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ENVIRONMENTAL LIABILITIES IN BANKRUPTCY

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Presenters



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Key Issues

- Automatic Stay
- Dischargeability
- Contaminated Property
- Abandonment
- Allowance
- Priority
- Sales of Assets

Automatic Stay

- Generally stays any action against the debtor or its property
 - Creditors (including environmental claimants) required to pursue claims in the bankruptcy
 - Intent is to place creditors on even footing and insure equitable distribution of debtor's assets
- Does not extend to government exercise of police powers (e.g., orders to cleanup property)
 - *City of New York v. Exxon Corp.* 932 F.2d 1020 (2d Cir. 1991)
- Government actions stayed where they are pecuniary in nature – government seeking damages or renumeration
- All actions to enforce monetary judgments are stayed even if in furtherance of regulatory powers
 - Efforts to collect a PRP's share of CERCLA cleanup costs stayed

Dischargeability

- “Claims” that “arise” before the petition date are dischargeable
- A “claim” is a right to payment
 - Includes contingent claim for cleanup costs
 - Includes pecuniary claims based upon pre-petition acts
 - Does not include obligations under ongoing cleanup orders
 - *Ohio v. Kovacs*, 469 U.S. 274 (1985)
- When does an environmental claim “arise”?
 - When the release occurs?
 - Future contingent claim (*Chateaugay I*, 944 F.2d 997 (2d Cir. 1991))
 - When claim is foreseeable?
 - Future claim not fairly contemplated (*In re Nat’l Gypsum*, 139 B.R. 397 (N.D. Tex. 1992))

Dischargeability

- Injunctions
 - Where obligations are related to ongoing pollution, likely non-dischargeable
 - Where obligations relate to past pollution that does not pose ongoing threat to health or environment, may be dischargeable
 - *In re IT Group, Inc.* (D. Del. 2006) – wetlands replacement
- Fines & Penalties
 - Generally Non-dischargeable
 - Disparate treatment in terms of priority

Contaminated Property

- Under CERCLA liability for environmental cleanup lies with owner of property regardless of fault
- Cleanup obligations cannot be discharged in bankruptcy
- Options in bankruptcy
 - Retain property (and cleanup obligations)
 - Sell property – purchaser assumes cleanup obligations
 - Settlement and transfer property to trust
 - Abandonment

Abandonment

- Bankruptcy Code (Section 554) allows debtors to abandon property that is burdensome to maintain or has no value
- *Midlantic Nat'l Bank v. New Jersey Dept. of Env'tl. Prot.*, 474 U.S. 494 (1986)
 - Debtor's ability to abandon property is limited if property poses an imminent and identifiable risk to public health and safety
 - Most litigation has focused on whether property poses an imminent and identifiable risk
 - Is there any ability to abandon property with known environmental liabilities?

In re Exide Holdings, Inc.

- 2020 Bankruptcy – District of Delaware
- Multiple non-performing properties with environmental liabilities (numerous different states)
- Settlement motion
 - Required fast-track settlement discussions and mediation with multiple environmental authorities
 - Mediation resulted in settlement with 11 states and federal government authorities
 - Properties placed in trusts
 - Access to surety funds
 - Contribution from bankruptcy estate
 - Trust funded with future sales of remediated properties

In re Exide Holdings, Inc.

- California withdraws from settlement
 - City of Vernon property
- Exide pivots to abandonment
- Parties acknowledge that property is (a) contaminated and poses a health hazard; (b) abandonment would violate California environmental law; and (c) site burdensome to maintain
- Bankruptcy court and District Court (on appeal) permit abandonment
 - Property does not pose an imminent danger due to partial remediation efforts
 - Orderly abandonment to state regulators
 - Surety funds available to complete remediation under state supervision

Allowance of Claims of Co-liable Parties

- Claims by Parties Jointly and Severally Liable with Debtor
 - Costs Incurred Prepetition (Past Costs) – generally allowed
 - *In re G-I Holdings, Inc.*, 308 B.R. 196 (Bankr. D.N.J. 2004)
 - Contingent Claims (Future Costs)
 - Claims of co-liable parties for reimbursement of future costs or contribution often disallowed under Section 502(e) if contingent as of petition date
 - *In re Lyondell Chem. Co.*, 442 B.R. 236 (Bankr. S.D.N.Y. 2011)

Priority

- Secured Claims
 - Includes, for example, debt secured by mortgage on real property
 - Afforded priority to the extent of collateral coverage
- Administrative & Priority Expenses
 - Expenses that: (1) are incurred post-petition by DIP or trustee; and (2) benefit or preserve estate
 - Paid in full before any distributions to general unsecured creditors or equity interest holders
 - Fines & Penalties
- General Unsecured Claims
 - Includes monetary claims for prepetition cleanup costs (past costs)
 - Entitled to distribution on pro rata basis with other general unsecured creditors after satisfaction of all secured and priority claims

Common Case Scenarios

- Party with Environmental Liabilities Files for Bankruptcy
 - Avoidance/Discharge of environmental liabilities
 - Rejection of executory contracts, including environmental cleanup agreements
 - Assertion of claims in bankruptcy to recover assets to address environmental liabilities
 - Sale or abandonment of property
- Assertion of Discharge to Avoid Post-Bankruptcy Environmental Claims
 - *Asarco LLC v. Noranda Mining Inc.*, No. 16-4045, 2017 WL 24609 (10th Cir. 2017)

Purchasing Assets in Bankruptcy

- Section 363 provides for asset sales free and clear of liabilities of the Debtor
 - Claims based upon past conduct should not follow property
- However, CERCLA liability cannot be discharged where contaminated real property is purchased
 - Likely to have limited indemnities in bankruptcy
 - Proper due diligence required

Questions



Biography



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Andrew Gallo is a co-leader of the firm's bankruptcy, restructuring and insolvency practice. Both an accomplished trial lawyer and bankruptcy attorney, Andrew counsels secured and unsecured creditors, equity holders and investors in bankruptcies and restructurings. He also litigates complex commercial cases in state and federal courts and arbitrations, with a specific focus on fraudulent transfer and creditor's rights. Andrew has extensive experience representing clients in distressed situations relating to the energy industry and serves as co-leader of the firm's energy industry team.

Biography



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Duke McCall's practice focuses on environmental law and complex litigation. He represents clients in contribution actions, enforcement proceedings, citizen suits, toxic tort litigation, and regulatory matters, including actions brought under the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, and analogous state laws.

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