

## Chapter 15

# Treatment of Environmental Liabilities in Bankruptcy

*Milissa A. Murray*

*Sandra Franco*

### Introduction

Litigants, courts, and Congress have struggled to reconcile the tension between the policies underlying bankruptcy laws and environmental laws. This tension is likely to escalate during a period of profound economic and environmental instability. While the Bankruptcy Code<sup>1</sup> strives to provide the debtor with a fresh start by fixing and discharging prepetition liabilities, environmental laws, and in particular the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended,<sup>2</sup> seek to remedy decades of unrestricted and unregulated contamination by imposing strict and sweeping cleanup obligations and liabilities on several broad categories of parties, including those that may only be associated remotely with prior disposal of hazardous substances at the site. Such laws are designed to abate dangers to public health and the environment promptly and to allocate the cost of cleanup and assess it against those deemed responsible.<sup>3</sup> Cutting off CERCLA claims prematurely in bankruptcy can impede CERCLA's allocation and distribution scheme.<sup>4</sup> Surviving environmental liabilities, indeed just the threat of them, can defeat a company's successful reorganization and substantially dilute and delay recoveries by all creditors.<sup>5</sup> Heated debate continues over whether and to what extent the debtor can and should be able to avoid its obligations to clean up or pay for past contamination,<sup>6</sup> particularly in a challenging economic climate in which the primary alternative source of funds for cleanup is the public coffers.<sup>7</sup>

The trends that emerge from the intersection of bankruptcy and environmental laws can have a profound impact on structuring a transaction that involves environmentally impacted property or an environmentally regulated company, and on effectively assessing the cost and benefit of pursuing an environmental claim against a bankrupt or reorganized company, as well as any analysis of whether bankruptcy is a viable option for dealing with contaminated property or environmental related obligations. This chapter discusses how

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environmental liabilities are determined and treated in bankruptcy. It includes a discussion of related issues, such as abandonment of contaminated or environmentally protected property; the scope and effect of the automatic stay on governmental claims and enforcement; the dischargeability of environmental obligations; the filing, allowability, liquidation (including estimation), and priority of environmental claims; executory environmental contracts capable of assumption or rejection; and successor liability.

The treatment to which environmental creditors are entitled in a bankruptcy case depends on the nature of the particular claim or debt, when it arose, and by whom it is held. Some claims will be disallowed entirely; some will be afforded only general unsecured status; and some will constitute priority claims entitled to payment in full ahead of all general unsecured claims and equity interests. Still others may survive bankruptcy, unrestricted by any bankruptcy discharge rules or confirmed reorganization plan.

The argument that environmental creditors are treated disparately in bankruptcy likely would not withstand close scrutiny. After all, an intended consequence of bankruptcy is the prejudice to almost all creditors, including environmental ones, created by the Bankruptcy Code's preemption of the laws from which creditors' rights spring. Nevertheless, it is fair to say that the bankruptcy process is not particularly conducive to the resolution of environmental claims nor is it user friendly to those who assert them. This is largely because the existence, nature, extent, cause, and remedy of contamination is often unknown for several years after the contaminants have been released into the environment and thus cannot be assessed (and corresponding liabilities defined) within the reorganization and claims resolution periods contemplated by the Bankruptcy Code. The problems presented by the complex liability and allocation scheme of environmental remediation statutes, the time it takes to define the nature, extent, cause, and remedy of contamination, and the significant costs of assessment and cleanup present problems for courts, creditors, and debtors alike.

## Environmental Laws

Controversy stemming from bankruptcy's effect on environmental liability has predominantly involved CERCLA, which imposes strict liability on certain categories of responsible parties for cleanup of contaminated property.<sup>8</sup> Potentially responsible parties (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.<sup>9</sup> The government can compel PRPs to investigate and remediate contaminated sites,<sup>10</sup> or it may elect to clean up the site and then sue the PRPs for reimbursement of its response costs.<sup>11</sup> PRPs that are sued by the government are generally jointly and severally liable for those costs, subject to apportionment or contribution claims brought against other PRPs.<sup>12</sup> A private party, including a PRP, can sue another PRP for reimbursement or contribution of the plaintiff's recoverable cleanup costs.<sup>13</sup> A PRP that settles its liability to the government, however, escapes contribution liability for the matters settled.<sup>14</sup>

Another federal environmental remediation statute that has increasingly garnered attention in the bankruptcy context is the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>15</sup> While CERCLA's primary purpose is to obtain prompt cleanup of waste sites and impose cleanup costs on those responsible, RCRA's primary goal is to reduce generation of waste and regulate the proper disposal, treatment, and storage of waste.<sup>16</sup> Although RCRA does not provide a private party with a cause of action for recovery of cleanup costs,<sup>17</sup> it does, under certain circumstances, authorize a private citizen and the government to seek an injunction against a responsible party to compel cleanup or enjoin contamination.<sup>18</sup> Certain injunctions issued or available under RCRA and similar relief to compel cleanup available under CERCLA have been upheld as nondischargeable equitable remedies that fall outside the Bankruptcy Code's definition of "claim."<sup>19</sup>

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## The Bankruptcy Code

The object of bankruptcy is to identify and reduce to a dollar amount all of the debtor's prebankruptcy debt; to divvy up the debtor's assets fairly for a final distribution on account of such debts, and to enable the debtor to emerge from the process with a fighting chance at future profitability. The more debts that are resolved through the bankruptcy, the less burden the debtor will have thereafter. Creditors' claims subject to the process are, therefore, defined broadly to include any right to payment, even if it is disputed, unliquidated, unmatured, or contingent. The extent to which an obligation gives rise to a claim, its amount, and its priority are issues generally determined by the bankruptcy court, which may estimate claims for prompt administration of the case.<sup>20</sup>

Congress's goal in passing the Bankruptcy Code was to provide the debtor with a fresh start.<sup>21</sup> Chapter 11 of the Bankruptcy Code provides an opportunity for financially distressed individuals or businesses to reorganize,<sup>22</sup> which would otherwise be impossible in the face of competing creditors racing to levy on the debtor's assets. Reorganization is facilitated by the breathing spell given to the debtor, the common forum of the bankruptcy court for dispute resolution between competing creditors as well as between the debtor and its creditors, and the broad release of the debtor's prebankruptcy liabilities. The automatic stay that takes effect immediately upon the filing of the bankruptcy petition usually bars the commencement or continuation of most acts or actions against the debtor or its property for the duration of the case giving the debtor the much needed breathing spell so it can focus on reorganization rather than keeping afloat. The stay can be very beneficial to a debtor faced with significant environmental liabilities or one on the verge of having to devote significant company resources to costly environmental litigation. The benefit can be diminished, however, for the debtor embroiled in environmental enforcement proceedings because the stay does not apply to governmental units seeking to enforce its police or regulatory powers.

In a Chapter 7<sup>23</sup> case, the debtor's nonexempt assets are liquidated by a trustee to pay prebankruptcy creditors, after which the debtor receives a discharge from all prebankruptcy debts<sup>24</sup> with the exception of certain statutory exclusions.<sup>25</sup>

Typically, the goal of a Chapter 11 debtor is to obtain creditor and bankruptcy court approval of a reorganization plan that generally will revert in the debtor (or its successor) its assets and discharge all of its debts, subject only to the debtor's compliance with the payment terms and other provisions of the plan.<sup>26</sup> Because plan confirmation generally requires acceptance by creditors,<sup>27</sup> a significant portion of the debtor's efforts during a Chapter 11 case is (or should be) spent in negotiating the terms of a consensual plan among the debtor's primary creditor constituencies. After certain disclosures of past and projected financial conditions, the debtor presents a plan of reorganization in which the payment scheme or other treatment on account of allowed claims is set forth.<sup>28</sup> Whether and to what extent such claims are paid in full depends on priority of claim and the debtor's projected financial condition. Whether or not it is ultimately paid in full under the plan, the claim typically is discharged once the plan is confirmed, and thereafter the creditor is entitled only to the relief provided in the plan.<sup>29</sup> Although a plan may provide certain classes of claimants with more favorable treatment than the Bankruptcy Code requires, as long as the junior claimants either consent or are not prejudiced, the general priority scheme for distribution of the debtor's unencumbered assets is set forth in the Bankruptcy Code.<sup>30</sup>

## Bankruptcy Concepts as Applied to Environmental Claims

### Abandonment of Contaminated Property

One issue that arises frequently in environmental bankruptcies is whether and under what circumstances a debtor may abandon contaminated real estate or property that the debtor

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is obligated to clean up pursuant to prepetition contracts, court orders, or federal or state law. The Bankruptcy Code provides that the trustee<sup>31</sup> may abandon property of the estate that is burdensome to the estate or is of inconsequential value and benefit to the estate.<sup>32</sup> The Supreme Court has held, however, in *Ohio v. Kovacs*,<sup>33</sup> that no one in possession of a site may avoid compliance with the environmental laws.<sup>34</sup> “[T]hat person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.”<sup>35</sup> Thus, statutory obligations attached to current ownership of land survive bankruptcy.

The Supreme Court later held, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, that the Bankruptcy Code does not authorize the abandonment of burdensome property in contravention of state environmental laws when cleanup costs would exceed the estate’s equity.<sup>36</sup> The Court recognized a narrow exception to abandonment and prohibited “abandonment without formulating conditions that [would] adequately protect the public’s health and safety.”<sup>37</sup> “*Midlantic* has spawned two lines of cases.”<sup>38</sup> Some courts have interpreted *Midlantic* to require strict compliance, before abandonment, with environmental laws.<sup>39</sup> Other courts have made exceptions where the trustee is shutting down the property or where abandonment would not create an imminent harm or danger to the public.<sup>40</sup> If an estate has unencumbered assets, stricter compliance with environmental laws likely will be required before abandonment will be permitted.<sup>41</sup>

Abandoned property reverts to the debtor or other person or entity that had possessory rights as of the petition date, and it is no longer the property of the estate.<sup>42</sup> Thus, environmental response costs incurred to clean it up after abandonment will not have administrative priority status because such costs are not necessary to preserve property of the estate.<sup>43</sup> In determining whether to oppose abandonment of contaminated property, the U.S. Environmental Protection Agency (EPA) will consider the availability of unencumbered assets to finance a cleanup, the nature and degree of the environmental threat posed by the property, and the need for EPA access to conduct future cleanup.<sup>44</sup>

## Effect of the Automatic Stay

As mentioned above, the automatic stay imposed by the Bankruptcy Code to give the debtor its breathing spell can be very valuable to the environmental debtor facing costly environmental cleanup obligations or pending lawsuits. Not surprisingly, the courts often struggle to balance the competing public policy interests in providing the debtor with the full benefits of the stay relief and protecting the environment and human health and safety by minimizing obstacles to prompt abatement of imminent environmental threats. While the filing of a bankruptcy petition generally operates as a stay of any actions against the debtor or its property,<sup>45</sup> the bankruptcy filing does not stay an action by a governmental body taken pursuant to its police or regulatory power.<sup>46</sup> Moreover, a bankruptcy filing does not stay the enforcement of a judgment, other than a monetary judgment, obtained in an action by a governmental body in support of an exercise of its police or regulatory power.<sup>47</sup> Historically, there has been some controversy about whether governmental actions requiring debtors to spend money, such as injunctions or other orders demanding that the estate clean up contaminated sites, are equivalent to monetary judgments and thus exempt from the police power exception.<sup>48</sup> The majority of courts, however, have defined “money judgment” narrowly and have refused to extend the protection of the automatic stay to governmental cleanup orders, even though compliance could force the debtor to expend substantial sums and could result in diminution of the bankruptcy estate.<sup>49</sup> This trend is consistent with the debtor’s ongoing obligation to manage and operate estate property in compliance with state laws, including environmental laws.<sup>50</sup>

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Financial assurance regulations promulgated under RCRA<sup>51</sup> and similar state laws<sup>52</sup> require companies in many industries to pledge and maintain sufficient financial resources to address contingent environmental liabilities, such as the financial assurance necessary to close or abandon a facility in an environmentally responsible fashion. These requirements are increasingly the subject of contention in bankruptcy cases. When a governmental unit asserts the police power exception to the stay, it often seeks to compel the debtor either to maintain certain balance sheet thresholds or to substitute cash or cash equivalents for shortfalls to comply with regulatory financial assurance obligations.<sup>53</sup> If such obligations are not met, the debtor risks the revocation of critical permits the debtor needs to operate.<sup>54</sup> The debtors' lenders, however, may balk at the use of its cash collateral to satisfy such obligations without adequate protection of its security.<sup>55</sup> Lessors of the at-risk real estate also may be motivated to weigh in on the issue.<sup>56</sup>

The commencement or continuation of private-party actions against the debtor or the estate are stayed by the bankruptcy filing until the bankruptcy court lifts or otherwise modifies the automatic stay.<sup>57</sup> Private parties include PRP groups whose members have joined forces and resources to clean up a site pursuant to a governmental order before any judicial findings of liability. Members of such groups often have to cover an additional share when another member seeks bankruptcy protection and stops paying its assessments. The automatic stay prevents actions by the group or its members for breach of the PRP agreement or for recovery of response costs under CERCLA. The group is usually left to file and pursue its proof of claim in the bankruptcy case.<sup>58</sup>

## Dischargeability of Environmental Obligations

Perhaps the answer most sought by environmental creditors and debtors is whether the debtor can effectively shed or significantly reduce oppressive environmental obligations through bankruptcy. Confirmation of a Chapter 11 debtor's plan of reorganization generally discharges the debtor only from *claims* that arose *before* the confirmation date<sup>59</sup> brought by claim holders who received adequate notice and had the opportunity to participate in the case.<sup>60</sup> A Chapter 7 discharge applies only to claims that arose prepetition.<sup>61</sup> The key issues relating to the disposition of environmental liabilities as framed by the existing case law are these:

1. Whether the environmental liability at issue is a "claim" under the Bankruptcy Code;
2. If so, whether the claim arose before or after plan confirmation (or the petition date in the case of Chapter 7);<sup>62</sup> and
3. Whether the creditor holding the claim had sufficient notice of the case and the debtor's liability to participate meaningfully in the bankruptcy proceedings.<sup>63</sup>

The first issue stems from the distinction between a creditor's right to recover cleanup costs, that is, its right to the payment of money, and its right to injunctive relief compelling the debtor to abate and clean up pollution.<sup>64</sup> Unless an injunction can be converted to a money judgment, it is not a "right to payment" within the statutory definition of "claim" under existing case law and thus is not dischargeable.<sup>65</sup> The second and third issues arise postbankruptcy when an environmental creditor challenges the purported discharge of its claims on the grounds that the creditor received inadequate notice, resulting in a denial of due process;<sup>66</sup> that it could not have known of its rights against the debtor until after bankruptcy because the contamination was not or could not have been discovered until after the bankruptcy; that the debtor's relationship to the site or to the creditor was not, or could not have been, known before the bankruptcy; or a combination of any of these grounds.<sup>67</sup>

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## Injunctions and Cleanup Orders: Are They “Claims”?

