent claim for contribution, knew of the facts giving rise to that claim, was potentially liable for the oil contamination . . . under state law, and had notice of the date to assert the claim to avoid being barred by [the] discharge from bankruptcy."[148]

B. Claims Not Dischargeable

As noted above, section 1141 of the Bankruptcy Code provides that claims that arose prior to confirmation are discharged upon substantial consummation of a reorganization plan.[149] Thus, if a creditor can demonstrate that it has a post-confirmation claim, the claim will survive and be enforceable against the reorganized debtor. Large impending environmental obligations may doom the debtor's reorganization efforts, however, as the debtor must show that its reorganization plan is feasible.[150] Under such circumstances, the court may refuse to confirm the plan and the debtor could be forced into liquidation. Thus, once it is determined that a claim exists, it is important to determine when the claim arose, because only debts, i.e., liabilities on a "claim," that arise prior to confirmation of a reorganization plan are dischargeable in a Chapter 11 case. The Bankruptcy Code does not, however, establish when a claim, or right to payment, accrues. Rather, the question must be answered by reference to applicable nonbankruptcy law.

Courts have struggled for years to determine precisely when an environmental obligation rises to the level of a claim. On the one hand, Chapter 11 debtors and their creditors have fought to have environmental obligations treated as dischargeable claims to prevent the government from

146. 587 F.3d 89 (1st Cir. 2009).
147. *Id.* at 104.
148. *Id.*
149. 11 U.S.C. § 1141 (2008).
150. 11 U.S.C. § 1129(a)(11).

bringing potentially crippling claims against the reorganized debtor. The government, on the other hand, has argued for the latest possible time of accrual of claims, so that the environmental obligations can pass through the bankruptcy case unimpaired and be enforceable against the reorganized debtor. (The situation is reversed in Chapter 7 cases when the cleanup is to take place after the liquidation. In those instances, the government will argue that the claims arose at the earliest possible date so that it can share in the distribution of the proceeds of the debtor's assets.)

Some courts equate a claim with a cause of action and have ruled that a claim does not arise until a cause of action accrues (i.e., the creditor has a right to payment).[151] These courts hold that a claim based on CERCLA liability does not arise until the creditor incurs response costs or, even more remotely, is found liable under CERCLA.[152] Some courts have even gone so far as to hold that claims based on CERCLA liability will not be discharged if the confirmation of the reorganization plan took place before the enactment of CERCLA.[153] For example, in *In re Penn Central Transportation Co.*,[154] the Third Circuit Court of Appeals held the government claims nondischargeable because they pre-dated CERCLA. The court explained that since the statutory basis for liability did not exist at the time of confirmation, there was no legal relationship between the debtor and creditor that could lead to the creation of a contingent claim.[155]

In addition, post-petition claims may be deemed not discharged if the debtor continues to operate property in a manner that is harmful to the environment. The Seventh Circuit Court of Appeals addressed this issue in *In re CMC Heartland Partners*.[156] In *CMC*, the former debtor argued that the government could not assert a post-petition CERCLA claim because it knew of the potential hazards associated with CMC's property prior to the claims bar date in CMC's reorganization case, but failed to file a claim. Because it failed to file a claim, CMC reasoned, the government was barred by the injunction issued by the bankruptcy court.

The district court disagreed with CMC, distinguishing its pre-petition liability from its post-petition liability (arising out of post-petition ownership/operation of property). The Seventh Circuit Court of Appeals affirmed and expanded on the district court's reasoning. The fact that the government "neglected to file a claim under CERCLA in the reorganization" extinguishes CMC's liability "before the bar date in 1985."[157] Liability for post-petition

151. *In re M. Frenville Co.*, 744 F.2d 332, 336 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 911 (1985).

152. *Al Tech Specialty Steel Corp. v. Allegheny Int'l, Inc.*, 126 B.R. 919, 923 (W.D. Pa. 1991); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835–36 (D. Minn. 1990).

153. *See, e.g.*, *In re Penn Central Transp. Co.*, 944 F.2d 164, 167–68 (3d Cir. 1991).

154. *Id.*

155. *Id. But see Providence & Worcester R. R. Co. v. Penn Central Corp.*, 1989 WL 73308, *3 (D. Mass. 1989) (dismissing post-confirmation claim of plaintiff who had purchased contaminated property from debtor prior to the enactment of CERCLA).

156. *In re CMC Heartland* Partners, 966 F.2d 1143, 1147 (7th Cir.1992).

157. *Id.*

violations is a different matter. The court reasoned that because CERCLA creates a claim running with the land, such claims cannot be said to be covered by a previous injunction. As a practical matter, if the reorganization case acted as a permanent injunction, it would allow CMC to violate CERCLA without redress until it sold the property to another party.

The Third Circuit Court of Appeals expanded on the Seventh Circuit's *CMC* rationale in *In re Torwico Electronics, Inc*.[158] In *Torwico*, the State of New Jersey ordered the debtor to clean up its waste under state environmental law. As in *CMC*, the debtor in *Torwico* argued that the government knew about the potential environmental harm and failed to file a claim in Torwico's reorganization case. However, unlike in *CMC*, the debtor in *Torwico* no longer owned the property causing the pollution and was not contributing to the deteriorating condition. Thus, the debtor argued that *CMC* was not applicable.

