

Fordham Environmental Law Review

Volume 4, Number 2

2011

Article 2

Balancing CERCLA and the Bankruptcy Code: The Legitimacy of Discharging Contingent Claims for Unincurred Response Costs in Chapter 11

Kerry H. Mithalal*

*

Copyright ©2011 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

**BALANCING CERCLA AND THE BANKRUPTCY CODE: THE
LEGITIMACY OF DISCHARGING CONTINGENT
CLAIMS FOR UNINCURRED RESPONSE
COSTS IN CHAPTER 11**

INTRODUCTION

Debtors reorganizing under Chapter 11 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code or Code)¹ who anticipate liability for response costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980² (CERCLA) because of conduct which contributed to pre-petition³ releases⁴ of hazardous substances⁵ normally attempt to discharge⁶ that liability in bankruptcy.⁷ Increasingly debtors have

1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1988)). Chapter 11 concerns the reorganization of debtors. *See generally* 11 U.S.C. § 1101-1174 (1988).

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). An entity becomes liable for response costs under CERCLA if it is:

(1) the owner and or operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

42 U.S.C. § 9607(a)(1)-(4) (1988).

3. A bankruptcy case is commenced by the filing of a petition with the bankruptcy court. 11 U.S.C. § 301 (1988). For the purposes of this Note, the fundamental difference between an unsecured claim that arises prior to the filing of the petition, a "pre-petition" claim, and one that arises subsequent to the filing of the petition, a "post-petition" claim, is the amount and timing of payment. A post-petition claim which is also an expense of preserving the debtor's estate, *see* 11 U.S.C. § 503(B)(1)(A) (1988), is entitled to be paid in full, *see* 11 U.S.C. § 1129(a)(9)(A) (1988), before pre-petition claims are paid. *See generally* 11 U.S.C. § 507 (1988). A pre-petition claim, by contrast, is paid on a pro-rata basis if assets remain after higher priority claims are paid. *Id.* The environmental claims discussed in this Note are treated as general unsecured claims.

4. *See* 42 U.S.C. § 9601(22) (1988) (defining a release as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substances or pollutant or contaminant).").

5. *See* 42 U.S.C. § 9601(14) (1988) (defining a hazardous substance as a substance listed under other federal laws such as the Solid Waste Disposal Act § 3001, 42 U.S.C. § 6921 (1988), and the Clean Air Act § 112, 42 U.S.C. § 7412 (1988)); *see also id.* at § 9602(a) (expanding the definition of hazardous substance to include any additional substances which the Administrator determines may pose a substantial danger to public health or the environment if released.).

6. A discharge in bankruptcy essentially extinguishes any claim or debt against the

sought declaratory judgments establishing that response costs⁸ incurred by the Environmental Protection Agency (EPA) while cleaning up releases or threatened releases of hazardous substances caused by the debtor at sites not owned by the debtor constitute dischargeable claims.⁹ Generally, the EPA will not know the ultimate costs of cleaning a given site until the process has been performed.¹⁰ The EPA may not even know the location of the sites at which the debtor ultimately may be a potentially responsible party (PRP), let alone the more specific details which determine cleanup procedures, such as the type of hazardous waste in-

debtor existing at the time of the bankruptcy. A discharge forecloses a creditor's right to collect its debt from the debtor after the close of the bankruptcy. *See* 11 U.S.C. § 1141(d) (1988).

7. To curb the increasing contamination of our natural resources, Congress enacted CERCLA or Superfund, which authorized a five-year, \$1.6 billion program to clean up releases of hazardous substances in abandoned disposal sites. *See* Krickenger & Rekar, *Superfund Settlements, Breaking the Logjam*, 19 *Env't Rep.* (BNA) 2384, 2386 (1989). However, at the end of the five-year period it became apparent that the problems posed by hazardous waste were more substantial and more pervasive than legislators had anticipated. By 1989 1200 sites were listed on the National Priority List (a list created by CERCLA which ranks the nation's most hazardous waste sites and which was originally supposed to contain only 400 sites, 42 U.S.C. § 9605 (1982) (language repealed 1986)). The EPA anticipated the addition of hundreds or even thousands more. *See* Lori Jonas, Note, *Dividing the Toxic Pie: Why Superfund Contingent Contribution Claims Should Not Be Barred By The Bankruptcy Code*, 66 *N.Y.U.L. REV.* 850 n.7 (1991). To combat this burgeoning problem, Congress enacted the Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C.), extending the life of the program by five years and allocating to the fund an \$8.5 billion budget. 42 U.S.C. § 9611(a) (1988).