“Claim” is defined broadly in the Code to include

[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

[a] 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.<sup>68</sup>

Courts generally have held that a debtor’s obligation under a governmental cleanup order or injunction to abate pollution is not a right to payment, thus is not a claim within the meaning of the Bankruptcy Code, and therefore is not dischargeable.<sup>69</sup> If it is not dischargeable, a claim will survive against the debtor or reorganized debtor, unaffected by the bankruptcy. Although the Supreme Court held in *Ohio v. Kovacs*<sup>70</sup> that the debtor’s obligation to perform cleanup work at a contaminated site pursuant to a prepetition order was dischargeable, the Court relied on the fact that the liability had been reduced to a demand for money and limited dischargeability only to those parts of the cleanup order that involved the collection of money.<sup>71</sup> The Court noted that other portions of a cleanup order, such as a prohibition against pollution or conduct contributing to pollution, were not dischargeable.<sup>72</sup>

In *Chateaugay I*,<sup>73</sup> the Second Circuit held that injunctive remedies may be dischargeable if the government has the option to perform the remediation and recover costs from the debtor.<sup>74</sup> The court ruled, however, that “a cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim.”<sup>75</sup> When there is no option for the enforcing agency to accept payment in lieu of ongoing pollution, any “order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a ‘claim.’”<sup>76</sup> On the other hand, a cleanup order that imposes obligations distinct from the obligation to stop ongoing pollution is a “claim” if the agency had the option to do the cleanup work and sue the corporation for response costs.<sup>77</sup> The Second Circuit predicted that most injunctions would “fall on the non-‘claim’ side of the line,”<sup>78</sup> because most cleanup orders include obligations to remove or remediate contaminated soil or other sources from which pollution continues to emanate.<sup>79</sup>

CERCLA gives the federal government the option to conduct the site investigation and remediation<sup>80</sup> and sue responsible parties for reimbursement of response costs.<sup>81</sup> Comparable state statutes often grant the government the authority to conduct the site investigation and remediation itself if the responsible party fails to do so or cannot be identified or located, or if the delay of remediation poses an imminent threat to the environment. Under the guidance of *Chateaugay I*, however, these state statutes do not give the government the option to accept payment from a liable party in lieu of addressing ongoing pollution leaching, migrating, or otherwise emanating from accumulated wastes at a site.<sup>82</sup> Even though the government may undertake cleanup in lieu of issuing an order, by removing the accumulated waste and preventing continued pollution, its action does not convert the amelioration facet of any order into a claim.<sup>83</sup> Similarly, based on the Supreme Court’s ruling in *Meghrig v. KFC Western, Inc.*<sup>84</sup> that RCRA’s citizens’ suits under section 7002(a) and substantial endangerment injunctions available to the government pursuant to section 7003(a) do not give rise to “claims” within the meaning of the Bankruptcy Code and thus are not dischargeable debts.<sup>85</sup>

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## When Does the Claim Arise?

As noted previously, in a Chapter 7 proceeding, only prepetition claims are treated and dischargeable in bankruptcy.<sup>86</sup> In Chapter 11 proceedings, only preconfirmation claims are subject to the bankruptcy process and the dischargeability rules.<sup>87</sup> Thus, whether the debtor's obligation is a dischargeable claim subject to the bankruptcy process depends on when the claim arises.

### *Chateaugay Analysis*

In *Chateaugay I*, the LTV Corporation filed a Chapter 11 petition and listed the EPA and the environmental enforcement officers in all states as holders of contingent claims.<sup>88</sup> The EPA filed a proof of claim for response costs incurred before the petition date and also indicated that additional response costs might be incurred at a later date, either at certain known sites or at unknown sites where the corporation might be a PRP.<sup>89</sup> The court ruled that response cost claims are dischargeable where the release or threat of release of the hazardous substance occurred prepetition, even though the release may not have been discovered by the relevant enforcement agency or anyone else. The court stated:

The relationship between environmental regulating agencies and those subject to regulation provides sufficient “contemplation” of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of “claims.” True, EPA does not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon LTV, and it does not yet even know the location of all the sites at which such wastes may yet be found. But the location of these sites, the determination of their coverage by CERCLA, and the incurring of response costs by EPA are all steps that may fairly be viewed, in the regulatory context, as rendering EPA's claim “contingent,” rather than as placing it outside the Code's definition of “claim.”<sup>90</sup>

Accordingly, with respect to governmental claimants who have incurred or will incur response costs under CERCLA, the Second Circuit held that a *contingent* claim arises at the time of the release or threat of release of the hazardous substance, regardless of when the government discovers the release or incurs recoverable costs.<sup>91</sup> The court noted that such a claim is nevertheless a claim under the Bankruptcy Code and stated that contingent claims may be estimated to avoid undue delay in the Chapter 11 proceeding.<sup>92</sup>

*Chateaugay I* involved governmental claims. Because the court's reasoning for broadly construing “claim” to include environmental claims arising from yet unknown prepetition releases was largely based on the relationship between the regulator (EPA) and the regulated party (debtor), it was uncertain whether it would also apply to nongovernmental environmental creditors (i.e., private-party claimants) who had no relationship with the debtor and therefore were unaware at the time of bankruptcy of any claim against the debtor arising from yet undiscovered, prepetition contamination. Subsequently, in *In re Texaco, Inc.*,<sup>93</sup> the “claim” analysis in *Chateaugay I* was applied to bar a private party's environmental claim raised after confirmation of the debtor's plan.<sup>94</sup> Later, in *In re Manville Forest Products Corp.*,<sup>95</sup> the Second Circuit stated:

A valid pre-petition claim requires two elements. . . . First, the claimant must possess a right to payment. Second, that right must have arisen prior to the filing of the bankruptcy petition. Whether a claim exists is determined by bankruptcy law, while the time a claim arises is determined under relevant non-bankruptcy law.<sup>96</sup>

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The court concluded that the creditor's claim for environmental indemnification under a prepetition contract was a "contingent" prepetition claim that was discharged and therefore barred as against the reorganized debtor.<sup>97</sup>

### ***Modified Approach: "Fair Contemplation" Standard***

*Chateaugay I* has been rejected by some courts as having used a definition of claim that encompassed costs "that could not 'fairly' have been contemplated by the EPA or the debtor pre-petition."<sup>98</sup> In *National Gypsum*, the court created a test to limit the discharge of claims resulting from prepetition conduct to situations in which response costs had been "fairly contemplated" by the debtor and the creditor on or before the petition date.<sup>99</sup> Among the factors that a bankruptcy court may consider in classifying a CERCLA response cost claim as prepetition under the *National Gypsum* test are knowledge by the parties of a site in which a PRP may be liable, listing of the site on the National Priorities List, notification by the EPA of PRP liability, commencement of an investigation and cleanup activities, and incurrence of response costs.<sup>100</sup>

The distinction between future claims not fairly contemplated that are outside the scope of the Code's definition of "claim" and "contingent," foreseeable claims of the kind in *Chateaugay I* and *Manville* is not always clear, and the case law is confusing. Outcomes often vary from jurisdiction to jurisdiction.<sup>101</sup> In stark contrast to the *Chateaugay I* holding that a contingent claim arises when the release occurs, for example, a 1997 Seventh Circuit decision effectively validated the survival of CERCLA claims against the reorganized debtor, even though the claimant's predecessor bought the contaminated site from the debtor prebankruptcy; there were prepetition releases of hazardous substances at the site; and the claimant, a postbankruptcy, subsequent purchaser, conducted environmental due diligence that identified contamination before it purchased the site.<sup>102</sup> The court affirmed the district court's finding that the claimant's predecessor had insufficient information to link the debtor to contamination at the site before plan confirmation, even though when the predecessor purchased the real estate, it was a tank farm with nine tanks, ranging in capacity from 6,000 to 8,000 gallons, in which the debtor mixed tetrachloroethylene with naphtha to produce "Blankrola" (a cleaning solvent); the predecessor leased the tank farm grounds back to the debtor prepetition; and former employees of the debtor who knew of releases of contaminants went to work for the predecessor, who operated a related business adjacent to the site.<sup>103</sup>

### **Due Process: What Constitutes Sufficient Notice?**

The effect of bankruptcy on very remote or unknown environmental claims has frequently been addressed by courts faced with the debtor's attempt to avoid an environmental claim whose holder was unknown at the time of bankruptcy. The debtor is bound by certain due process requirements, compliance with which will minimize the risk that any prepetition obligations survive after bankruptcy.<sup>104</sup> The debtor is required to identify in its schedules all creditors and to notify all creditors and parties-in-interest of the filing of the case and the date by which proofs of claim must be filed (the "bar date").<sup>105</sup> If the debtor fails to schedule a claim held by a *known* creditor, fails to serve a *known* creditor with notice of the bar date, or fails to publish notice of the bar date to alert *unknown* creditors, a holder of a claim who did not otherwise have actual notice of the case may not be bound by the debtor's discharge.<sup>106</sup> If the debtor identifies the scheduled claim as disputed, contingent, or unliquidated, the claimant must file a proof of claim by the bar date to preserve its claim and the right to participate in bankruptcy distributions.<sup>107</sup>

A debtor is obligated to undertake more than a cursory review of its records and files to ascertain its known creditors.<sup>108</sup> Due process requires a reasonable search for contingent



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or unmatured claims so that ascertainable creditors can receive actual notice of the bar date.<sup>109</sup> Whether a creditor is known or unknown is determined by whether, at the time of the petition's filing, the creditor's identity is either known or ascertainable by the debtor.<sup>110</sup> A creditor's identity is reasonably ascertainable if that creditor can be identified through reasonably diligent efforts.<sup>111</sup> Unknown creditors have claims that are either conjectural or will arise in the future or that do not, in due course of business, come to the debtor's knowledge.<sup>112</sup> It is, therefore, reasonable to dispense with actual notice to unknown creditors, provided that the debtor makes reasonably diligent efforts to uncover their identities and claims.<sup>113</sup> Notice by publication is sufficient as to unknown creditors.<sup>114</sup>

Because the existence and scope of a debtor's environmental liability at a site may not be discovered or fully known for several years after the release of contaminants into the environment, due process rules present difficult issues in the environmental claim context. For those debtors particularly susceptible to environmental liabilities, filing an exhaustive list of potential environmental creditors will maximize the scope of the discharge and could dramatically reduce future environmental liabilities. On the other hand, identifying and notifying all conceivable parties who may hold only speculative or conjectural environmental claims could provoke the filing of unfounded claims. Moreover, the line between what constitutes a known environmental creditor and an unknown one is not clear.<sup>115</sup> In the case of contractual environmental indemnification and hold-harmless obligations, the debtor would likely be required to treat the holders of such rights as known creditors entitled to actual notice.<sup>116</sup> If the claims are not scheduled and the holders are not served with adequate notice, such creditors' indemnification and hold-harmless claims would not be discharged or otherwise subject to the bankruptcy process unless the creditors had actual knowledge of the case.<sup>117</sup> Whether the debtor's neighbor, however, whose property may be contaminated by the debtor's prior operations, is a known creditor is not as clear.<sup>118</sup> If such a creditor is considered unknown, notice by publication only would be sufficient due process.<sup>119</sup>

These due process rules seem inadequate when applied to environmental creditors who discover their claims against the debtor long after the bankruptcy because (1) the prebankruptcy release of contaminants was not earlier known or (2) the debtor's (or its predecessor's) relationship to the contamination or the site was not known. Such creditors may find their claims forever barred by the bankruptcy, even though their due process consisted solely of a published notice of bankruptcy for an entity with which the creditor then had no known ties and against whom it had no known claims.<sup>120</sup>

The trend appears to be that before a creditor's CERCLA claim may be cut off by a bankruptcy discharge, the creditor must have had sufficient notice of the case and some basis on which to foresee its claim against the debtor. The courts' approaches to reach this result, however, have not been consistent. Potential outcomes remain difficult to predict.<sup>121</sup>

## **Allowability, Amount, and Priority of Environmental Claims**

Environmental claims can present difficult and complex issues when the parties and court are attempting to determine the allowability, amount, and priority of the claim. Moreover, plan confirmation and a successful reorganization can often turn on whether and to what extent these issues are determined. Unless a creditor's claim is allowed, it is not entitled to vote on a Chapter 11 plan<sup>122</sup> or to receive any distributions on account of its claim.<sup>123</sup> Although the underlying validity of a claim is determined by nonbankruptcy substantive law (e.g., CERCLA or other environmental laws),<sup>124</sup> the allowability in bankruptcy of claims against the debtor is determined by the bankruptcy court using federal bankruptcy law.<sup>125</sup> Contingent and unliquidated claims may be estimated by the bankruptcy court to avoid undue delay in the administration of the case.<sup>126</sup> The claims objection process and estimation litigation can be costly and time-consuming. If the proceedings are not resolved quickly,

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disputed, contingent, or unliquidated claims could give rise to questions about the feasibility of the reorganization plan that could substantially delay or prevent confirmation.<sup>127</sup>

### *Estimation*

Courts have a great deal of discretion in selecting the procedures for a claim estimation proceeding, and the methods employed have ranged from full-blown evidentiary trials to a mere review of pleadings and briefs. In an estimation hearing, the amount of a claim should be estimated in accordance with the statute or common law from which it arises, although the bankruptcy court has broad discretion to deviate from a strict construction of that law.<sup>128</sup> Therefore, estimation of contingent or unliquidated environmental claims will largely turn on the substantive merits of the claim and will require evidence by the creditor and debtor about the claims and available defenses.<sup>129</sup> Any uncertainty about the debtor's liability, the nature and extent of contamination at the site, the dollar amount required to clean the site, and the degree to which the court should consider potential insurance, successor liability, and contribution issues will render the estimation process complex, time-consuming, and expensive. It will also render the results unpredictable. Although as a practical matter the estimation process may not be much more efficient than actually litigating the claim on the merits to judgment,<sup>130</sup> the process is being used more frequently to resolve complex, multisite environmental claims of the government.<sup>131</sup> In the absence of proving the likelihood of success on the merits, claims may be estimated at zero.<sup>132</sup>

### *Disallowance of Certain Contingent Claims*

Contingent claims of parties co-liable with the debtor for reimbursement or contribution are disallowed under section 502(e)(1)(B) of the Bankruptcy Code.<sup>133</sup> The purpose is to avoid duplicate claims against the debtor for the same indebtedness.<sup>134</sup> This statutory exclusion has had a significant and often fatal impact on a PRP's claim against another PRP in bankruptcy, if the bankruptcy petition was filed before the PRP's liability at a site was determined or before the claimant had actually incurred cleanup costs.<sup>135</sup> Unless and to the extent that the PRP claimant had actually incurred cleanup costs, the PRP's claim for contribution or reimbursement was contingent.<sup>136</sup> Moreover, as a practical matter, a PRP seeking contribution would be reluctant to offer evidence of its own exposure for liability for cleanup costs if its liability to the government has not yet been judicially determined for fear that such evidence could constitute admissions in a subsequent cost recovery or cleanup action against the claimant.<sup>137</sup> In addition, the payout on account of such a claim may be so small as not to warrant the litigation costs or risks inherent in pursuing the claim.