The bankruptcy court agreed with the debtor, but the district court reversed. The Third Circuit Court of Appeals affirmed the district court's decision, explaining that though "Torwico's obligations do not run with the land as did the debtor's in *CMC*; . . . they run with the waste."[159] To the extent that Torwico's waste posed a continuing hazard, the court found Torwico responsible for remedying the problem, regardless of where the waste might be.

The Seventh Circuit Court of Appeals more recently found nondischargeable a negative injunction for remediation, even where the debtor would be forced to incur significant fees in performing the remediation. In *United States v. Apex Oil Co., Inc.*,[160] the Seventh Circuit, affirming lower courts' decisions, held that the debtor's previous bankruptcy filing did not discharge it from an EPA injunction to remediate past contamination, even though it would cost the debtor $150 million to hire a third party to perform the remediation. In *Apex Oil*, the debtor, a former oil refiner, filed for bankruptcy in 1986. Years after the bankruptcy case had ended, EPA sought an injunction against the debtor to clean up millions of gallons of oil trapped underground. At the time of the EPA injunction, the debtor was no longer in the oil refining business and would be required to hire a third party to perform the cleanup work at an expense of $150 million. The debtor argued that EPA's action sought enforcement of a claim previously discharged in the 1986 bankruptcy case because the remedial action was reducible to money.

158. *In re Torwico Electronics, Inc*., 8 F.3d 146, 150 (3d Cir.1993).
159. *Id*. at 151.
160. *United States v. Apex Oil Co., Inc.,* 579 F.3d 734 (7th Cir. 2009).

The Seventh Circuit disagreed with the debtor, explaining that such an injunction—mandating a party to remediate pollution—will often lead to the incurrence of costs. Whether the cost is minor or major, and whether the party can perform the cleanup internally or will be required to hire a third-party, is "arbitrary."[161] According to the court, adopting the debtor's position would create a perverse incentive for companies to lack "internal capability of cleaning up their pollution, even if hiring third parties to do it would be more expensive."[162]

In sum, courts will generally uphold the validity of environmental statutes to the extent governments (federal, state, and local) seek purely nonmonetary remedial measures from a debtor.[163] Debtors are not discharged of such duties even if the government entity has notice of the problem pre-bar date and, nevertheless, fails to file a proof of claim.

C. Disallowance or Estimation of Contingent Contribution Claims

The Bankruptcy Code provides a debtor with two additional and powerful weapons to seek to reduce or eliminate a creditor's contingent environmental claims. First, under section 502(e)(1)(B) of the Bankruptcy Code, a bankruptcy court may disallow a claim for contribution or reimbursement against the debtor if the creditor is liable as a joint tortfeasor with the debtor and the claim is contingent. Section 502(e)(1)(B) provides:

> (e)(1) ... the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on, or has secured, the claim of a creditor, to the extent that-
>
> (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; . . .

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161. *Id*. at 7.

162. *Id*. at 8.

163. Recently, the Bankruptcy Court for the Southern District of New York held that a debtor's specific performance environmental obligations were not dischargeable in bankruptcy. *Mark IV Industries, Inc. v. The New Mexico Environment Department (In re Mark IV Industries, Inc.)*, 2010 WL 4225949 (Bankr. S.D.N.Y. Oct. 21, 2010). The court relied on the *Kovacs* and *Chateaugay* decisions to fashion a three factor test to determine the dischargeability of environmental obligations: (i) whether the debtor was capable of executing the equitable decree or if the debtor was only capable of compliance by paying another party to do it on its behalf, (ii) whether the pollution was "ongoing", and (iii) if the pollution was not ongoing, or if the environmental agency had imposed discrete obligations on the debtor, whether the agency had the authority to complete the work on its own and seek reimbursement from the debtor. *Id.* at *6-7. Because the relevant state law did not authorize the agency to perform the work and seek reimbursement from the debtor, the court concluded that the agency had no right to payment and thus the claim was not dischargeable. The court's reasoning is generally consistent with the *Apex Oil* approach, where the U.S. Court of Appeals for the Seventh Circuit held that the relevant statute did not allow for an alternative monetary remedy.

This provision is intended to disallow the claims of parties who are secondarily liable with the debtor to a third party and to prevent competition between the creditor and debtor for the limited proceeds of the bankruptcy estate.[164] The disallowance procedure can be a powerful weapon against landlords or PRPs who are jointly or severally liable with the debtor. If their claims are disallowed, the creditors will be precluded from participating in any distribution in the debtor's case.[165]

Debtor-defendants in CERCLA actions have successfully employed this approach and sought to have contingent claims disallowed in their bankruptcy cases. Strict liability under CERCLA satisfied the co-liability requirement, and the nature of the pending CERCLA actions rendered contribution claims contingent. For example, in *In re Charter Company*,[166] the claimants, owners, or operators of a facility and named defendants in a massive CERCLA litigation filed proofs of claims for indemnity and contribution against other defendant-debtors that had generated wastes transported to the contaminated site. The Eleventh Circuit Court of Appeals affirmed the lower courts in disallowing the claimants' claims because the claimants were liable with the debtors to the plaintiffs and the claims were entirely dependent on the outcome of the CERCLA actions.