The United States Environmental Protection Agency (EPA) which bears the primary responsibility for enforcing CERCLA and overseeing or conducting cleanups of hazardous sites, 42 U.S.C. § 9615 (1988) (listing agencies authorized to enforce Superfund), has a number of enforcement options open to it. It may clean the site with Superfund money and then sue the polluters, or potentially responsible parties (PRPs) for reimbursement under section 9607. 42 U.S.C. §§ 9604, 9607 (1988). The EPA may also order the PRPs to remedy the site with their own resources or it may seek injunctive relief against the PRP in a United States district court. 42 U.S.C. § 9606(a) (1988). Any PRP found responsible for a release or threatened release of any hazardous substance is liable for the technical and administrative costs incurred by the EPA in cleaning the site. *See* 42 U.S.C. § 9606(b) (1988).

As will be discussed later, CERCLA imposes strict liability upon a broad category of PRPs. *See infra* notes 142-146 and accompanying text. The average cost of cleanup at a moderately sized site has been estimated between \$21 million and \$30 million. *See* Krickenger & Rekar, *supra*, at 2386. It is not surprising that debtors attempt to escape these costs through bankruptcy.

8. The term "response costs" means the costs associated with a removal or remedial action. It is not defined in CERCLA, however, its meaning may be derived from the definitions of "remove or removal," "remedy or remedial" and "respond or response." *See* 42 U.S.C. §§ 9601(23), 9601(24), 9601(25). *See also* Amy B. Blumberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 *HASTINGS L.J.* 661, 676 (1992).

9. *See infra* notes 23-69 and accompanying text.

10. *Id.* *See also* Jonas, *supra* note 7, at 882-83 (describing how the investigation and cleanup of sites can take years).

volved and the geological character of the site.¹¹ To combat the perceived inequity of letting debtors discharge CERCLA response costs before the EPA is even aware that such costs may be appropriate, some courts have phrased the dischargeability of response costs in terms of their foreseeability to the agency.¹²

Specifically, these courts hold that only response costs foreseeable to the EPA at the time of the bankruptcy are dischargeable.¹³ Theoretically, this approach balances the policies of the Bankruptcy Code and CERCLA by preventing a debtor from shifting the financial burden of cleaning up contamination to taxpayers or other PRPs while preserving the debtor's fresh start to the broadest extent possible.¹⁴ However, the legitimacy of the foreseeability standard with respect to the Bankruptcy Code is questionable because it is not mandated by the Code and because it frustrates primary policies behind the Code, such as the debtor's entitlement to a fresh start and the concept of equality among creditors with identical legal rights.¹⁵ Its usefulness in furthering CERCLA's goals is also doubtful because it fails to resolve the procedural conflict between CERCLA and the Bankruptcy Code.¹⁶

Part I of this Note explores the legitimacy and utility of the foreseeability requirement as a means of balancing the objectives of the statutes. Part II details the way in which bankruptcy processes conflict with CERCLA's jurisdictional bar. Part III concludes that a legislative solution is necessary to resolve the procedural conflicts between CERCLA and the

11. See, e.g., *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991); *In re National Gypsum Co.*, 139 B.R. 397 (N.D. Tex. 1992).

12. See, e.g., *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 786 (7th Cir. 1992) (holding that where potential claimant knows that known release of hazardous substance will lead to CERCLA response costs, and has conducted tests with regard to contamination problem, dischargeable, contingent CERCLA claim exists); *In re Chateaugay Corp.*, 944 F.2d at 1005 (relationship between EPA and debtor created a relationship which should provide EPA with awareness of the existence of debtor's potential response cost obligations sufficient to make them dischargeable contingent claims); *In re National Gypsum Co.*, 139 B.R. at 409 (N.D. Tex. 1992) (all future response costs based on pre-petition conduct of the debtor capable of being "fairly contemplated" by the parties at time of bankruptcy are claims); *Sylvester Bros. Dev. Co. v. Burlington Northern R.R.*, 133 B.R. 648, 653 (D. Minn. 1991) (debtor could not discharge CERCLA liability when EPA did not have actual notice of the potential claim in time to file proof of claim); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 838 (D. Minn. 1990) (release of hazardous substances does not give rise to a dischargeable claim where EPA had no notice of relationship between the debtor and the property at the time of the bankruptcy). See also Kevin J. Saville, Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?*, 76 MINN. L. REV. 327, 354-62 (1991) (arguing that courts faced with determining the dischargeability of CERCLA liability during a bankruptcy or upon detection of the pollution years after the close of the case should apply a foreseeability standard and discharge only the CERCLA liability that is or was foreseeable at the conclusion of the bankruptcy case).