The Supreme Court's recent decision in *Atlantic Research* breathed new life into PRP CERCLA claims against co-liable PRPs. In that case the Court revived PRP's direct claims against other responsible parties under section 107(a) of CERCLA and rejected the law in almost every circuit that PRP claims were limited to those in contribution under section 113 of CERCLA. As a result, PRPs can now assert 107(a) direct claims against another PRP and thereby potentially escape the consequences of section 502(e)(1)(B)'s bar against certain contribution claims.<sup>138</sup>

In addition, PRPs can obtain indirect relief if the government, the primary creditor, files its own proof of claim.<sup>139</sup> If the government's response cost claim is allowed, its ultimate recovery from the estate should, theoretically, reduce the payout of the remaining PRPs. If the government refuses or fails to file its own proof of claim, a PRP may file a surrogate proof of claim on the government's behalf.<sup>140</sup> This is a relatively low-risk strategy for the PRP or PRP group. The government may elect to take over prosecution of the claim when and if the claim is opposed by the debtor and to settle with the bankruptcy estate for an amount, the payment of which will only benefit the other PRPs.<sup>141</sup> If it does not, the

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filing PRP may vote on a Chapter 11 plan in the name of the government<sup>142</sup> and thereby potentially acquire some leverage with which to settle the debtor's liability.

### ***Priority Administrative Claims***

Monetary claims for cleanup costs incurred prepetition, if allowed, typically are general unsecured, dischargeable claims, the holders of which are entitled to distributions on a pro rata basis with other general unsecured creditors after satisfaction of all secured and priority claims.<sup>143</sup> Similarly, monetary claims for *future* response costs arising from pre-bankruptcy releases of contaminants, if allowed, are also general unsecured, dischargeable claims.<sup>144</sup> However, priority administrative expense status (as explained below) is generally granted to monetary claims for reimbursement of CERCLA response costs *actually incurred* postpetition (1) to remedy contamination at the debtor's site that poses an imminent danger to the public health and environment<sup>145</sup> or (2) that brings the debtor's operations into compliance with applicable environmental laws, otherwise benefits the estate, or improves the value of the debtor's property.<sup>146</sup>

The Bankruptcy Code provides that administrative expenses are allowed—including the actual, necessary costs and expenses of preserving the estate—for services rendered after the case's commencement.<sup>147</sup> Allowed administrative claims must typically be paid in full before any distributions are made to general unsecured creditors or equity interest holders.<sup>148</sup> A claim obtains administrative expense status only if the debt (1) arises from a transaction with the debtor in possession (or trustee) and (2) benefits or preserves the estate postpetition.<sup>149</sup> Costs incurred postpetition to clean up a site owned by a debtor where there had been a prepetition release or threatened release of hazardous substances may be entitled to administrative priority.<sup>150</sup> When the remediation is necessary to preserve the bankruptcy estate and confers an actual postpetition benefit upon it (e.g., action taken to comply with the law), the claimant is entitled to administrative priority status.<sup>151</sup> Costs incurred postpetition in connection with both postpetition and prepetition releases have been granted administrative expense priority.<sup>152</sup>

Although postpetition cleanup costs incurred by the government or a private party at a site owned or operated by the debtor will likely be afforded priority administrative expense status, attempts to obtain administrative priority status for cleanup costs incurred at a site not owned by the debtor have been generally unsuccessful.<sup>153</sup>

### **Prepetition Settlement Agreements as Executory Contracts**

Chapter 11 provides to debtors the ability to reject or assume executory contracts and unexpired leases, subject to court approval.<sup>154</sup> The purpose of rejection is to convert burdensome obligations of the debtor into a damages claim against the debtor in favor of the aggrieved party. Such claims typically will be general unsecured, dischargeable claims.<sup>155</sup> Rejection will be permitted if the contract is executory, rejection benefits the estate, and rejection is an appropriate exercise of the debtor's business judgment.<sup>156</sup> To effectuate an assumption, the debtor must cure all preassumption defaults,<sup>157</sup> and the expense of doing so is given priority administrative status.<sup>158</sup>

A contract is executory if there are material unperformed obligations on the part of both parties such that the failure of either party to perform would constitute a material breach of the contract excusing performance of the other.<sup>159</sup> Judgments or judicial orders on the merits are not usually executory contracts within the meaning of the Bankruptcy Code.<sup>160</sup> However, a settlement agreement containing consensual obligations merely approved by a court may also constitute an executory contract.<sup>161</sup>

A debtor's settlement agreements with co-PRPs, even if judicially approved, may constitute contracts and, if executory at the time of the debtor's bankruptcy, may be capable

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of rejection or assumption.<sup>162</sup> Bankruptcy court approval of rejection will turn on issues such as whether the contract burdens the estate financially (apart from any like obligations owed to the EPA or state), whether rejection would result in a large claim against the estate, and whether the debtor can show real economic benefit resulting from the rejection.<sup>163</sup> This presumably would include whether rejection would jeopardize any valuable contribution protection otherwise afforded in the settlement, and the risk that rejection, particularly with respect to settlements relating to debtor-owned sites, would eliminate funds or other resources that directly or indirectly reduce the ultimate net costs of the debtor's cleanup efforts.

## Successor Liability Issues Peculiar to Bankruptcy

It is now widely recognized that successor liability applies in CERCLA cases.<sup>164</sup> Moreover, successor liability has been applied to CERCLA cases involving asset purchasers in several circuits.<sup>165</sup> Indeed, in CERCLA cases, courts have been willing to broaden substantially the scope of the exceptions to the general rule that an asset purchaser does not acquire the seller's liabilities.<sup>166</sup> Whether the asset purchaser is liable as a successor for the predecessor's CERCLA liability can turn on the extent to which the purchaser knew or should have known (or inquired) about the potential CERCLA liabilities.<sup>167</sup>

A real estate purchaser will be potentially liable under CERCLA by virtue of its present or former ownership of the contaminated real estate regardless of asset successorship issues.<sup>168</sup> Yet what about an asset purchaser who buys non-real estate assets in a bankruptcy proceeding *free and clear of any lien or interest* in such property?<sup>169</sup> Does such a purchaser risk CERCLA liability based on the bankrupt seller's presale conduct at or in relationship to a site that the debtor neither owned or operated (e.g., a landfill to which the debtor's hazardous waste was taken) nor sold to the purchaser? One court dodged the question,<sup>170</sup> finding that if the plaintiff's CERCLA claim was a "claim" under the Bankruptcy Code that could have been filed and discharged against the debtor, such a claim is necessarily barred as against the asset purchaser, regardless of section 363(f).<sup>171</sup> Conversely, if the CERCLA claim could not have been filed or discharged against the debtor because it did not "arise" until after the bankruptcy proceeding was concluded, then a section 363(f) sale free and clear "does not bar such claim."<sup>172</sup> The *Allis-Chalmers* court rejected the purchaser's additional argument that the bankruptcy court order approving the sale freed the purchaser of such successor liability because the court-approved asset purchase agreement expressly excluded the purchaser's assumption of environmental liability based on prior operations.<sup>173</sup>

As discussed above, there is no uniform rule governing when a CERCLA claim arises.<sup>174</sup> Nevertheless, the issue not only determines whether a CERCLA obligation survives against a reorganized company, but it also may now determine whether an asset purchaser whose sale is approved by the bankruptcy court is subject to successor liability as a result of presale releases of contaminants about which neither the debtor nor the purchaser were aware.<sup>175</sup> The *Allis-Chalmers* decision should send a strong warning to any prospective purchaser of bankruptcy assets. Until the issue is further refined in the Seventh Circuit and other circuits, any prospective bankruptcy asset purchaser should be aware of its potential exposure for the bankrupt seller's yet undisclosed CERCLA liability, which can exist solely by virtue of the debtor's having sent one 55-gallon drum of potentially hazardous substances to a landfill 30 years earlier.<sup>176</sup>

Any perceived trend that the courts were relaxing traditional limited liability notions of common corporate law likely ended with the Supreme Court's decision in *United States v. Bestfoods*.<sup>177</sup> In that case, the Supreme Court rejected the notion that a parent corporation could be derivatively liable as an "operator" under CERCLA by exercising sufficient control over its subsidiary. For derivative liability, the Court held, traditional requirements for

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veil-piercing must be met.<sup>178</sup> It was significant to the Court that Congress was silent on the issue in CERCLA, and in the absence of a clear intent to abandon traditional state common corporate law, veil-piercing would remain the proper test to determine whether a parent corporation is liable for the CERCLA liability of its subsidiary.<sup>179</sup> The Court did acknowledge, however, that a parent company could be directly liable as an owner or operator under CERCLA for exercising sufficient control over the disposal activities at the facility.<sup>180</sup>

## Protections for Lenders and Fiduciaries

In 1996 Congress passed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (also referred to as the Asset Conservation Act),<sup>181</sup> which amended CERCLA's liability provisions.<sup>182</sup> The legislation was largely in response to the imposition of CERCLA liability upon lenders and fiduciaries, highlighted by the controversial Eleventh Circuit case of *Fleet Factors*.<sup>183</sup> In that case, the court in dictum stated that a lender merely having the capacity to influence or the right to control the debtor's disposal practices or contaminated property could be held liable as an owner or operator under CERCLA, regardless of the degree of actual control it exercised.<sup>184</sup> There is now less risk that a foreclosing lender that exercises control necessary to protect its collateral will be liable under CERCLA as having "participated in management."<sup>185</sup>

In addition, the Asset Conservation Act restricts imposition of CERCLA liability on fiduciaries such as bankruptcy trustees. A fiduciary, now broadly defined to include persons acting as trustee, administrator, custodian, guardian of estates or guardian ad litem, and personal representatives, among others,<sup>186</sup> cannot be held personally liable for contamination caused solely by others.<sup>187</sup> Moreover, liability typically will be limited to the assets of the person or entity for whom the trustee is acting.<sup>188</sup> Thus, a bankruptcy trustee's liability could be satisfied only out of the assets of the bankruptcy estate.<sup>189</sup>

## Insurance for Environmental Claims

Debtors and creditors alike should be aware of the potential impact that insurance policies can have on the administration of the bankruptcy estate and the treatment of environmental claims. For example, the existence of coverage for an environmental claim may justify modification of the stay so as to permit the creditor to establish the nature and extent of the debtor's liability, particularly if costs of defense are a covered item.<sup>190</sup> In addition, the potential coverage for environmental claims under either an environmental impairment liability policy or a comprehensive general liability policy can increase the value of the estate, either by offsetting corresponding environmental obligations or by providing an alternative source of payment on account of real property secured claims. Lenders, particularly those looking to potentially contaminated real property as security for a loan, should be careful to properly perfect security interests not only in the applicable insurance policies but also in policy proceeds and in the debtor's right to sue the insurer.<sup>191</sup> Close attention to such details may ultimately result in the lender's exclusive access to policy proceeds, rather than the proceeds being available to satisfy all claims.<sup>192</sup>

Insurance policies are property of the bankruptcy estate,<sup>193</sup> and an insurer's attempt to cancel or revoke a policy because of an insured's bankruptcy would violate the stay.<sup>194</sup> Because a discharge affects only the liability of the debtor, however, it does not relieve codebtors or insurers.<sup>195</sup> Whether proceeds of a policy are estate property depends upon the insurance contract and the particular facts of the case.<sup>196</sup> In the absence of a mass tort, however, the proceeds generally do not belong to an estate, and injured plaintiffs may pursue the debtor on the condition that they will look solely to insurance proceeds to satisfy their claims.<sup>197</sup>

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Whether a particular policy provides coverage for a specific environmental liability of the debtor, whether coverage has been triggered, and what parties-in-interest have interests in policy proceeds are historically heavily contested and litigated issues, rich in factual and legal complexities.<sup>198</sup> Counsel to creditors and debtors are well advised to consult with bankruptcy *and* insurance specialists when evaluating the nature, extent and effects of coverage for third-party environmental claims. Insurance “archeologists,” for example, can often assist in reconstructing a company’s policies.<sup>199</sup>

