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Notes from the Chair

Lawrence Schnapf, *Chair*
Committee on Environmental, Energy and Natural Resources Law
ABA Business Law Section

The interplay of the Bankruptcy Code and environmental laws has always been complex, and with the country mired in the longest economic downturn since the Great Depression, the Environmental, Energy and Natural Resources Law Committee decided to dedicate this issue to this topic. Because the Great Recession has been so different from other recent recessions, debtors and creditors have had to employ creative uses of the Bankruptcy Code to navigate through the reorganization process. Included in this issue is a series of articles I hope you'll find helpful in addressing the many environmental issues raised by the use of these innovative tools.

First, Milissa Murray of Bingham McCutcheon discusses two recent nonbankruptcy decisions — *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*[1] and *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*[2] — and their effect on the future viability of private party environmental claims in bankruptcy. Then David Johnson and Peckar & Abramson's David Scriven-Young discuss the status of the case law relating to the discharge of environmental injunctions in light of the recent *United States v. Apex Oil Co., Inc.*[3] decision, while Peter Haley of Nelson Mullins highlights some considerations for practitioners as a result of the *Apex Oil* holding. Finally, I discuss the importance of reviewing environmental issues as part of the 363 sale process to avoid unexpected environmental liabilities.

Continuing with this theme, our committee will also be participating in a program with the Business Bankruptcy Committee at the Spring Meeting titled "Restructuring Environmental Claims in Bankruptcy After Chrysler and General Motors," to be held on Friday, April 23rd from 10:30 am to noon. Thanks to the hard work of our program chair, David Roth of Bradley Arant, our committee we will be holding a "Hot Environmental Topics: 2010" on April 24th from 2:30 pm to 4:30 pm at the Governor's Square 15. We will have a committee meeting in the same room from 2:00 pm to 2:30 pm.

As always, please let us know if you would like to contribute to a future edition of this newsletter. We welcome submissions on the wide variety of issues that are present in environmental law.

[1] 596 F.3d 112 (2d Cir. 2010).

[2] ___F.3d. ___, No. 09-1814, 2010 WL 1427582 (3d Cir. Apr. 12, 2010).

[3] 579 F.3d 734 (7th Cir. 2009).

Featured Articles

Recent Developments Regarding CERCLA Claims and Their Disallowance Under Bankruptcy Code Section 502(e)(1)(B)

Milissa A. Murray, Bingham McCutchen LLP

What the Supreme Court giveth, the Second and Third Circuits taketh away in yet another roller coaster ride though the tunnels of CERCLA.[1]

Reorganized and reorganizing companies should breathe a sigh of relief (although, given history should not get too comfortable) in the wake of two recent nonbankruptcy decisions that will affect the future viability (or lack thereof) of private party environmental claims in bankruptcy. In *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*[2] and *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*,[3] the Second

and Third Circuits, respectively, significantly limit the right of private parties to assert a direct claim against other private parties under CERCLA Section 107(a) for reimbursement of cleanup costs, a right thought to have been resuscitated and expanded by the Supreme Court's 2007 decision in *United States v. Atlantic Research*.[4] The result will reestablish--to the extent it was ever in doubt--Bankruptcy Code Section 502(e)(1)(B) as an effective tool in reorganizing debtors' efforts to shed large or unliquidated, contingent environmental liabilities.

CERCLA

CERCLA is a sweeping federal remedial statute designed to encourage the prompt abatement of contamination and cleanup of hazardous waste sites and to assess the costs for doing so against those responsible for the contamination. It is a strict liability statute and provides broad authority to the President (delegated to the Environmental Protection Agency ("EPA")) to compel responsible parties to conduct cleanup and to collect reimbursement of EPA's own response costs from the four categories of potentially responsible parties ("PRPs").[5] CERCLA also provides causes of action to nongovernmental entities for the recovery of appropriate response costs.[6] A PRP that settles its liability to the government, however, escapes contribution liability for the matters settled.[7]

Although the nature of contaminated sites certainly varies, it is common for there to be numerous PRPs at a single site as they will include the present owners and operators, prior owners or operators to the extent disposals occurred during their tenure, and generators and transporters of waste--whose numbers can run into the hundreds at former hazardous or industrial waste dump sites to which the generators' wastes were historically transported. In such cases, often one or more PRPs, voluntarily, or as a result of the issuance by regulators of a CERCLA enforcement order,[8] form a working group and agree among themselves and usually in a consent decree with EPA, to fund the cleanup and perform the work in accordance with the consent decree.[9] Typically EPA will issue Section 106 administrative orders only to those seemingly liable parties that are the largest contributors of waste and are financially viable.[10] The core working group is left to its own devices and at its own expense to seek reimbursement or contribution from the remaining PRPs.