13. See generally *infra* notes 23-69 and accompanying text.

14. See generally *Chicago*, 974 F.2d at 779-787; *Gypsum*, 139 B.R. at 407-08.

15. See generally *infra* notes 73-78 and accompanying text.

16. See generally *infra* part II.

Bankruptcy Code, and thus, to successfully balance the statutes' competing objectives.

I. THE BANKRUPTCY CODE DOES NOT REQUIRE THAT CLAIMS BE FORESEEABLE IN ORDER TO BE COGNIZABLE IN BANKRUPTCY

Almost every case that has addressed CERCLA claims in a bankruptcy proceeding has noted that the goals and timing of the statute are almost diametrically opposed.¹⁷ CERCLA provides for the investigation and clean up of toxic sites, assigns liability to any person connected to the creation of the hazardous waste problem, and distributes the attendant costs among the relevant parties.¹⁸ Conversely, the Bankruptcy Code enables debtors to jettison most liabilities and affords equal treatment to unsecured creditors. CERCLA, in the interest of rapid cleanup, enables the EPA to postpone litigation regarding response costs until after the completion of the cleanup; determination of liability and distribution of costs to the relevant PRPs generally does not occur until after completion of the cleanup.¹⁹ In contrast, the Bankruptcy Code envisions a process of early identification and discharge of all pre-petition liabilities.²⁰ These variations in the timing and treatment of claims have led to considerable confusion in the case law.²¹

A. *The Environmental Cases*

To date, the EPA has challenged debtors' attempts to discharge liability for environmental response costs in a variety of situations.²² The following discussion centers primarily on the circuit courts' differing responses to such challenges.

1. *In re Chateaugay Corp.*

In *In re Chateaugay Corp.*,²³ the EPA brought an action seeking a declaratory judgment regarding the dischargeability of environmental re-

17. See, e.g., *In re National Gypsum Co.*, 139 B.R. 397, 404 (N.D. Tex. 1992). See also Anne D. Weber, Note, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1502 (1989).

18. 42 U.S.C. § 9604(a) (1988). See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040-41 (2d Cir. 1985).

19. See *In re Combustion Equipment Associates, Inc.*, 838 F.2d 35, 37 (2d Cir. 1988); *In re National Gypsum Co.*, 139 B.R. at 404 (N.D. Tex. 1992). See also 42 U.S.C. § 9613(h) (1988).

20. See *In re Combustion Equipment Associates, Inc.*, 838 F.2d at 37.

21. *Id.*

22. See, e.g., *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775 (7th Cir. 1992); *In re Chateaugay Corp.*, 944 F.2d 977 (2d Cir. 1991); *Matter of Penn Central Transp. Co.*, 944 F.2d 164 (3d Cir. 1991); *In re National Gypsum Co.*, 139 B.R. 397 (N.D. Tex. 1992); *Sylvester Bros. Dev. Co. v. Burlington Northern R.R.*, 133 B.R. 648 (D. Minn. 1991); *In re Jensen*, 127 B.R. 27 (Bankr. 9th Cir. 1991); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn. 1990).

23. 944 F.2d 997 (2d Cir. 1991).

sponse costs under CERCLA in the Chapter 11 reorganization of the LTV Corporation and its related companies (LTV).²⁴ LTV, a diversified steel, energy and aerospace corporation with operations in several states, filed for protection under Chapter 11.²⁵ It listed among its schedule of liabilities twenty four pages of "contingent" claims held by the EPA and the environmental enforcement officers of every state and the District of Columbia, without listing any information regarding these claims.²⁶ The EPA filed a proof of claim for \$32 million in response costs incurred at fourteen sites where it had identified LTV as a PRP.²⁷ Only one site had been improved to the point where no further response costs were anticipated. The EPA asserted that LTV might ultimately be found liable as a PRP at many more sites than those listed, whose locations were still unknown to the EPA.²⁸ Consequently, the original \$32 million claim might prove to be but a small part of the total CERCLA liability that the EPA ultimately could assert against LTV.²⁹ Largely because of this uncertainty, the EPA argued that a bankruptcy claim for CERCLA response costs did not exist until after the government had expended money to clean up the site.³⁰ Therefore, the EPA sought a determination that response costs yet to be incurred in remedying pre-petition releases or threatened releases of hazardous substances for which LTV was liable were not dischargeable.