## Conclusion

Bankruptcy can have a profound effect on the rights of both debtors and creditors in the disposition of the debtor’s environmental obligations. Courts continue to struggle with balancing the policy goals and, in particular, with resolving unliquidated, disputed, and contingent environmental liabilities that can threaten or prevent a debtor’s successful reorganization, severely delay or dilute other creditors’ recoveries, or pose a danger to public health and safety. The treatment of such liabilities in bankruptcy can be influenced by various factors, including

- the nature of the environmental creditor (i.e., governmental body or a private party)<sup>200</sup>
- the debtor’s present relationship to the contaminated site (e.g., present or former owner, operator, transporter, or generator)<sup>201</sup>
- the type of relief sought by the environmental creditor (e.g., injunctive relief requiring the debtor to conduct cleanup; reimbursement of cleanup costs incurred by the creditor)<sup>202</sup>
- the time at which the environmental claim arose<sup>203</sup>
- the danger posed by any contamination<sup>204</sup>

Subject to certain caveats and exceptions, governmental cleanup orders or injunctions are unaffected by bankruptcy, and the debtor remains obligated to comply with them, particularly at sites that the debtor continues to own or operate. Monetary claims for past or future cleanup costs resulting from prebankruptcy contamination are typically general unsecured, dischargeable claims entitled to no priorities, except that costs actually incurred postpetition to abate imminent danger or that otherwise benefit the estate may be afforded priority administrative expense status. In addition, purely equitable remedies such as cleanup injunctions available under RCRA even as to nonowned sites do not constitute “claims” within the meaning of the Bankruptcy Code; thus, they are nondischargeable and, unless expressly released under the plan, survive against the reorganized debtor even if based on known, prebankruptcy releases of contaminants into the environment. To the extent that a claim is asserted as a contingent contribution claim of a co-liable PRP, it likely will be disallowed, although a claim by the government based on the same environmental obligation would not be. Direct claims by PRPs under section 107(a) of CERCLA that now are permitted under the Supreme Court decision of *Atlantic Research* will allow more PRPs and PRP groups to survive the debtor’s claim objection and thus will allow them some additional leverage when they participate in resolving the debtor’s environmental obligations. In some cases, if the creditor has insufficient information before or during the bankruptcy on which to base an environmental claim for CERCLA response costs, the debtor’s obligation may survive its bankruptcy discharge, subjecting the reorganized company or the debtor’s successor to liability for the obligation.

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## Notes

1. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101–1532, as amended [hereinafter Bankruptcy Code].
2. 42 U.S.C. §§ 9601–9675.
3. Many states have enacted statutes relating to cleanup and assessment of liability for the disposal of hazardous waste. In addition, there are common law causes of action that may be available to redress environmental harm. This work focuses on CERCLA, because it presents the most uniform and comprehensive liability and compensation schemes available, and state laws that have similar cleanup objectives to CERCLA's are often interpreted based on CERCLA decisions. Moreover, federal preemption may limit the types of causes of action available under state law. *See* New York v. Hickey's Carting, Inc., 380 F. Supp. 2d 108, 114 (E.D.N.Y. 2005); *Volunteers of Am. of W. N.Y. v. Heinrich*, 90 F. Supp. 2d 252, 257–58 (W.D.N.Y. 2000). CERCLA and most recently the Resource Conservation and Recovery Act (RCRA) have presented the biggest controversy and challenges to the federal courts and, thus, have given rise to the most significant body of federal case law addressing the intersection of these two areas of law.

For an excellent discussion of causes of action available for CERCLA-excluded petroleum contamination and the effect of the Supreme Court's RCRA decision in *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996), see Samuel P. Logan, *Cost Recovery for Petroleum Contamination: Will RCRA Citizen Plaintiffs Be Cookin' with KFC or Relegated to a State Law Jungle?*, 10 TAX L. REV. (BNA) 946 (1996).
4. *In re Chi., Milwaukee, St. Paul & Pac. R.R. Co. (Chicago I)*, 974 F.2d 775, 799 (7th Cir. 1992).
5. *See* New Jersey v. W.R. Grace & Co. (*In re WR Grace & Co.*), 412 B.R. 657 (D. Del. 2009) (upholding injunction barring New Jersey Department of Environmental Protection suit against the debtor for civil penalties for environmental reporting violations, while recognizing public interest in timely resolution of the bankruptcy estate and prevention of needless environmental enforcement action that delays and deprives creditors of their proceeds and prevents the debtor from completing its reorganization).
6. *Compare* Ninth Ave. Remedial Group v. Allis-Chalmers Corp., 195 B.R. 716 (N.D. Ind. 1996) (environmental claims survive bankruptcy when creditor could not have foreseen debtor's potential liability in time to participate in bankruptcy case), *with In re Texaco, Inc.*, 182 B.R. 937 (Bankr. S.D.N.Y. 1995) (environmental claims barred by bankruptcy discharge when release of contaminants occurred, but was not discovered, prepetition). *See also In re Texaco*, 254 B.R. 536 (S.D.N.Y. 2000) (environmental contract claims not discharged when there is no prepetition breach) and *In re Am. Coastal Energy Inc.*, 399 B.R. 805 (Bankr. S.D. Tex. 2009) (finding postpetition costs for plugging abandoned wells constituted administrative expenses).

*See also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-658, ENVIRONMENTAL LIABILITIES—EPA SHOULD DO MORE TO ENSURE THAT LIABLE PARTIES MEET THEIR CLEANUP OBLIGATIONS, at Highlights (Aug. 2005), *available at* <http://www.gao.gov/new.items/d05658.pdf> [hereinafter GAO 2005 Report] (“[B]ankruptcy law presents a number of challenges to EPA’s ability to hold parties responsible for their cleanup obligations, challenges that are largely related to the law’s intent to give debtor’s a fresh start. Moreover, by the time the business files for bankruptcy, it may have few, if any, assets remaining to distribute among creditors.”).
7. GAO 2005 Report, *supra* note 6, at 2 (“[T]he cleanup burden borne by EPA and other government entities will be increased if operating businesses, including those regulated under RCRA, fail to fulfill their cleanup obligations. For example, businesses may simply close and abandon contaminated properties-or they may go through bankruptcy proceedings-leaving contaminated properties for state programs or EPA’s Superfund Program to clean them up.”).
8. 42 U.S.C. § 9607.
9. 42 U.S.C. § 9607(a)(1)–(4).
10. 42 U.S.C. § 9606.
11. 42 U.S.C. §§ 9604, 9607.
12. *See* U.S. Bank Nat’l Ass’n v. EPA, 563 F.3d 199, 207 (6th Cir. 2009); *United States v. Capital Tax Corp.*, 545 F.3d 525, 534–36 (7th Cir. 2008). In *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009), the Supreme Court upheld apportionment in a section 9607(a) case brought by the United States. The Court adopted a flexible approach in apportioning the harm when there is a reasonable basis for doing so, endorsing estimates, geographical division, and degree-of-damage division, in addition to the more common volumetric divisions.

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13. 42 U.S.C. §§ 9607, 9613(f)(1). Prior to 2004, the majority of courts held that PRPs must sue in contribution under section 9613(f), although some courts found that “innocent” PRPs may still have a cost recovery claim under section 9607. *See* Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 828–29 (7th Cir. 2007). In 2004, the U.S. Supreme Court held that contribution claim under section 9613(f)(1) was limited to parties against whom a claim under section 9606 or 9607 had been filed. *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 168 (2004). The Supreme Court in *Aviall* also noted that contribution claims were available under section 9613(f)(3)(B), which provides a contribution claim for “[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement,” but left open the question whether PRPs could also sue for cost recovery or contribution under section 9607(a). *Id.* at 163, 168–71. The Supreme Court largely answered this question in 2007 in *United States v. Atlantic Research*, 551 U.S. 128 (2007), in which the Court held that section 9607(a) provides PRPs with a cause of action to recover costs from other PRPs, distinguishing recovery of costs actually incurred by the plaintiff, which would give rise to a claim under section 9607(a), from costs reimbursed to other parties, which would give rise to a contribution claim under section 9613. *See also* W.R. Grace & Co.-Conn. v. Zotos Int’l, Inc., 559 F.3d 85, 89 (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.”). *Atlantic Research*, however, left open the question of what happens when the costs at issue may be recoverable under both provisions. *Id.* at 2338 n.6. The Supreme Court also did not determine whether a claim between PRPs under section 9607(a) was for joint or several liability or several liability only. *Id.* at 2339 n.7. *See infra* note 138 for discussion of recent Second and Third Circuit decisions interpreting *Atlantic Research*.
  14. 42 U.S.C. § 9613(f)(2). Such contribution protection can be a major incentive for a bankrupt PRP to resolve its liability to the government, particularly if the debtor or its successor faces potential future liability because of a limited discharge. Since *Aviall*, some courts have limited what may constitute an administrative “settlement” for purposes of section 9613(f)(3)(B), which may also affect whether the party has contribution protection under section 9613(f)(2). The Second Circuit, for example, has rejected reliance on certain agreements with the State, a voluntary cleanup agreement and orders on consent as “administrative settlements” for purposes of seeking contribution under section 9613(f)(3)(B), finding “‘only when liability for CERCLA claims, rather than some broader category of legal claims, is resolved’ does section 113(f)(3)(b) create a right to contribution.” *W.R. Grace & Co.-Conn.*, 559 F.3d at 90 (quoting *Consol. Edison v. UGI Utils., Inc.*, 423 F.3d 90, 95 (2d Cir.2005)).
  15. 42 U.S.C. §§ 6901–6992k.
  16. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996).
  17. *Id.* at 484 (“It is apparent from the two remedies described in § 6972(a) that RCRA’s citizen suit provision is not directed at providing compensation for past cleanup efforts.”). *See also* 87th St. Owners Corp. v. Carnegie Hill-87th St. Corp., 251 F. Supp. 2d 1215, 1218 (S.D.N.Y. 2002) (“It is certainly true that RCRA does not permit a citizen suit for damages for past environmental harm, and authorizes only prospective relief to address threatened future harm.”) (citing *Meghrig*, 516 U.S. 479).
  18. *Meghrig*, 516 U.S. at 484; 42 U.S.C. § 6972(a) (addressing private party’s RCRA remedies). *See also* *United States v. Apex Oil Co., Inc.*, 438 F. Supp. 2d 948, 953–54 (S.D. Ill. 2006) (addressing government’s remedies: “The Court finds that *Meghrig*’s logic should be extended to 42 U.S.C. § 6973(a). Consequently, the Court finds that section 6973(a) does not allow the government to seek pecuniary relief here, and thus that the injunction the government seeks could not have been discharged in earlier bankruptcy proceedings.”), *aff’d*, 579 F.3d 734 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010).
  19. *See* *United States v. LTV Corp. (In re Chateaugay Corp.) (Chateaugay I)*, 944 F.2d 997 (2d Cir. 1991), and *Torwico Elecs. Inc. v. N.J. Dep’t of Env’tl. Prot. (In re Torwico)*, 8 F.3d 146 (3d Cir. 1993), both discussing CERCLA injunctions; *Apex Oil Co.*, 579 F.3d 734 (RCRA injunction action against a reorganized debtor to clean up prepetition contamination was nondischargeable action not within definition of “claim” under Bankruptcy Code).
  20. *See* *FCC v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 302 (2003) (“We have said that ‘[c]laim’ has ‘the broadest available definition.’”) (quoting *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991)); *In re Worldcom, Inc.*, 546 F.3d 211, 216 (2d Cir. 2008) (“Thus, this Court has explained that ‘a “claim” should be deemed to exist whenever, in the absence of bankruptcy, a particular claimant has the right to reach the debtor’s assets.’”) (quoting *Chateaugay I*, 944 F.2d at 1003). On the estimation of claims, see 11 U.S.C. § 502(c) providing for the estimation of contingent and unliquidated claims; see also *infra* notes 124–127 and accompanying text.