Bankruptcy Code Section 502(e)(1)(B)

Bankruptcy Code Section 502(e)(1)(B) mandates disallowance of claims for reimbursement or contribution of an entity that is co-liable with the debtor to a third party creditor and has long been an obstacle to private party hazardous waste site remediators in their efforts to recover cleanup costs from recalcitrant bankrupt contributors to the contamination.[11] Because the identification, assessment, and remedy of contamination; identity and resolution of liability among multiple parties; and cleanup often take years, and because bankruptcy is designed to resolve pre-petition claims in relatively short order, environmental bankruptcy claims are often unliquidated and contingent when filed and when assessed by the bankruptcy court.[12] In addition, in recent years, private party PRPs lacked a direct claim under Section 107. Their only remedy against other PRPs under CERCLA has been for contribution under Section 113.[13] Thus, Bankruptcy Code Section 502(e)(1)(B) has largely resulted in the disallowance of private party PRP claims for reimbursement of their excess share of yet incurred site cleanup costs.[14]

United States v. Atlantic Research

A shift was anticipated, however, after the Supreme Court's 2007 ruling in *United States v. Atlantic Research*.[15] In that case, the Supreme Court held that Section 107 of CERCLA is not reserved solely for the government and innocent parties and can be the basis for a direct claim by even another PRP seeking reimbursement of cleanup costs it has incurred. "[Section] 107(a) permits a PRP to recover only the costs it has 'incurred' in cleaning up a site."[16] In addition the Court explained that "[w]hen a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that those parties incurred."[17]

Reading Company filed an amicus brief in the *Atlantic Research* case, admonishing the Court to consider the effect in bankruptcy of renewed CERCLA Section 107 claims. It cautioned that a Section 107 claim would diminish the value to the reorganized debtor of any settlement or discharge of CERCLA liability to the government and by giving rise to direct claims not necessarily covered by the Bankruptcy Code's discharge provisions or contribution protection under CERCLA Section 113(f)(2).[18] Indeed, the logical consequence of expanding a PRP's remedy beyond contribution, and recognizing a PRP's potential *direct* claim under Section 107 for incurred costs, would be to eliminate the Bankruptcy Code's Section 502(e)(1)(B) bar, at least for PRPs voluntarily cleaning up a site and, thus, without access to contribution under Section 113(f)(1) or 113(f)(3)(B).[19] PRPs could now defend their claims against bankrupt PRPs and argue that their CERCLA claims against the debtor include a direct claim under Section 107, the liability on which is not shared and, thus, not barred by the Bankruptcy Code's Section 502(e)(1)(B) disallowance.

In the first case after *Atlantic Research* to recognize its potential effect on bankruptcy cleanup cost claims held by PRPs, the Bankruptcy Court sitting in Delaware recognized, albeit in dicta, that a PRP's direct claim under Section 107 would take the claim out of the disallowance provision of Section 502(e)(1)(B) of the Bank-

ruptcy Code.[20] Indeed, in subsequent environmental bankruptcy cases, PRP creditors argued, in response to continued debtor claim objections, that *Atlantic Research* changed the law and private party PRP claims are no longer subject to a summary objection as a statutorily disallowed contingent contribution claim.[21]

As recognized by Reading in its Amicus brief, the ramifications in bankruptcy of *Atlantic Research* went beyond the mere allowance of claims, and posed other obstacles to debtors' reorganization in environmental bankruptcy cases: direct Section 107 claims of PRPs arguably are not barred by the contribution protection debtors typically obtain in a governmental settlement of environmental liabilities.[22] Thus, PRP claims once summarily ignored as barred contingent contribution claims under Section 502(e)(1)(B) or as barred by contribution protection under CERCLA Section 113(f)(2), would now have to be considered and possibly liquidated or estimated if their unliquidated amount could pose feasibility issues in connection with confirmation of a plan. Moreover, to the extent direct Section 107 claims may arise post-petition or post-confirmation, they may not constitute dischargeable claims, and debtors must attempt to deal with this contingency in the plan. The uncertainty of the impact of the PRP claims affirmed by *Atlantic Research* in turn would enhance PRP creditors' bargaining power, enabling them to negotiate a reasonable resolution of their claims.

Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc. and *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*

Thus, all seemed well in the world for private party PRP creditors (at least compared to their lot before *Atlantic Research*), that is until *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*[23] and *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*[24] Both circuits have taken the wind out of the proverbial sails of remediating PRPs by holding that PRPs who have a viable claim for contribution under Section 113(f)(1) or Section 113(f)(3)(B), or who are entitled to contribution protection under Section 113(f)(2), do not have a direct claim under Section 107.[25] Although the Supreme Court in *Atlantic Research* suggested that there could be an overlap between Section 107 and Section 113 and that a PRP might have the opportunity to elect the more generous Section 107 as its claim of choice, the Second Circuit nevertheless found it compelling that Niagara Mohawk's procedural situation, that is, its consent order with the State of New York that resolved its liability at the site, fell squarely within the more specific requirements of Section 113(f)(3)(B). "Congress recognized the need to add a contribution remedy for PRPs similarly situated to NiMo. To allow NiMo to proceed under § 107(a) would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under § 113."[26] *Niagara Mohawk* thus confirms, at least in the Second Circuit, that a PRP does not have an election of remedies or access to both a direct Section 107 claim and a Section 113 contribution claim where it clearly falls within the scope of Section 113(f)(1) or Section 113(f)(3)(B).

In *Agere Systems*, the Third Circuit found on the facts of that case that if the PRPs' Section 107 claims were permitted, the defendant PRP would not be able to "blunt" the inequitable results by filing a contribution counterclaim and thereby convert the action to one in contribution as suggested by the Supreme Court in its *Atlantic Research* decision. The plaintiffs there were protected by contribution protection for the matters addressed in their settlement, and thus, the aggrieved PRP defendant could not file a counterclaim and would be subject to joint and several liability, including for the plaintiffs' own shares. The court found this to be a "perverse result" and held that "plaintiffs in the position of Cytec, Ford, SPS, and TI, who if permitted to bring a § 107(a) claim would be shielded from contribution counterclaims under § 113(f)(2), do not have any § 107(a) claims for costs incurred pursuant to consent decrees in a CERCLA suit."[27]

Conclusion

Thus, PRPs who have a viable Section 113(f)(1) contribution claim, or who are cleaning up pursuant to a settlement in which they have resolved their liability to a state or EPA within the meaning of Section 113(f)(3)(B), will not have a Section 107 direct claim against a co-liable bankrupt PRP, and their contribution claims once more will be subject to disallowance under Section 502(e)(1)(B) of the Bankruptcy Code to the extent the contribution claim meets the other disallowance criteria. Pursuant to the law in the Second and Third Circuits, it would appear that the only PRPs who could conceivably maintain a Section 107 direct action would be those that are conducting a completely voluntary cleanup without any consent order or judicial settlement in place. This likely excludes most working group PRPs.

Solvent PRPs and PRP working groups left holding the bag with inflated shares at hazardous waste sites had reason to rejoice after the Supreme Court resurrected CERCLA Section 107 direct claims as a remedy for innocent and liable private parties alike. The elation was short-lived, however, as a result of the recent Second Circuit decision in *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, and the Third Circuit decision in *Agere Systems, Inc. v. Advanced Environmental Technology Corp.*, each of which has largely and once again eliminated direct claims for PRPs thought to have been acknowledged--indeed supported--by the Supreme Court in *Atlantic Research*.

[1] The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, was enacted almost 30 years ago.

[2] 596 F.3d 112 (2d Cir. 2010).

[3] __F.3d. __, No. 09-1814, 2010 WL 1427582 (3d Cir. Apr. 12, 2010).

[4] 551 U.S. 128 (2007). See W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 90 (2d Cir. 2009) ("In light of Atlantic Research, we now confirm that Bedford Affiliates's holding limiting recoveries by PRPs to actions brought under section 113(f) is no longer valid.") (citations omitted).