In *In re Kent Holland Die Casting & Plating, Inc.*,[167] the bankruptcy court similarly disallowed the landlord's contribution claim against the debtor lessee. There, EPA had commenced an administration action against the debtor-lessee for hazardous contamination resulting from the debtor's operations prior to ceasing business. EPA then sued the landlord to compel cleanup. The landlord asserted a contribution claim for cleanup expenses attributable to contaminated personal property the debtor-lessee had left on the property. Because EPA's environmental action against the landlord was still pending at the time, the court found the claim for contribution contingent and the landlord liable with the debtor.

164. *In re Dant & Russell,* Inc., 951 F.2d 246, 248 (9th Cir. 1991); *In re Allegheny Int'l, Inc.*, 126 B.R. 919, 922 (W.D. Pa. 1991).

165. *In re Amatex Corp.*, 110 B.R. 168, 168 (Bankr. E.D. Pa. 1990), *aff'd*, 908 F.2d 961 (3d Cir. 1990); *In re Charter Co.*, 862 F.2d 1500, 1502–03 (11th Cir. 1989).

166. *In re Charter Co.*, 862 F.2d at 1502–03.

167. *In re Kent Holland Die Casting & Plating, Inc.*, 125 B.R. at 504.

The disallowance of contribution claims may be less likely absent governmental action. In *In re Dant & Russell, Inc.*,[168] the debtor's landlord sought $1 million in past response costs and another $13 million in anticipated response costs attributable to contamination caused by the debtor's operations. The bankruptcy court declared the debtor liable for 52 percent of the past and future cleanup costs. Without reaching the contingency issue, the Ninth Circuit Court of Appeals found that section 502(e)(1)(B) of the Bankruptcy Code did not bar the claim for future cleanup costs, reasoning that no future cleanup had been ordered by EPA so there was no third party to whom the landlord was liable with the debtor.[169]

Estimation proceedings under section 502(c) of the Bankruptcy Code provide a second important tool for debtors. Under section 502(c), a debtor may compel estimation of contingent or unliquidated claims if the failure to fix the claim would unduly delay the administration of the bankruptcy estate.[170] Unlike section 502(e)(1)(B), the estimation proceeding can more readily be used to reduce government claims.[171] The bankruptcy court may exercise broad discretion when estimating contingent claims,[172] so with little information available about the true nature and extent of the contamination, a court may set an artificially low value for the allowable claim, a value that cannot be subsequently adjusted upward because the section 502(c) estimation serves as a "cap" on the allowed claim.[173]

VIII. Conclusion

Environmental laws and bankruptcy laws each promote important societal goals. The Bankruptcy Code, however, provides debtors with mechanisms to avoid or limit their obligations, including environmental obligations. Courts thus have struggled to resolve these conflicting interests, particularly

168. *In re Dant & Russell, Inc.*, 951 F.2d at 247.

169. Ultimately the court reversed the award for future cleanup costs, finding that the debtor could only be responsible for cleanup costs that had actually been incurred to date under the relevant CERCLA provision.

170. 11 U.S.C. § 502(c) (2008).

171. Section 502(c) estimation proceedings can be utilized in even the most complex environmental bankruptcies. For example, in *In re ASARCO, LLC*, No. 05-21207 (Bankr. S.D. Tex. 2005), the debtor faced environmental claims of over $3 billion from various state and federal government agencies and private parties for alleged contamination in approximately 100 of the debtor's sites. The bankruptcy court held three separate estimation hearings to address the federal government's claims at three of the largest sites at issue. During these hearings, which consumed a total of 13 days, the bankruptcy court heard testimony from more than 50 witnesses, admitted nearly 1,400 exhibits, and heard arguments from counsel to the debtor, the federal and state governments, and various other parties in interest. The court, however, refrained from ruling on estimation to allow additional settlement negotiations to proceed, which were ultimately resolved in a subsequent settlement agreement.

172. *See, e.g., In re Allegheny Int'l, Inc.*, 126 B.R. 919, 924 (W.D. Pa. 1991).

173. *See In re Chateaugay Corp.*, 944 F.2d 997, 1006–08. (2d Cir. 1991).

in those cases in which environmental liabilities were the catalyst for the debtor's bankruptcy filing. As we have seen, the most significant provisions of the Bankruptcy Code impacting environmental liability issues are those relating to the automatic stay, abandonment of property, administrative priority afforded certain types of claims asset sales by debtors, and discharge of environmental obligations. In light of the competing policy considerations between environmental and bankruptcy laws, it is not surprising that courts have been less than uniform in their consideration and resolution of these issues. The intersection of environmental and bankruptcy laws thus remains a complex area of inquiry, one in which the law continues to evolve.