21. *Grogan v. Garner*, 498 U.S. 279 (1991).
22. 11 U.S.C. §§ 1101–1174.
23. 11 U.S.C. §§ 701–766.
24. 11 U.S.C. § 727.
25. *Id.*; 11 U.S.C. § 523. Although corporations may be liquidated under Chapter 7 or Chapter 11, only individuals who liquidate their assets can obtain a discharge. 11 U.S.C. §§ 727(a)(1), 1141(d)(3).
26. 11 U.S.C. § 1141. Unlike a Chapter 7 case, in Chapter 11 a trustee is not appointed unless a party-in-interest demonstrates cause, including, among other things, gross mismanagement by current managers. 11 U.S.C. § 1104. Unless and until a Chapter 11 trustee is appointed, the debtor, known as a debtor in possession, performs the functions of a trustee. 11 U.S.C. § 1107.
27. 11 U.S.C. § 1126. Typically “a Chapter 11 proceeding, unlike a Chapter 7 proceeding, is not aimed at accomplishing a prompt closure and liquidation of the debtor’s estate. Rather, Chapter 11 ‘provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors.’ *Pioneer Investment [Servs. Co. v. Brunswick Assoc. L.P.]* 507 U.S. [380], 389 (1993).” *In re Eagle-Picher Indus., Inc.*, 131 F.3d 1185, 1189 (6th Cir. 1997).
28. 11 U.S.C. §§ 1121–1129.
29. 11 U.S.C. § 1141(d). There are statutory restrictions on discharge in certain Chapter 11 cases set forth in 11 U.S.C. § 1141(d)(2)–(3) (e.g., typically claims against a liquidating Chapter 11 debtor will not be discharged).
30. 11 U.S.C. § 507. Administrative expenses are afforded the highest payment priority. General unsecured claims are afforded the lowest payment priority (excluding the interests of equity interest holders). *See In re Columbia Gas Sys., Inc.*, 50 F.3d 233, 239 (3d Cir. 1995) (acknowledging distinction in context of executory contract assumption dispute).
31. The trustee is appointed automatically in Chapter 7 and 13 cases. *See* 11 U.S.C. § 701 and 11 U.S.C. § 1302. In a Chapter 11 case, however, the debtor assumes most of the duties and rights of a trustee and is called the “Debtor in Possession.” *See* 11 U.S.C. § 1107. Nevertheless, under certain circumstances, including, inter alia, gross mismanagement by the debtor in possession, the court can order the appointment of a Chapter 11 trustee to serve in lieu of the debtor. 11 U.S.C. § 1104. A trustee is the representative of the estate, 11 U.S.C. § 323(a), whose duties can be found in Chapter 3 (Case Administration), Subchapter II (Officers); Chapter 7 (Liquidation), Subchapter I (Officers and Administrative); Chapter 11 (Reorganization), Subchapter I (Officers and Administration); and Chapter 13 (Adjustment of Debts of An Individual With Regular Income), Subchapter I (Officers, Administration and the Estate). *See also* 11 U.S.C. § 323(a).
32. 11 U.S.C. § 554.
33. 469 U.S. 274, 285 (1985).
34. *Id.* at 284.
35. *Id.* at 285.
36. 474 U.S. 494 (1986), *reh’g denied*, 475 U.S. 1091 (1986), and *reh’g denied*, 475 U.S. 1090 (1986) (although the decision was based narrowly on the specific facts of the case).
37. *Id.* at 506–07. *See also In re St. Lawrence Corp.*, 248 B.R. 734 (D.N.J. 2000) (excellent analysis and application of *Midlantic*); *In re Insilco Techs., Inc.* 309 B.R. 111, 114 (D. Del. 2004) (*Midlantic* and its progeny guide that “property of the estate may not be abandoned if the abandonment will act to contravene laws designed to protect public health and safety and will pose an imminent threat to the public’s welfare.”).
38. *In re Eagle-Picher Holdings, Inc.*, 345 B.R. 860, 862 (Bankr. S.D. Ohio 2006).
39. *In re Peerless Plating Co.*, 70 B.R. 943 (Bankr. W.D. Mich. 1987). *See also In re H.L.S. Energy Co.*, 151 F.3d 434, 438 (5th Cir. 1998) (“[A] bankruptcy trustee may not abandon property in contravention of a state law reasonably designed to protect public health or safety.”) (citation omitted); *In re Am. Coastal Energy Inc.*, 399 B.R. 805, 810 (Bankr. S.D. Tex. 2009) (“[A] trustee cannot abandon contaminated estate property if state health or safety law prohibits such abandonment.”) (citation omitted).
40. *See N.M. Env’t Dep’t v. Foulston (In re L.F. Jennings Oil Co.)*, 4 F.3d 887, 890 (10th Cir. 1993) (abandonment allowed where there was no immediate threat at the time of the abandonment); *In re Smith-Douglass, Inc.*, 856 F.2d 12 (4th Cir. 1988) (permitting unconditional abandonment of contaminated property where estate lacked unencumbered assets to finance cleanup and plant did not present any imminent harm or danger to public); *In re Globe Bldg. Materials, Inc.*, 345 B.R. 619, 636 (Bankr. N.D. Ind. 2006) (construing *Midlantic* to be inapplicable where a Chapter 7 trustee is merely liquidating environmentally contaminated property on which trustee did not operate facility giving rise to environmental problems and to be applicable only where action are necessary to abate conditions that post an imminent and identifiable harm

- to public health or safety); *In re Unidigital, Inc.* 262 B.R. 283, 286–87 (Bankr. D. Del. 2001) (“Since the *Midlantic* decision, the majority of courts have read the exception to abandonment only where there is an imminent and identifiable harm to the public health or safety.”) (listing cases). In addition, there is some support for the notion that where abandonment would result in reversion of possession to a third-party with resources to address environmental concerns, abandonment will not be barred under *Midlantic*. See *White v. Coon (In re Purco, Inc.)*, 76 B.R. 523 (Bankr. W.D. Pa. 1987) (allowing abandonment of inventory where there was insufficient evidence of a threat to public health and safety and noting that landlord was able to provide any remedy necessary to protect public health).
41. *In re Smith-Douglass, Inc.*, 856 F.2d 12, 17 (4th Cir. 1988); *In the Matter of MCI, Inc.*, 151 B.R. 103, 108 (E.D. Mich. 1992).
  42. See *In re Guterl Special Steel Corp.*, 316 B.R. 843, 861 (Bankr. W.D. Pa. 2004) (abandoned property reverts nunc pro tunc to the debtor or to the party with possessory rights to the property as of petition date) (citing *In re Dewsnup*, 908 F.2d 588, 590 (10th Cir. 1990), *aff’d*, 502 U.S. 410 (1992)); *In re St. Lawrence Corp.*, 239 B.R. 720, 727–28 (Bankr. D.N.J. 1999), *aff’d*, 248 B.R. 734 (D.N.J. 2000).
  43. Compare 11 U.S.C. § 507 with 11 U.S.C. § 554. See also *In re Insilco Techs., Inc.* 309 B.R. 111, 114 (D. Del. 2004) (costs incurred in connection with property that is not property of the estate can not give rise to a priority administrative expense claim). But see *In re H.L.S. Energy Co.*, 151 F.3d 434 (5th Cir. 1998) (priority administrative expense status granted for plugging and abandonment of oil and gas wells required by Texas state law even though the wells were unproductive).
  44. See EPA Memorandum, Guidance on EPA Participation in Bankruptcy Cases, at 6–8 (Sept. 30, 1997).
  45. 11 U.S.C. § 362.
  46. 11 U.S.C. § 362(b)(4). There has been some confusion over whether the police and regulatory power exception under section 362(b)(4) of the Bankruptcy Code is limited by section 362(a)(3)’s prohibition of “any act to obtain possession of . . . or to exercise control over” estate property. Compare *Hillis Motors v. Haw. Auto. Dealers’ Ass’n*, 997 F.2d 581 (9th Cir. 1993) (section 362(b)(4) is not applicable to section 362(a)(3)), with *Javens v. City of Hazel Park and City of Royal Oak (In re Javens)*, 107 F.3d 359 (6th Cir. 1997) (exception in section 362(b)(4) not limited by section 362(a)(3)). But see *In re Chapman*, 264 B.R. 565 (B.A.P. 9th Cir. 2001).
  47. 11 U.S.C. § 362(b)(5).
  48. See *City of New York v. Exxon Corp.*, 932 F.2d 1020 (2d Cir. 1991) (government may continue its actions against debtor for reimbursement of prepetition costs and mandatory injunctive relief compelling compliance with environmental laws notwithstanding the resultant expenditure of money); *New York v. N. Storonske Cooperage Co.*, 174 B.R. 366 (N.D.N.Y. 1994) (state’s motion for partial summary judgment in an action seeking CERCLA response costs and abatement is not stayed by defendant’s bankruptcy); *Penn Terra, Ltd. v. Pa. Dep’t of Env’tl. Res.*, 733 F.2d 267 (3d Cir. 1984) (state injunction ordering debtor to correct state environmental law violations was exempt from stay even though it required substantial expenditure of money that would deplete estate’s assets—stay should apply to actions to clean up past harms but not to orders to prevent future harms). One court, however, held that an EPA order requiring the debtor to remove asbestos contamination from a waste site was subject to the automatic stay because it involved the substantial expenditure of funds from estate assets and therefore was equivalent to enforcement of a money judgment. *United States v. Johns-Manville Sales Corp.*, 18 Env’t Rep. Cas. (BNA) 1177 (D.N.H. 1982). See also *New Jersey v. W.R. Grace & Co. (In re WR Grace & Co.)*, 412 B.R. 657 (D. Del. 2009). In *New Jersey v. W.R. Grace & Co.*, the district court upheld an injunction issued by the bankruptcy court enjoining the State’s lawsuit on public policy grounds, stating that while allowing the New Jersey Department of Environmental Protection’s suit to fix civil penalties for reporting failures is within the police power exception, allowing it to continue would result in further delay of the company’s reorganization:
 

[I]t is just as clear that timely resolution of the bankruptcy estate is also in the public interest. Asbestos cases have filled the federal docket for decades, and this particular bankruptcy suit [has] been underway for nearly a decade. Actions that needlessly delay a fair settlement deprive claimants of their proceeds while preventing the debtor from completing its reorganization. Such delay does not benefit the public interest.
  49. *W.R. Grace & Co.*, 412 B.R. at 666.
  50. See 28 U.S.C. § 959(b) (in bankruptcy, property of the estate must be managed and operated in compliance with state law); *Chateaugay I*, 944 F.2d 997 (2d Cir. 1991). See also *In re Udell*, 18

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- F.3d 403, 407 (7th Cir. 1994) (citing its decision in *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992)).
51. See 40 C.F.R. pt. 264, subpt. H (owners and operators of permitted hazardous waste facilities); 40 C.F.R. pt. 265, subpt. H (owners and operators of facilities operating under interim status). See also *Sierra Club v. Johnson*, No. C 08-1409, 2009 WL 482248 (N.D. Cal. Feb. 25, 2009) in which the court required EPA to prepare and publish a list of the kinds of facilities and industries that should be subject to financial assurance requirements pursuant to CERCLA. EPA published the notice on July 28, 2009, at 74 Fed. Reg. 37,213 and identified additional classes of facilities in a second notice on January 6, 2010, at 75 Fed. Reg. 816. Thus, it may be that financial assurance regulations will also be required under CERCLA.
  52. See, e.g., TEX. NAT. RES. CODE §§ 91.103-91.1091; 16 TEX. ADMIN. CODE § 3.78.
  53. See 40 C.F.R. § 264.148(b). See also *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 864–66 (4th Cir. 2001) (finding automatic stay does not apply to state actions enforcing financial assurance requirements); *Cumberland Farms, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 116 F.3d 16 (1st Cir. 1997) (affirming fine imposed for failure to comply with state regulations, including financial responsibility requirements); *Bickford v. Lodestar Energy, Inc.*, 310 B.R. 70 (E.D. Ky. 2004) (reversing order enjoining state officials from enforcing state bonding requirements where bonding requirements were found to fall under police power exception to automatic stay); *Mo. Dep’t of Nat. Res. v. Valley Steel Prods. Co.*, 157 B.R. 442 (Bankr. E.D. Mo. 1993) (denying request of State Department of Natural Resources to compel debtor to comply with financial assurance requirements, among other state law requirements, because property was no longer in debtor’s possession and because debtor was in process of liquidation). In most cases the government’s right to enforce financial assurance obligations against the debtor postpetition are recognized as a police power exception to the automatic stay pursuant to section 362(b)(4) of the Bankruptcy Code, and supported further by the Chapter 11 Debtor-in-possession’s obligations to operate its property in compliance with state law pursuant to 28 U.S.C. § 959(b).
  54. RCRA § 3008(a), 42 U.S.C. § 6928(a). See also *EPA v. Env’tl. Waste Control, Inc.*, 917 F.2d 327, 333–34 (7th Cir. 1990) (finding that landfill lost interim status due to failure to comply with applicable financial responsibility regulations).
  55. See 11 U.S.C. § 363(e), which requires that the court prohibit or condition the use, sale, or lease of property in which an entity has an interest as necessary to provide adequate protection of such interest.
  56. See *In re Circle K Corp.*, Nos. B-90-5052-B-90-5075, 1991 WL 349900 (Bankr. D. Ariz. Apr. 5, 1991) (case in which landlords, among others, opposed debtor’s request to reject certain leases involving property with underground storage tanks); *In re Integrated Petroleum Co.*, 44 B.R. 210 (Bankr. N.D. Ohio Nov. 19, 1984) (granting lessor’s motion to lift automatic stay to allow state action for breach of oil and gas lease where debtor failed to comply with state requirements to plug and abandon wells or complete or place in production uncompleted wells on the property).
  57. See 11 U.S.C. § 362. Although the automatic stay does not enjoin commencement or continuation of litigation brought by the debtor against others, in environmental litigation when the debtor is a plaintiff and a counter defendant or third-party defendant, the bankruptcy court may, upon motion, permit the case to proceed to judgment as to all pending claims in state or federal district court to facilitate liquidation of the claims.
  58. Although theoretically the government could assert its police powers to force the now bankrupt PRP to participate in ongoing efforts to abate contamination, it rarely will engage in such efforts as long as the remaining members of the PRP group continue to comply with the cleanup order. *But see United States v. Apex Oil Co., Inc.*, 579 F.3d 734 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010) (EPA sought RCRA cleanup order against reorganized company 15 years after its discharge and notwithstanding continued participation by other solvent PRPs). See also *infra* notes 135–144 discussing the treatment of co-liable PRP claims in bankruptcy.
  59. 11 U.S.C. § 1141(d)(1)(A). “Debt” is defined as a “liability on a claim.” 11 U.S.C. § 101(12). *But see In re Manville Forest Products Corp.*, 209 F.3d 125, 128 n.1 (2d Cir. 2000) (noting an inconsistency between the Code, which discharges debt arising before the *confirmation* date, and in *Chateaugay I*, 944 F.2d 997, which states the relevant date is the *petition* date.).
  60. 11 U.S.C. § 523(a)(3).
  61. 11 U.S.C. § 727(b).
  62. See *Chateaugay I*, 944 F.2d 997 (2d Cir. 1991) (addressing the issue of existence and accrual of a claim).
  63. See *Chemetron Corp. v. Jones*, 72 F.3d 341 (3d Cir. 1995), *cert. denied*, 517 U.S. 1137 (1996) (notice by publication to unknown creditors sufficient).
  64. 11 U.S.C. § 101(5).