The Second Circuit disagreed, holding that the unincurred response costs were contingent claims for the purposes of bankruptcy, even with respect to sites unknown to the EPA.³¹ As a regulatory agency, once the EPA became aware of LTV's potential liability at one site, they could then anticipate that LTV might be liable elsewhere.³² Given such foreseeability, the location of unknown sites, together with their respective required investigation and remediation, were merely factors which made the EPA's claim contingent.³³

The breadth of response costs which the *Chateaugay* court was willing to recognize as dischargeable has been questioned by the Seventh Circuit

24. *Id.* at 999.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Chateaugay*, 944 F.2d at 999.

30. *Id.* at 1005. Section 101(5) of the Bankruptcy Code defines a claim in terms of a "right to payment" whether or not such right is contingent, unmatured or unliquidated. 11 U.S.C. § 101(5) (Supp. III 1991).

31. *Chateaugay*, 944 F.2d at 1005.

32. *Id.*

33. *Id.* What the Second Circuit gave in *Chateaugay*, it also took away by holding that if the EPA incurred response costs post-petition, its claim for those costs would be allowed as administrative claims. *Id.* at 1009-10. As such, they are entitled to administrative priority. 11 U.S.C. § 507(a)(1) (1988). Under Chapter 11 there must be provision for payment in full of such claims if a reorganization plan is to be confirmed. 11 U.S.C. § 1129(a)(9).

in *Matter of Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*,³⁴ and by the district court for the Northern District of Texas in *In re National Gypsum Co.*³⁵ Both courts limited the dischargeability of unincurred response costs in bankruptcy to costs incurred at sites where the EPA had conducted testing or other investigation.³⁶

2. *Matter of Chicago, Milwaukee, St. Paul & Pacific Rail Road Co.*

Although the environmental agency suing for response costs did so post-bankruptcy, and thus was in a different procedural posture with respect to the bankruptcy case, the issues that the Seventh Circuit faced in *Chicago* were not significantly different from those addressed by the Second Circuit. Specifically, the court had to determine whether environmental response costs constituted claims which were discharged in the debtor's bankruptcy.

In *Chicago*, the debtor, Milwaukee Road, filed for reorganization in bankruptcy under section 77 of the former Bankruptcy Act of 1898 on December 19, 1977.³⁷ The court ordered that all post-petition claims be filed by September 10, 1985 or be barred. On November 12, 1985 the court entered a consummation order which became effective on November 25 of that year.³⁸ In 1984 the Washington State Department of Transportation (WSDOT) bought property from Milwaukee Road that had been contaminated by a derailment in 1979. The Washington State Department of Ecology (WSDOE) was aware of the contamination by June or July of 1985 when it took soil samples at the site and did a bioassay on those samples.³⁹ In August of 1985, before the bar date had passed, WSDOE notified WSDOT that the site was contaminated and would have to be cleaned up, requiring treatment, removal and storage of waste.⁴⁰ Despite this knowledge, neither WSDOT nor the State of Washington took any action until 1989, when WSDOT filed a complaint against the successor to Milwaukee Road, CMC Heartland Partners (CMC). CMC sought an injunction in the district court for the Northern District of Illinois on the grounds that its liability for response costs had been discharged in the Milwaukee Road bankruptcy. The district court granted the injunction, holding that the State's claim for cleanup costs was dischargeable, and thus had been discharged. It ruled that notice given to the Washington State Department of Revenue about the bankruptcy was sufficient to notify the true party in interest, Washington State.⁴¹ Thus, the consummation order barred the State of Washington's

34. 974 F.2d 775 (7th Cir. 1992).

35. 139 B.R. 397 (N.D. Tex. 1992).

36. See *infra* notes 43-47 and 61-65 and accompanying text.

37. *Chicago*, 974 F.2d at 777.

38. *Id.*

39. *Id.* at 778.