[5] 42 U.S.C. § 9607. PRPs include the present owner or operator of the contaminated facility; former owners and operators of the facility, if there was a disposal of hazardous substances at the facility during such ownership or operation; arrangers for the disposal of hazardous substances; and transporters of such materials. Id. § 9607(a)(1)–(4).

[6] 42 U.S.C. § 9607(a)(4)(B). The Superfund Amendments and Reauthorization Act ("SARA"), enacted in 1986 and amending CERCLA, expressly provided for contribution actions among those with (x) shared liability in the event a "civil action" under Sections 106 or 107 has been filed and (y) who have resolved their liability to the United States or a State "in an administrative or judicially approved settlement." 42 U.S.C. §§ 9613(f)(1), (f)(3)(B). Equitable factors are to be considered in determining cost allocation among liable parties. Id.

[7] 42 U.S.C. § 9613(f)(2).

[8] 42 U.S.C. § 9606.

[9] See generally Environmental Law Handbook, ch. 9, § 4.3 (18th ed. 2005). See also 42 U.S.C. § 9622.

[10] See Environmental Law Handbook, ch. 9, § 4.7.1.

[11] 11 U.S.C. § 502(e)(1)(B). See Gary E. Claar, The Case for a Bankruptcy Code Priority for Environmental Cleanup Claims, 18 Wm. Mitchell L. Rev. 29, 50 (1992). Reportedly, the purpose of the provision was to prevent double payouts, once to the assured primary creditor and again to the surety or guarantor. See 124 Cong. Rec. H 11,094 (Sept. 28, 1978); 124 Cong. Rec. S 17,410-11 (Oct. 6, 1978). The legislative history talks of the surety or codebtor having a choice to pay the assured and obtain an allowed claim or not, depending on what would be most advantageous. For a claim to be disallowed under Section 502(e)(1)(B) of the Bankruptcy Code, the claimant must assert a (i) contingent claim (ii) for reimbursement of a debt (iii) for which the debtors and the claimant are co-liable. All three elements must be satisfied for the claim to be disallowed. In re Pinnacle Brands, Inc., 259 B.R. 46, 55 (Bankr. D. Del. 2001). Governmental entities are not typically subject to Section 502(e)(1)(B) because they are rarely co-liable with the debtor on the CERCLA claim.

[12] Contingency is determined as of the date the claim is allowed or disallowed, as the case may be. 11 U.S.C § 502(e)(1)(B). This is typically at the time the court rules on the debtor's objection to the claim or estimates the claim pursuant to 11 U.S.C § 502(c). Because only the contingent portion of the claim is subject to disallowance, a claim for recoverable response costs actually incurred by the claimant will not be barred. The disallowances under Section 502(e)(1)(B) typically involve the disallowance of a claim for future response costs to be incurred at the site. Norpak v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.), 131 F.3d 1185, 1190 (6th Cir. 1997). See also In re APCO Liquidation Trust, 370 B.R. 625 (Bankr. D. Del. 2007).

[13] See United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 98-103 (1st Cir. 1994); Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 349-56 (6th Cir. 1998); Pneumo Abex Corp. v. High Point, T. & D.R. Co., 142 F.3d 769, 776 (4th Cir. 1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301-06 (9th Cir. 1997); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120-24 (3d Cir. 1997); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496, and n.7 (11th Cir. 1996); United States v. Colo. & E.R.R. Co., 50 F.3d 1530, 1534-36 (10th Cir. 1995); Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 169 (2004) (citing numerous decisions of the Courts of Appeals holding that a private party that is itself a PRP may not pursue a Section 107(a) claim against other PRPs). In Atlantic Research, however, the Supreme Court held that the plain language of Section 107(a) authorizes cost recovery claims by any private party, including PRPs. See United States v. Atlantic Research Corp., 551 U.S. 128 (2007).

[14] See In re Eagle-Picher, 131 F.3d at 1190. See also In re APCO Liquidation Trust, 370 B.R. 625 (Bankr. D. Del. 2007) (and cases cited); In re Tri-Union Dev. Corp., 314 B.R. 611 (Bankr. S.D. Tex. 2004).