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65. See *Ohio v. Kovacs*, 469 U.S. 274 (1985); *Chateaugay I*, 944 F.2d 997.
66. *Chateaugay I*, 944 F.2d 997; *Torwico*, 8 F.3d 146 (3d Cir. 1993); *CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992).
67. See *Chemetron*, 72 F.3d 341 (four years after the bankruptcy claims bar date, creditors brought toxic tort suit against the reorganized debtor claiming that they received inadequate notice of the claims bar date and, thus, their claims could not have been within the scope of the debtor's discharge).
68. 11 U.S.C. § 101(5); *Chateaugay I*, 944 F.2d 997; *Torwico*, 8 F.3d 146; *CMC Heartland Partners*, 966 F.2d 1143; *In re Jensen*, 127 B.R. 27 (B.A.P. 9th Cir. 1991), *aff'd*, 995 F.2d 925 (9th Cir. 1993); *In re Nat'l Gypsum Co.*, 139 B.R. 397 (N.D. Tex. 1992); *AM Int'l*, 106 F.3d 1342 (7th Cir. 1997). See also *supra* note 20.
69. *AM Int'l*, 106 F.3d 1342, 1348–49; *Chateaugay I*, 944 F.2d 997; *Torwico*, 8 F.3d 146; *CMC Heartland Partners*, 966 F.2d 1143.
70. 469 U.S. 274.
71. *Id.*
72. *Id.*
73. 944 F.2d 997.
74. *Id.*
75. *Id.* at 1008.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* The Third Circuit expanded upon *Chateaugay I* and applied the “nonclaim” analysis to a cleanup order directing the debtor to clean up a site it did not own or operate. *Torwico*, 8 F.3d 146 (3d Cir. 1993). The court there held that the debtor was required to comply with a prepetition cleanup order at a site not owned or operated by the debtor postpetition, reasoning that, although the debtor was no longer a tenant at the site, the waste it had generated was a continuing environmental hazard, and the debtor could not avoid its responsibility to comply with environmental laws. The Third Circuit rejected the debtor's contention that *Chateaugay I* was distinguishable because the debtor there owned or was otherwise in possession of the site. *Id.* The statute on which the order in *Torwico* was based did not allow the state to perform the cleanup and then sue for reimbursement. *Id.* at 151 n.6. That the state had such right under other applicable and relevant statutes was insufficient to convert the order into a claim. *Id.* See also *AM Int'l*, 106 F.3d 1342 (7th Cir. 1997) (former debtor is subject to RCRA injunction directing it to clean up site it no longer owned).
80. 42 U.S.C. § 9604.
81. 42 U.S.C. § 9607.
82. 944 F.2d 997, 1008.
83. *Id.*
84. 516 U.S. 479 (1996).
85. See *AM Int'l*, 106 F.3d 1342, 1348 (a RCRA injunction granted to a private party directing the debtor to clean up a site no longer owned by the debtor, pursuant to RCRA § 7002, 42 U.S.C. § 6972, is not a dischargeable claim in bankruptcy because the creditor could not convert the injunction into a right to payment); *United States v. Apex Oil Co., Inc.*, 579 F.3d 734 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010) (rejecting argument that because EPA could have sought a money judgment under the Clean Water Act or sued for restitution of cleanup costs after EPA conducted its own cleanup, it had an alternative payment remedy and therefore the EPA claim was within the Bankruptcy Code's definition of “claim”). *But see* *Krafczek v. Exide Corp.*, No. 00-1965, 2007 WL 1199530 (E.D. Pa. Apr. 19, 2007) (dismissing individuals' request for injunctive relief under RCRA § 7002 where decontamination request was a “claim” barred by bankruptcy court's final injunction).
- The Seventh Circuit's recent holding in *Apex* was stunning. EPA's petition for a RCRA cleanup order against the reorganized debtor was sought 15 years after discharge; EPA had notice or some knowledge of the debtor's link to the site before confirmation of its plan; there were other apparently solvent and jointly and severally liable PRPs; and the injunction issued required reorganized *Apex* to expend \$150 million to clean up a site it no longer owned or operated. The extension of *Meghrig's* nonclaim/nondischarge analysis to RCRA equitable relief available to the government poses sweeping implications and had an immediate and profound effect in many large environmental Chapter 11 cases then pending or soon thereafter filed. The prospect of crippling governmental cleanup orders available against the reorganized company even as to nonowned sites would significantly diminish the value of the reorganized company and its prospects for competitive exit financing and seemed to undercut for these companies the

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benefits of Chapter 11. Initial results of the leverage the *Apex* decision bestowed upon government environmental enforcers (who before *Apex* mostly were relegated to the status of mere general unsecured creditor based on *Chateaugay*'s holding that CERCLA claims arise when the contaminants are released into the environment) reveal that the debtors are avoiding or diminishing the risk and uncertainty posed by *Apex* by offering the government premiums in exchange for a whole or partial release of the government's rights to future injunctive remedies and a covenant not to sue the reorganized company on account of past contamination. Such premiums have been in the form of cash payments; a combination of cash and allowed liquidated claims; and/or real estate, control over cleanup, and avoidance litigation proceeds via environmental and litigation trusts. In addition to the government's release and covenant not to sue, the debtors are negotiating contribution protection provisions that bar and result in the disallowance of contribution claims by other co-liable PRPs. *See and compare* the debtors' bankruptcy court-approved environmental settlement agreements with the United States and various states in *In re Lyondell Chemical Co.*, Case No. 09-10023-reg, and *In re Chemtura Corp.*, Case No. 09-11233-reg, respectively, and the proposed EPA settlement agreement in *In re Tronox, Inc.*, Case No. 09-10156-alg, all of which are Chapter 11 cases presently pending in the U.S. Bankruptcy Court for the Southern District of New York.

86. 11 U.S.C. § 727(b).
87. 11 U.S.C. § 1141(d)(1)(A). When an environmental claim arises postpetition but preconfirmation, however, under certain circumstances, it may not be subject to discharge. In the case of *In re Duplan Corp.*, 212 F.3d 144 (2d Cir. 2000), the court held that CERCLA claims could not have arisen prepetition because CERCLA was enacted *after* the petition date. Moreover, because the plan of reorganization and order approving it expressly excepted from discharge all administrative claims, CERCLA claims arising postpetition but preconfirmation escaped the discharge provision and were "expressly assumed" by the debtor. "Assuming the Oil Companies' CERCLA claims arose on the date of [CERCLA's] enactment, they arose post-petition during the reorganization and therefore are Administrative Claims not discharged or enjoined by the Final Decree." *Id.* at 155. *See also In re Manville Forest Products Corp.* 209 F.3d 125, 128 n.1 (2d Cir. 2000) ("We see an inconsistency between the wording of the Bankruptcy Code, which discharges debt arising before the *confirmation* date, and our statement in *LTV Steel Co. (In re Chateaugay Corp.)* that the discharged debt must arise before the *filing* date." (emphasis in original)).
88. *Chateaugay I*, 944 F.2d 997.
89. *Id.* at 999.
90. *Id.* at 1005.
91. *Id.* *See also In re Jensen*, 127 B.R. 27 (B.A.P. 9th Cir. 1991), *aff'd*, 995 F.2d 925 (9th Cir. 1993) (claim arose at time of prepetition threatened release and, thus, states' claim was discharged); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn. 1990) (prepetition release does not necessarily give rise to a bankruptcy claim when there have been no prepetition response costs and the government lacked knowledge of debtor's liability at the site); and *Jeld-Wen, Inc. v. Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 121–28 (3d Cir. 2010) (tracking cases and analyzing different tests courts have adopted to determine when a claim arises and overturning its highly criticized decision in *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332 (3d Cir. 1984), in which it held that claim does not arise under CERCLA until response costs are incurred and CERCLA cause of action has accrued).
92. 944 F.2d at 1006. *See infra* notes 128–132 and accompanying text.
93. 182 B.R. 937 (Bankr. S.D.N.Y. 1995).
94. *Id.* The private parties in that case, however, had prepetition contractual relationships with the debtor, the debtor's saltwater storage pits from which the contamination migrated were open and notorious, and the claimants received actual knowledge of the bar date. *Id.* at 955–56. *See also In re Revere Copper & Brass, Inc.*, 172 B.R. 192, 196 (S.D.N.Y. 1994) (in dicta court acknowledged that *Chateaugay I* rule on time-of-accrual may not apply to private-party claims given the heavy emphasis in *Chateaugay I* on the EPA's role as a regulator). Private claimants able to show that they truly had no prepetition reason to contemplate that they had a claim against the debtor may be able to assert their claims postconfirmation. *AM Int'l*, 106 F.3d 1342 (7th Cir. 1997).  
In yet another *Texaco* discharge dispute, however, the court distinguished "contingent" claims from "future claims for possible future breaches of contract," and held the latter not to be "claims." In *In re Texaco, Inc.*, 254 B.R. 536 (S.D.N.Y. 2000), the court held that "[p]otential claims for liabilities for breach of obligations which might occur after confirmation cannot be filed before confirmation even if they could be anticipated." *Id.* at 559. Postconfirmation breaches of lessee's implied "prudent operator" obligations under prepetition and continuing oil and gas leases were not "prepetition claims requiring filing. Rather, if and when such

- breaches occur, the associated liability can be asserted against the reorganized debtor said to have “assumed” the lease.” *Id.*
95. 209 F.3d 125 (2d Cir. 2000).
  96. *Id.* at 128.
  97. *Id.* Although “[the Debtor’s] liability here is triggered by LEQA, [ ] it flows from the indemnification agreements, which allocated risk from a category of anticipated losses without reference or limitation to particular causes of action or particular statutes. In short, Olin brought a contract cause of action based on a prepetition contract, not a statutory claim for indemnification under a statute enacted after confirmation.” *Id.* at 130. *Cf. In re Texaco*, 254 B.R. 536 (S.D.N.Y. 2000) (obligations arising from postconfirmation breaches or potential future breaches of prepetition contracts are not “claims” and thus not dischargeable).
  98. *In re Nat’l Gypsum Co.*, 139 B.R. 397, 407 (N.D. Tex. 1992). Ironically, in a subsequent Second Circuit decision in the *LTV* case, *LTV Steel Co., Inc. v. Shalala (In re Chateaugay) (Chateaugay II)*, 53 F.3d 478 (2d Cir. 1995), the Court quoted *National Gypsum* for the definition of a prepetition claim. *Chateaugay II*, 53 F.3d at 497.
  99. *Nat’l Gypsum*, 139 B.R. at 397–407.
  100. *Id.* at 407. *See also Chicago I*, 974 F.2d 775 (7th Cir. 1992) (the inquiry must center on whether the potential claimant has sufficient information to give rise to a claim, such as whether the claimant has conducted tests with regard to the contamination problem); *In re Jensen*, 995 F.2d 925 (9th Cir. 1993) (following *Nat’l Gypsum* approach); *CMC Heartland Partners v. Union Pac. R.R. (In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.) (Chicago II)*, 3 F.3d 200 (7th Cir. 1993); *Allis-Chalmers*, 195 B.R. 716 (N.D. Ind. 1996); *AM Int’l*, 106 F.3d 1342 (7th Cir. 1997) (all recognizing that the creditor’s environmental claim must be fairly contemplated, foreseeable, or reasonably capable of discovery before it may be prematurely cut off in bankruptcy). *See also In re Hexcel Corp.*, 239 B.R. 564, 567 (N.D. Cal. 1999) (rejecting the applicability of the “debtor’s conduct” test for determining when the claim arose, when the claim, as a matter of fact, could not fairly have been contemplated by the parties until well after the debtor’s bankruptcy proceedings: “Any future, unknown claim that could not have been reasonably contemplated does not fall within the purview of section 101(5) [of the Bankruptcy Code] and must not be discharged, even if the conduct giving rise to the claim took place before the bankruptcy proceedings” (citations omitted)).
  101. *See Hexcel*, 239 B.R. at 567, and survey of cases cited therein. *Compare In re Texaco*, 254 B.R. 536 (S.D.N.Y. 2000) (future breach of “prudent operator” obligations implied in prepetition oil and gas contract is not a discharged claim), *with In re Manville Forest Products Corp.*, 209 F.3d 125 (2d Cir. 2000) (environmental indemnification obligation arises prepetition when the indemnification agreement is executed rather than postconfirmation when the environmental claims against the indemnitee creditor were first asserted by the state environmental enforcement agency).
  102. *AM Int’l*, 106 F.3d 1342.
  103. *Id.* It is difficult to imagine a case more at odds with the strict rule of *Chateaugay I*.
  104. *See City of New York v. N.Y., N.H. & H.R. Co.*, 344 U.S. 293 (1953); 11 U.S.C. § 523(a)(3) (excepting from discharge debts held by creditors who do not receive proper notice of the case and bar date).
  105. Fed. R. Bankr. P. 2002.
  106. 11 U.S.C. § 523(a)(3). *See Chemetron*, 72 F.3d 341, 345–47 (3d Cir. 1995) (surveying cases). *See also In re Trans World Airlines, Inc.*, 96 F.3d 687 (3d Cir. 1996) (in Chapter 11 case creditors known at time of confirmation were not barred from asserting claims against debtor based on postpetition conduct because they were not given notice of confirmation hearing).
  107. Fed. R. Bankr. P. 3002; *Chemetron*, 72 F.3d at 346.
  108. *Chemetron*, 72 F.3d 341, 347 n.2.
  109. *Id.* at 345–49; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).
  110. *Mullane*, 339 U.S. 306.
  111. *Id.*; *see also Chemetron*, 72 F.3d at 347 n.2 (“Although some courts have held, regardless of the circumstances, that the ‘reasonably ascertainable’ standard requires only an examination of the debtor’s books and records, without an analysis of the specific facts of each case, *see, e.g., In re Best Products Co.*, 140 B.R. 353, 358 (Bankr. S.D.N.Y. 1992); *In re Texaco, Inc.*, 182 B.R. 937, 955 (Bankr. S.D.N.Y. 1995), we do not construe it so narrowly. Situations may arise when creditors are ‘reasonably ascertainable,’ although not identifiable through the debtor’s books and records.”).
  112. *Chemetron*, 72 F.3d at 346 (citing *Mullane*).
  113. *Trans World Airlines*, 96 F.3d 687; *In re Drexel Burnham Lambert Group, Inc.*, 151 B.R. 674 (Bankr. S.D.N.Y. 1993) (notice by publication to unknown creditors satisfies such creditors’