40. *Id.*

41. *Id.* at 779.

claims.⁴²

The court's rationale for this holding was that:

when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim for the purposes of Section 77⁴³

In its analysis the court disagreed with *In re Chateaugay Corp.*⁴⁴ and *In re Jensen*,⁴⁵ both of which had held that a claim arises on the release or threatened release of a hazardous substance, without more. The Seventh Circuit was concerned that such a broad interpretation of when a claim arises could render claims dischargeable although the relevant creditors had no reason to know of the release or threatened release of a hazardous substance.⁴⁶ The court similarly declined to accept the rationale adopted in *United States v. Union Scrap Iron & Metal*.⁴⁷ The *Union Scrap* court ruled that a CERCLA claim dischargeable in bankruptcy did not arise until the environmental agency incurs response costs.⁴⁸ Endorsement of such an analysis, according to the *Chicago* court, risked encouraging a CERCLA creditor to delay response costs until after the close of the bankruptcy. This would frustrate the Bankruptcy Code's dual policies of giving a fresh start to debtors and treating all creditors with similar legal rights equally. It would also frustrate CERCLA's policy of encouraging the fastest possible cleanup.⁴⁹

3. *In re National Gypsum Co.*

In *In re National Gypsum Co.*,⁵⁰ the debtor sought a determination that claims for response costs ultimately arising out of pre-petition releases at several sites were dischargeable.⁵¹ The costs resulted from pre-

42. *Chicago*, 974 F.2d at 788.

43. *Id.* at 784.

44. 944 F.2d 997 (2d Cir. 1991).

45. 127 B.R. 27 (Bankr. 9th Cir. 1991).

46. *Chicago*, 974 F.2d at 786.

47. 123 B.R. 831 (D. Minn. 1990).

48. It is worth noting that the *Union Scrap* court later appeared to retreat from this analysis. In *Sylvester Bros. Dev. Co. v. Burlington Northern R.R.*, 133 B.R. 648, 653 (D. Minn. 1991), the court shifted its emphasis from whether response costs had yet been incurred to whether the creditor knew of the existence of its claim before the close of the bankruptcy. The court distinguished its holding from both *In re Jensen*, 127 B.R. 27 (Bankr. 9th Cir. 1991), and the district court opinion in *In re Chateaugay Corp.*, 112 B.R. 513 (S.D.N.Y. 1990), with respect to its procedural posture. Specifically, the court indicated that where the opportunity to participate in the bankruptcy is no longer available, the policy analysis changes. The court implied that this change is a shift in preeminence from the debtor's traditional right to a fresh start to the creditor's right to have notice of the existence of a potentially dischargeable claim in time to file a proof of claim.

49. *Chicago*, 974 F.2d at 786.

50. 139 B.R. 397 (N.D. Tex. 1992).

51. *Id.* at 400-01.

petition releases at three categories of sites: (1) seven "listed" sites, sites identified on EPA's National Priority List (NPL)⁵² and in the EPA's proof of claim; (2) thirteen "unlisted" sites, places *not* identified on the EPA's National Priority List⁵³ or in the EPA's proof of claim; and (3) numerous other sites to which the EPA believed the debtor was linked based on information in its computer databases.⁵⁴ Some form of governmental remedial action had been taken at the seven sites listed in the proof of claim: either the sites had been listed on the NPL,⁵⁵ the government had notified the debtors of their PRP status, the government had conducted remedial investigation/feasibility studies (RI/FS),⁵⁶ the government had produced a record of decision (ROD),⁵⁷ the government had issued an Administrative Consent Order,⁵⁸ or the government had incurred response costs.⁵⁹ At these sites the EPA had conducted sufficient investigation to allege that the debtor had arranged for disposal of its wastes.⁶⁰

Using the Second Circuit's *Chateaugay* opinion as a guide for its analysis, the *Gypsum* court was particularly troubled by the fact that the *Chateaugay* court's broad definition of claim "encompass[ed] costs that could not 'fairly' have been contemplated by the EPA or the debtor pre-petition,"⁶¹ because they had not been discovered by the EPA or by anyone else.⁶² The court noted that *Chateaugay* based its determination of when a claim arises for the purpose of bankruptcy on the debtor's pre-petition conduct, rather than on the release or threatened release of a hazardous substance. However, the court found no "meaningful distinction between the debtor's conduct and the release or threatened release resulting from this conduct," since the recognition of either circumstance depended upon its fortuitous discovery.⁶³ The court held that future response costs based on pre-petition conduct which could be fairly contem-

52. The NPL prioritizes releases or threatened releases nationwide in order to facilitate remedial action. See 42 U.S.C. § 9605(a)(8)(A)-(B) (1988). The criteria structuring these priorities are statutorily set and include the population placed at risk, the hazard potential of the substances, the potential of contaminating water and air, the potential for destruction of ecosystems, and other factors. Listing on the NPL requires a preliminary finding by the EPA that there exists at the site a release or threat of release of a hazardous substance. See 42 U.S.C. §§ 9605(a)(8)(A)-(B), 9604(a)(1) (1988).