[15] In an earlier ruling the Court overruled the widely followed practice nationwide to permit contribution actions under Section 113(f)(1) in the absence of any CERCLA Section 106 or 107 action. In Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, the Court held that a Section 113(f)(1) contribution action cannot be sustained unless and until the plaintiff has been sued under Section 107 or Section 106 administrative order. Aviall did not decide whether an administrative order under Section 106 would qualify as a "civil action under section 9606 . . . or under section 9607(a)" of CERCLA. Id. at 168 n.5 (quoting 42 U.S.C. § 9613(f)(1)).The ruling deprived private party PRPs who voluntarily engage in cleanup of the statutory contribution remedy they had been uniformly using in the wake of United Technologies Corp. v. Browning-Ferris Industries, 33 F.3d 96, 98-103 (1st Cir. 1994), and its progeny. See supra note 13.

[16] Atlantic Research, 551 U.S. at 139 (quoting 42 U.S.C. § 9607(a)(4)(B)).

[17] Id.

[18] See Brief of Reading Co. as Amicus Curiae in Support of Petitioner, No. 06-562, 2007 WL 697587, at 8-9 (hereafter "Reading Brief").

[19] The Court left open the issue of whether there was an overlap of remedies between Section 107 and Section 113, but implied that it would not necessarily rule out use of Section 107 by a private party PRP electing to use its more generous remedy including joint and several liability. The Court said any such concern is mitigated by the ability of the aggrieved Section 107 defendant to convert the Section 107 action to one in contribution by bringing a contribution counterclaim. Atlantic Research, 551 U.S. at 140-41.

[20] In re APCO, 370 B.R. 625.

[21] See Claimant Weyerhaeuser Company's Response to Debtor's Section 502(e)(1)(B) Objections, In re Lyondell Chem. Co., No. 09-10023, 2009 WL 3415518 (Bankr. S.D.N.Y); Response of Maxus Energy Corp. & Tierra Solutions, Inc. to Debtors' Objections to Claims, In re Lyondell Chem. Co., No. 09-10023, 2009 WL 34115516 (Bankr. S.D.N.Y); Brief of BNSF, BNSF Ry. Co. v ASARCO, No. 208CV00130, 2008 WL 4400282 (S.D. Tex.).

[22] 42 U.S.C. § 9613(f)(2). See Fuller, The Sanctity of Settlement: Stripping CERCLA's Volunteer Remediators from Sidestepping the Settlement Bar, 34 Colum. J. Envtl. L. 219, 244 (2009).

[23] 596 F.3d 112 (2d Cir. 2010).

[24] __F.3d. __, No. 09-1814, 2010 WL 1427582 (3d Cir. Apr. 12, 2010).

[25] Niagara Mohawk, 596 F.3d at 127-29; Agere Sys., 2010 WL 147582, at *19.

[26] 596 F.3d at 128.

[27] 2010 WL 1427582, at *19. Cf. Niagara Mohawk, 596 F.3d at 127 (holding that a PRP who had settled its CERCLA liability by consent order with a state environmental agency had a Section 113(f)(3)(B) claim but not a Section 107(a) claim, and saying, "[c]learly, the two sections have differing restrictions and different purposes.").

United States v. Apex Oil Co., Inc.: State of the Law Regarding Discharge of Environmental Injunctions

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In August 2009, the Seventh Circuit issued its opinion in *United States v. Apex Oil Co., Inc.*[3] that sent a ripple through the bankruptcy and environmental world. The court ruled that an injunction to clean up a contaminated property is not dischargeable, contrary to a prior ruling by the Sixth Circuit. This ruling highlights the competing policy objectives of environmental regulations and the Bankruptcy Code.

Bankruptcy, which is specifically discussed in the United States Constitution,[4] was created to give a person a fresh start and encourage the risk-taking that has contributed to this nation's growth. On the other hand, environmental regulations were created to protect the environment and the health and safety of the individual. Both of these objectives are important; however, problems arise when you try to reconcile the two. Put simply, "[b]ankruptcy does not insulate a debtor from environmental regulatory statutes."[5] Furthermore, the filing of a bankruptcy petition does not operate as a stay against "the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power."[6] However, in application this rule has become more complicated. The *Apex Oil* ruling thrusts this complicated topic back into the spotlight and creates a circuit split. Thus, the treatment of environmental injunctions in bankruptcy is an issue that may end up before the Supreme Court.

"Under the Bankruptcy Code, . . . except for debts saved from dischargeability under the Code, specifically, 11 U.S.C.S. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy."[7] A debt, under the Bankruptcy Code, is a "liability on a claim."[8] A claim is

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.[9]