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- due process rights); *In re Texaco, Inc.*, 182 B.R. 937, 954 (Bankr. S.D.N.Y. 1995) (cases cited therein); *Mullane*, 339 U.S. 306, 314.
114. *Chemetron*, 72 F.3d 341.
115. See *Chemetron*, 72 F.3d at 345–49 (surveying cases).
116. This is because the potential contract claim, albeit unmatured or contingent, can reasonably be ascertained from the contract among the debtor’s business records. See *Chemetron*, 72 F.3d at 347 n.2.
117. 11 U.S.C. § 523(a)(3).
118. *But see PacifiCorp v. W.R. Grace*, No. 05-764, 2006 WL 2375371, at \*10 (D. Del. Aug. 16, 2006) (no title search required to identify potential environmental claimants, relying on *Jones v. Chemetron Corp.*, 72 F.3d 341 (3d Cir 1995)).
119. *Drexel Burnham*, 151 B.R. 674; *Texaco*, 182 B.R. 937.
120. This dilemma has been partially addressed not in the context of notice and due process, but in determining when an environmental claim arises for purposes of dischargeability. See *Allis-Chalmers*, 195 B.R. 716 (N.D. Ind. 1996) (the environmental claim arises when the claimant has actual or constructive knowledge of the release of hazardous substances and can reasonably foresee the debtor’s liability therefor). One commentator has criticized the courts for having resolved the harshness of the rule not by applying principles of due process, but by tortured and confusing analyses about when an environmental claim arises. See John P. Berkery, *The Dischargeability of CERCLA Cleanup Costs Incurred After Bankruptcy*, 9 BANKR. DEV. J. 417, 447 (1992). See *Acevedo v. Van Dorn Plastic Mach. Co.*, 68 B.R. 495, 499 (Bankr. E.D.N.Y. 1986) (the court stated that due process should also require the debtor to notify the creditor of his claim when the creditor is unlikely to know about the claim otherwise). In *Jones v. Chemetron Corp.* (*In re Chemetron*), 212 F.3d 199 (3d Cir. 2000), the Court held that unborn future claimant’s toxic tort claim against the debtor was not discharged because he did not receive notice and there was no effort taken in the bankruptcy to address his interests. *Id.* at 209–10.
121. See *Jeld-Wen, Inc. v. Brunt* (*In re Grossman’s Inc.*), 607 F.3d 114, 121–28 (3d Cir. 2010) (tracking cases and analyzing different tests courts have adopted to determine when a claim arises). When faced with the issue of whether an environmental claim is barred by a bankruptcy discharge, the practitioner should evaluate (1) whether the claimant received adequate notice of the case and bar date and (2) whether the claimant’s claim could have been fairly contemplated, was foreseeable, or was reasonably capable of discovery before the bankruptcy. A reasonable dispute as to the answers to the foregoing questions would likely justify further pursuit of the matter.
- To minimize the risk of sanctions or other penalties for taking actions against the debtor on account of prebankruptcy debts in violation of the plan injunction, a discharge-implementation device found in most plans, the creditor should consider seeking preliminary court approval to pursue the environmental claims.
122. 11 U.S.C. § 1126(a).
123. Fed. R. Bankr. P. 3009 (as to Chapter 7) and Fed. R. Bankr. P. 3021 (as to Chapter 11).
124. *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (D. Minn. 1990) (citing *In re Remington Rand Corp.*, 836 F.2d 825, 830 (3d Cir. 1988)).
125. 11 U.S.C. § 502; *In re Johnson*, 960 F.2d 396 (4th Cir. 1992).
126. 11 U.S.C. § 502(c). The language in § 502(c) is mandatory. The bankruptcy court is required to estimate a contingent or unliquidated claim if its resolution in another forum would unduly delay the administration of the case.
127. See *In re Dow Corning*, 211 B.R. 545, 568 (Bankr. E.D. Mich. 1997) (discussing the impact of estimation of mass tort claims on feasibility of the debtor’s plan of reorganization). The rule on estimation has limitations, and sufficient *cause* for estimation may be difficult to establish if the estimation process is as time-consuming as liquidating the claim. *Id.* (Sufficient cause did not exist to invoke estimation of mass tort claims, in part, because the estimation process would be no less difficult or time-consuming than final liquidation of the claims.) As noted earlier, a filed claim is deemed allowed unless and until an objection is filed. There is no statutory deadline for filing objections. It is not unusual for a Chapter 11 debtor to refrain from filing an objection to a claim until *after* plan confirmation if (1) the claim, even if deemed allowed, will not negatively impact feasibility or other confirmation standards and (2) a negative ballot from the claimholder in the face amount of its claim will not affect plan confirmation. By delaying the dispute until after confirmation, the debtor may be able to avoid confirmation roadblocks (e.g., objections to the debtor’s disclosures and the plan) that would otherwise be threatened or pursued by disgruntled creditors whose claims have been opposed.
- Once the plan is confirmed, the creditor has much less leverage with which to negotiate an acceptable resolution to its disputed, contingent, or unliquidated claim, and the claims litigation process could materially delay (or even threaten) whatever distributions the creditor might

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otherwise be entitled to, particularly if the plan permits reserves on account of disputed claims that are inadequate to bring all previously disputed, allowed claims in parity with recipients of prior distributions on account of like claims. *See* 11 U.S.C. § 502(j) (reconsideration of a previously disallowed claim will not affect the validity of prior distributions).

Many a creditor, enticed by promises of prompt or high returns, has cast an accepting ballot and failed to oppose problematic plan provisions only to discover after confirmation that the plan substantially discriminates against (and perhaps fails to protect) holders of disputed, contingent, or unliquidated claims. Therefore, before accepting a plan and waiving objections, a creditor should understand the treatment it will receive if its claim is opposed after confirmation.

128. *Bittner v. Borne Chem. Co.*, 691 F.2d 134 (3d Cir. 1982); *In re Aspen Limousine Serv., Inc.*, 193 B.R. 325 (D. Colo. 1996). The general rules regarding estimation proceedings was summarized well in *In re FV Steel and Wire Co.*, 372 B.R. 446, 452–54 (E.D. Wis. 2007), wherein the court there states:

The case law suggests that formal claim estimation proceedings are not the norm, and in fact, ‘it may be sometimes inappropriate to hold time-consuming proceedings which would defeat the very purpose of 11 U.S.C. § 502(c)(1) to avoid undue delay.’ In *Windsor Plumbing Supply Co.*, 170 B.R. 503, 520 (Bankr. E.D.N.Y. 1994). The bottom line is, ‘to the greatest extent possible, a selected estimation procedure should not run counter to the efficient and expeditious administration of the bankruptcy estate.’ In *G-I Holdings, Inc.*, 323 B.R. 583, 599 (Bankr. D.N.J. 2005). The substance of the claim rather than overly formalized procedural rules should be the paramount consideration.

(citing *Bittner*, 691 F.2d at 135 (“Where there is sufficient evidence on which to base a reasonable estimate of the claim, the bankruptcy judge shall determine the value . . . the court is bound by the legal rules which may govern the ultimate value of the claim.”)).

129. *See, e.g., Dow Corning*, 211 B.R. 545.
130. *Id.* at 568–69. *See also supra* note 128.
131. *See Asarco*, No. 05-21207 (Bankr. S.D. Tex. filed Aug. 9, 2005), and *Dana Corp.*, No. 07 Civ. 8160 (SAS) (Jointly Administered Bankruptcy: Bankr. Case No. 06-10354 (BRL)) (S.D.N.Y. filed Sept. 18, 2007), both mega-Chapter 11 cases in which the estimation process resulted in settlements of large contingent and unliquidated environmental claims. In the *Asarco* case, likely the largest and most complex bankruptcy environmental case in any jurisdiction at the time, environmental claims exceeded \$6 billion arising from more than 75 sites and were filed by the federal government, state governments, Indian tribes and private parties. The claims estimation provision was employed and many claims were resolved in a timely fashion. *See Baker Botts LLP, ASARCO: The Estimation of Environmental Claims*, LAW 360, Jan. 29, 2009, <http://bankruptcy.law360.com/articles/82959>. In the *Dana* case, the estimation proceeding resulted in a settlement that gave the United States an allowed claim of over \$125,000,000, resolving *Dana Corp.*'s liability at six sites in five states. 73 Fed. Reg. 36,900 (June 30, 2008).
132. *See Aspen Limousine*, 193 B.R. at 339 (zero valuation upheld based on creditor's lack of proof of facts from which court could discern the likelihood of success on the merits of the creditor's claim).
133. 11 U.S.C. § 502(e)(1)(B) provides that “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 . . . such claim for reimbursements or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution.” *Id.*
134. *Al Tech Specialty Steel Corp. v. Allegheny Int'l, Inc.* (*In re Allegheny Int'l, Inc.*), 126 B.R. 919, 923 (W.D. Pa. 1991), *aff'd*, 950 F.2d 721 (3d Cir. 1991). *See also* Donald R. Korobkin, “*Killing the Husband*”: *Disallowing Contingent Claims for Contribution or Indemnity in Bankruptcy*, 11 CARDOZO L. REV. 735, 757 (1990) (the author severely criticizes the statute and makes a case for its repeal).
135. *See* Francis E. Goodwyn, *Claims Estimation and the Use of the “Cleanup Trust” in Environmental Bankruptcy Cases*, 9 AM. BANKR. INST. L. REV. 769, 795–807.
136. *In re Eagle-Picher Indus., Inc.*, 144 B.R. 765, 769 (Bankr. S.D. Ohio 1992), *aff'd*, 164 B.R. 265 (S.D. Ohio 1994). *See also In re Tri-Union Dev. Corp.*, 314 B.R. 611, 617 (Bankr. S.D. Tex. 2004) (“[C]laims remain ‘contingent’ for purposes of Bankruptcy Code § 502(e)(1)(B) until the co-debtor has paid the creditor.”); *In re G-I Holdings, Inc.*, 308 B.R. 196, 212 (Bankr. D.N.J. 2004) (“Here, the funds have been expended and thus the claim to that extent is not contingent. In addition, since the Novak Group seeks to recover sums personally expended and to be



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expended by the Novak Group, as opposed to sums owed to a third party such as a governmental entity which has paid for the clean-up, the Debtor's liability is direct and not subject to disallowance under § 502(E)(1)(B), as a contingent liability.”).

137. See Korobkin, 11 CARDOZO L. REV. 735 n.134.

138. See *In re Apco Liquidating Trust*, 370 B.R. 625 (Bankr. D. Del. June 29, 2007). In dicta the court inferred that under the *Atlantic Research* decision a PRP has a direct claim under CERCLA section 107(a) and thus, “[w]ith a direct claim, of course, disallowance under section 502(e)(1)(B) of the Code would not be proper due to the lack of co-liability.” *Id.* at 637.

But in *Niagara Mohawk Power Corp. v. Chevron, USA, Inc.*, 596 F.3d 112 (2d Cir. 2010), and *Agere Sys., Inc. v. Advanced Envtl. Tech. Corp.*, 602 F.3d 204, 218 (3d Cir. 2010), both the Second Circuit and the Third Circuit have restricted the application of *Atlantic Research* 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 do not have a direct claim under section 107. 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.” *Niagara Mohawk Power Corp.*, 596 F.3d at 128. Thus, *Niagara Mohawk* would appear to support the proposition 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*, 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. *Agere*, 602 F.3d at 228–29. The plaintiffs there enjoyed contribution protection for the matters addressed in their settlement; 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 . . . , 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.” *Id.*

Thus, in the Second and Third Circuits, PRPs who have a viable section 113(f)(1) claim, including those conducting the response action pursuant to a settlement within the meaning of section 113(f)(3)(B), do not appear to have a section 107 direct claim against a co-liable bankrupt PRP; their contribution claims, therefore, likely will remain subject to disallowance under section 502(e)(1)(B) of the Bankruptcy Code to the extent the contribution claim meets the other disallowance criteria. See also Milissa A. Murray, *Recent Developments Regarding CERCLA Claims and Their Disallowance under Bankruptcy Code Section 502(e)(1)(B)*, ENVTL. & ENERGY BUS. L. REP. (Am. Bar Ass'n, Chicago, IL), Spring 2010, available at <http://www.abanet.org/buslaw/newsletter/0093/materials/pp4a.pdf>.

139. Typically, the enforcement agency is not *co-liable* with the debtor and, thus, section 502(e)(1)(B) is not an impediment to the allowance of its claim.

140. 11 U.S.C. § 501(b); Fed. R. Bankr. P. 3005(a). See *In re FV Steel and Wire Co.*, 372 B.R. 446, 449 (E.D. Wis. 2007) (court disallowed the claims filed by Glidden and CRI Committee based on Bankruptcy Code § 502(e)(1)(B), which bars contingent claims for contribution and reimbursement. However, the court permitted the CRI Committee to file the claim on behalf of the EPA and proceeded with an estimation hearing under 11 U.S.C. § 502(c)(1).

141. Stated factors considered by the EPA when evaluating whether to file a proof of claim include the potential for recovery, the impact on agency resources, and fairness to other liable parties. See EPA Memorandum, Guidance on EPA Participation in Bankruptcy Cases, at 2–6 (Sept. 30, 1997).

142. Fed. R. Bankr. P. 3005(b).

143. See *In re Mahoney-Troast Constr. Co.*, 189 B.R. 57 (Bankr. D.N.J. 1995) (landlord's postpetition cleanup costs gave rise to only a general unsecured claim and not priority administrative expense. There was no imminent threat to public health posed by the contamination, and the debtor did not own the property.). In some cases, response costs have been given priority over

- the claims of even secured creditors, pursuant to section 506(c) of the Bankruptcy Code, as reasonable and necessary costs of preserving or disposing of property to the extent of a benefit conferred thereby on the secured creditor. *See In re Better-Brite Plating, Inc.*, 105 B.R. 912 (Bankr. E.D. Wis. 1989), *vacated on other grounds*, 136 B.R. 526 (Bankr. E.D. Wis. 1990) (the EPA and state were granted a superpriority lien on proceeds from the sale of property after cleanup but only to the extent that the cleanup costs were necessary to cure the immediate threat to public health and safety). *See also In re Distrigas Corp.*, 66 B.R. 382 (Bankr. D. Mass. 1986) (superpriority lien on secured property applies only if secured creditor receives benefit such as the cleanup of its collateral).
144. *Id.* But *see Nat'l Gypsum*, 139 B.R. 397 (N.D. Tex. 1992), and its progeny.
  145. Pa. Dep't of Env'tl. Res. v. Conroy (*In re Conroy*), 24 F.3d 568 (3d Cir. 1994); *Chateaugay I*, 944 F.2d 997, 1010; *Lancaster v. Tennessee (In re Wall Tube & Metal Products Co.)*, 831 F.2d 118, 123–24 (6th Cir. 1987).
  146. *See* 28 U.S.C. § 959; *Chateaugay I*, 944 F.2d 997, 1009.
  147. 11 U.S.C. § 503(b)(1)(A); *Wall Tube & Metal*, 831 F.2d 118.
  148. 11 U.S.C. § 507; *Mahoney-Troast*, 189 B.R. 57, 59.
  149. *In re Jartran, Inc.*, 732 F.2d 584 (7th Cir. 1984). The Bankruptcy Court for the Southern District of New York ruled that postpetition cleanup costs incurred by a landlord of the debtor after the debtor had vacated the premises and rejected the lease would not be granted priority status. In the case of *In re McCrory Corp.*, 188 B.R. 763 (Bankr. S.D.N.Y. 1995), the court reasoned that if under the *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection* decision, 474 U.S. 494 (1986), the debtor could have abandoned the property and, in fact, the property was no longer property of the estate, the landlord would have only a prepetition unsecured claim for the remediation costs.
  150. *Chateaugay I*, 944 F.2d at 1009–10.
  151. *In re Conroy*, 144 B.R. 966 (Bankr. W.D. Pa. 1992), *aff'd in part and rev'd in part*, 153 B.R. 686 (W.D. Pa. 1993), *aff'd*, 24 F.3d 568 (3d Cir. 1994).
  152. *Wall Tube & Metal*, 831 F.2d 118; *Hemingway Transp.*, 126 B.R. 656.
  153. *See In re High Voltage Eng'g Corp.*, 397 B.R. 579 (D. Mass. 2008), *aff'd*, 403 B.R. 163 (D. Mass. 2009) *See also Mahoney-Troast*, 189 B.R. 57; *McCrory*, 188 B.R. 763. In these cases, the courts rejected as distinguishable the Third Circuit decision in *Torwico*, 8 F.3d 146 (3d Cir. 1993), which held that a governmental cleanup order/injunction directing the debtor to clean up contamination at a site the debtor did not then own or operate was not a “claim” within the meaning of the Bankruptcy Code and, thus, not dischargeable.
  154. *See* 11 U.S.C. § 365.
  155. *See* 11 U.S.C. § 365(g); *In re Dant & Russell, Inc.*, 853 F.2d 700 (9th Cir. 1988); *Mahoney-Troast*, 189 B.R. 57, 62.
  156. *See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1098 (2d Cir. 1993) (discussing thresholds for bankruptcy court approval of rejections or assumptions of executory contracts).
  157. 11 U.S.C. § 365(b).
  158. *Univ. Med. Ctr. v. Sullivan (In re Univ. Med. Ctr.)*, 973 F.2d 1065, 1078 (3d Cir. 1992); *Columbia Gas*, 50 F.3d 233, 238–39 (3d Cir. 1995).
  159. *Columbia Gas*, 50 F.3d at 239; Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).
  160. *Roxse Homes, Inc. v. Roxse Homes L.P. (In re Roxse Homes)*, 83 B.R. 185 (D. Mass. 1988); *See also In re Jolly*, 574 F.2d 349 (6th Cir. 1978) (discussing effect of prepetition judgment on executory nature of obligation).
  161. *See Columbia Gas*, 50 F.3d at 237–38 (rejecting argument that a settlement agreement merged into a judgment is necessarily incapable of constituting an executory contract that can be rejected or assumed under 11 U.S.C. § 365).
  162. *Id.* (acknowledging, however, that failure of conditions precedent for payments are distinguished from breaches that excuse performance).
  163. “The debtor will assume an executory contract when the package of assets and liabilities is a net asset to the estate. When it is not the debtor will (or ought to) reject the contract.” *Columbia Gas*, 50 F.3d at 238.
  164. *See Allis-Chalmers*, 195 B.R. 716, 722–23 (N.D. Ind. 1996) (citing cases).
  165. *United States v. Gen. Battery Corp., Inc.*, 423 F.3d 294 (3d Cir. 2005); *La.-Pac. Corp. v. Asarco*, 909 F.2d 1260 (9th Cir. 1990); *United States v. Carolina Transformer Co.*, 978 F.2d 832 (4th Cir. 1992); *United States v. Mexico Feed & Seed Co., Inc.*, 980 F.2d 478 (8th Cir. 1992); *See Per-Co, Ltd. v. Great Lakes Factors, Inc.*, 509 F. Supp. 2d 642 (N.D. Ohio 2007), *aff'd*, 299 Fed. Appx. 559 (6th Cir. 2008); *Action Mfg. Co., Inc. v. Simon Wrecking Co.*, 428 F. Supp.

- 2d 288 (E.D. Pa. 2006), *aff'd*, 287 Fed. Appx. 171 (3d Cir. 2008); Hunt's Generator Comm. v. Babcock & Wilcox Co., 863 F. Supp. 879 (E.D. Wis. 1994); Allied Corp. v. Acme Solvents Reclaiming, Inc., 812 F. Supp. 124 (N.D. Ill. 1993). Courts are split whether to apply federal common law or state law to determine whether to apply successor liability. *Compare* United States v. Gen. Battery Corp., Inc., 423 F.3d 294 (3d Cir. 2005) (finding federal common law appropriate), *with* U.S. Bank Nat'l Ass'n v. EPA, 563 F.3d 199 (6th Cir. 2009) (applying state law); Mickowski v. Visi-Trak Worldwide, LLC, 415 F.3d 501 (6th Cir. 2005); United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) (applying state law provided it is not hostile to the federal interests underlying CERCLA); Carrier Corp. v. Piper, 460 F. Supp. 2d 827 (W.D. Tenn. 2006) (relying on *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991) to apply state law). *See also* K.C. 1986 Ltd. P'ship v. Reade Mfg., 472 F.3d 1009 (8th Cir. 2007) and New York v. Nat'l Serv. Indus., 460 F.3d 201, 206–09 (2d Cir.2006) (recognizing disagreement over applicable law but concluding that resolving issue was not necessary). Courts have moved away from federal common law to the extent it differs from traditional corporate principles based on more recent Supreme Court decisions. In particular courts have rejected the expansion these principles through the federally created "substantial continuity" test. *See* United States v. Gen. Battery Corp., Inc., 423 F.3d 294 (3d Cir. 2005); New York v. Nat'l Serv. Indus., Inc., 352 F.3d 682 (2d Cir. 2003); Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358 (9th Cir. 1997); Action Mfg. Co., Inc. v. Simon Wrecking Co., 387 F. Supp. 2d 439 (E.D. Pa. 2005).
166. *Chi. Truck Drivers, Helpers and Warehouse Workers Union Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48 (7th Cir. 1995); *See Allis-Chalmers*, 195 B.R. at 724–25; *But see* *Sylvester Bros. Dev. Co. v. Burlington N.R.R.*, 772 F. Supp. 443, 449 (D. Minn. 1990).
167. *Allis-Chalmers*, 195 B.R. at 726–29.
168. 42 U.S.C. § 9607.
169. *See* 11 U.S.C. § 363(f).
170. *Allis-Chalmers*, 195 B.R. 716, 731.
171. *Id.* at 731–32. Such reasoning is suspect given that the bankruptcy discharge provisions are to benefit only the debtor and not co-liable parties who have not themselves filed for bankruptcy, as in the case of guarantors or general partners. *See* 11 U.S.C. § 524(f).
172. *Allis-Chalmers*, 195 B.R. at 732.
173. *Id.* at 733 (citing CERCLA's prohibition on the determination of CERCLA liability by agreement between parties). *See* CERCLA, 42 U.S.C. § 9607(e).
174. *See supra* notes 88–103 and accompanying text.
175. *Allis-Chalmers*, 195 B.R. 716.
176. There is no minimum disposal amount required to maintain a cause of action under CERCLA. 42 U.S.C. § 9607.
177. 524 U.S. 51 (1998).
178. *Id.* at 63–64.
179. *Id.* at 52.
180. *Id.* at 54.
181. Pub. L. No. 104-208, 110 Stat. 3009-462 (1996) (codified in scattered sections of U.S.C.).
182. *See* 42 U.S.C. § 9607.
183. *United States v. Fleet Factors*, 901 F.2d 1550 (11th Cir. 1990).
184. *Id.* at 1557.
185. *See* *Kelley v. Tiscornia*, 104 F.3d 361 (6th Cir. 1996) (enumerating steps a foreclosing lender can take to manage its collateral and sell contaminated property without risk of operator liability).
186. 42 U.S.C. § 9607(n)(5)(A).
187. 42 U.S.C. § 9607(n)(4); the protections do not apply where the fiduciary's negligence causes or contributes to the release or threatened release of hazardous substances. 42 U.S.C. § 9607(n)(3).
188. 42 U.S.C. § 9607(n)(2) and (3) (providing certain exclusions). *See also* chapter 4 in this text.
189. 42 U.S.C. § 9607(n)(1).
190. *See In re Holtkamp*, 669 F.2d 505 (7th Cir. 1982). *See also* *Liberty Mut. Ins. Co. v. Official Unsecured Creditors' Committee (In re Spaulding Composites Co., Inc.)*, 207 B.R. 899 (B.A.P. 9th Cir. 1997) (bankruptcy stay not violated when insurer brings state action against debtor's shareholders for declaratory judgment of its liability under policies issued to both the debtor and shareholders). *See also In re Greenway*, 126 B.R. 253 (Bankr. E.D. Tex. 1991) (debtor's discharge did not preclude determination of debtor's liability in tort for purposes of enabling recovery from debtor's employers' liability carrier) and *Owaski v. Jet Fla. Sys., Inc. (In re Jet Fla. Sys., Inc.)*, 883 F.2d 970 (11th Cir. 1989) (surveying cases).
191. *See* John A. Barclay, *Insurance for Environmental Claims Against Bankruptcy Estates*, 20 CAL. BANKR. J. 1, 16–18 (1992) (discussing perfection issues and typical deficiencies in perfection);

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- See also Robert J. Gilbert, *Environmental Impairment Insurance: Practical Considerations*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS 380 (James B. Witkin ed., Am. Bar Ass'n. 2d Ed. 1999).
192. See *In re Catania*, 94 B.R. 250, 252–53 n.4 (Bankr. D. Mass. 1989).
  193. 11 U.S.C. § 541; *In re Pester Ref. Co.*, 58 B.R. 189, 192 (Bankr. S.D. Iowa 1985).
  194. 11 U.S.C. § 362(a)(3). Cf. *In re New England Marine Serv., Inc.*, 174 B.R. 391 (Bankr. E.D.N.Y. 1994) (insurer allowed to cancel under contract term permitting either party to cancel on 30 days' notice. Court emphasized, however, that cancellation was not because of the bankruptcy. *Id.* at 395.).
  195. See *supra* note 192; see also *In re Miller*, 228 B.R. 203, 206 (Bankr. N.D. Ill. 1999); *In re Lembke*, 93 B.R. 701 (Bankr. D.N.D. 1988); *In re White*, 73 B.R. 983 (Bankr. D.D.C. 1987).
  196. See Michael Sean Quinn & Brian S. Martin, *Insurance and Bankruptcy*, 36 TORT & INS. L.J. 1025, 1064–1066 (2001) (surveying cases).
  197. *Baez v. Med. Liab. Mut. Ins. Co.*, 136 B.R. 65 (Bankr. S.D.N.Y. 1992); *First Fid. Bank v. McAteer*, 985 F.2d 114, 117 (3d Cir. 1996). See also *supra* note 192 and cases cited therein.
  198. See *Toledo v. Van Waters & Rogers, Inc.*, 92 F. Supp. 2d 44 (D.R.I. 2000).
  199. Typically it is the older policies without the “absolute pollution exclusion” that are a potential source of funds, and these may be difficult to locate. Specialists often can find policy identifying features from old declaration or assignment documents, agents, cancelled premium checks and the like.  
In *In re Celotex Corp.*, 204 B.R. 586 (Bankr. M.D. Fla. 1996), the asbestos property damage claimants did not initially oppose the debtor's objection to their claims because they believed the estate had insufficient assets to cover the claim. After retaining insurance counsel and determining there was coverage under several policies, the creditors were allowed (luckily for them) to pursue the claims on the grounds that there was no prejudice to the debtor or estate. *Id.*
  200. The government typically is not co-liable with the debtor and, thus, will not be subject to the disallowance of certain contingent reimbursement claims that often bars private party PRP claims. See 11 U.S.C. § 502(e)(1)(B) (contingent claims for contribution or reimbursement of parties co-liable with the debtor are disallowed). In addition, the government is not always subject to the stay. 11 U.S.C. § 362(b)(4).
  201. Postpetition cleanup costs incurred in connection with a site owned or operated by the debtor in many cases will receive priority administrative expense status because such costs benefit the estate, preserve the debtor's assets, and/or are required for continued operations. Cleanup costs incurred postpetition at a site the debtor does not own or operate typically will not enjoy such priority treatment. See, e.g., *McCrorry*, 188 B.R. 763 (Bankr. S.D.N.Y. 1995) (landlord's response costs incurred after the debtor rejected the lease not a priority administrative expense).
  202. Unlike a monetary claim for reimbursement of cleanup costs, an injunction or cleanup order may not give rise to a *right to payment* and, thus, may not be a dischargeable *claim*. See 11 U.S.C. § 101(5).
  203. If the debtor's liability on a claim arises *after* confirmation of a Chapter 11 plan or after the petition date in the case of Chapter 7, the debt is not subject to discharge. 11 U.S.C. § 1141(d)(1)(A) (as to Chapter 11); 11 U.S.C. § 727(b) (as to Chapter 7).
  204. The degree of harm posed by contamination will be the primary factor in the determination of whether the debtor may abandon a contaminated facility pursuant to section 554 of the Bankruptcy Code and whether postpetition cleanup costs will be entitled to priority payment pursuant to section 503(b)(1)(A) as an administrative expense.