53. *Gypsum*, 139 B.R. at 398-401.

54. *Id.* at 403.

55. *Id.*

56. See *infra* note 226 and accompanying text.

57. *Id.*

58. *Id.*

59. *Gypsum*, 139 B.R. at 402.

60. *Id.*

61. *Id.* at 407 (quoting *Chateaugay*, 944 F.2d at 1005).

62. *Id.*

63. *Id.* The court noted that it is the Fifth Circuit's position that disposal of a hazardous substance in itself constitutes a release or threatened release. See *id.* at 407 n. 25 (citing *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989)). CERCLA itself defines a release as, among other things, the "dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed recep-

plated by the parties at the time of the debtor's bankruptcy were claims under the Code.⁶⁴ The court proposed consideration of the following factors to identify claims that could have been "fairly" contemplated by the parties: "knowledge by the parties of a site in which a PRP may be liable, NPL listing, notification by EPA of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs."⁶⁵ However, the court noted that the government need not have full information as to the debtor's existing or potential liability for future response costs in order to include unliquidated or contingent claims in its proof of claim.⁶⁶ In conclusion, the court warned that it would not tolerate dilatory tactics by the EPA in order to preserve known dischargeable claims to assert post-bankruptcy.⁶⁷

In each of these instances, the court held that response costs arising out of pre-petition releases or threatened releases of hazardous materials by the debtor were contingent claims under the Bankruptcy Code. However, the courts also attempted to condition discharge upon the information possessed by the creditor about that claim. In creating this standard the courts were influenced by a need to balance CERCLA's mandate that PRPs should finance the clean up of toxic sites with the Code's policy that all of the debtor's obligations should be resolved and discharged. However, this compromise is neither sanctioned by the Bankruptcy Code⁶⁸ nor useful in furthering CERCLA's goals.⁶⁹

B. *Background: Congressional Intent*

Understanding the approaches of the Second and Seventh Circuits and the district court requires review of the Code and its definition of what constitutes a contingent claim cognizable in bankruptcy. Case after case has held that Congress intended that courts interpret the definition of claim⁷⁰ broadly.⁷¹ The ambiguities inherent in the statute have ensured,

tacles containing any hazardous substance or pollutant or contaminant)." 42 U.S.C. § 9601(22) (1988).

64. *Gypsum*, 139 B.R. at 409.

65. *Id.*

66. *Id.* at 409.

67. *Id.*

68. See *infra* notes 70-141 and accompanying text.

69. See generally *infra* parts ID and II.

70. The Code defines the term "claim" to mean a:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or

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

11 U.S.C. § 101(5).

71. See *Johnson v. Home State Bank*, 111 S. Ct. 2150 (1991); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552 (1990). The CRIMINAL VICTIMS PROTECTION ACT OF 1990, Pub. L. No. 101-581, § 3, 104 Stat. 2865 (1990), substantially overruled the

however, that no court has yet authoritatively defined the parameters for interpreting this provision, i.e., what constitutes a claim in bankruptcy and when it arises. As drafted and understood by Congress, the provision unquestionably anticipates that the bankruptcy process concerns the collection and discharge of as many of the claims outstanding against the debtor as possible in the bankruptcy proceeding.⁷² Through the breadth of the definition, Congress hoped to implement certain policies, primarily that the debtor should receive a fresh start and that all similarly situated creditors be treated equally in the bankruptcy.⁷³ On one hand, the Code allows debtors to reenter their businesses without being shadowed by debt.⁷⁴ Through this fresh start it seeks to prevent the liquidation of the debtor's business and thus the attendant unemployment of workers and the inefficient utilization of economic resources.⁷⁵ On the other hand, the Code treats all similarly situated creditors⁷⁶ identically, no matter when the debtor's obligation to repay them arises,⁷⁷ so that the debtor's assets

Supreme Court's holding here. Nevertheless, as the Court noted in *Johnson*, the Act did not disturb the Court's general conclusions with respect to the breadth of the Code. See *Johnson*, 111 S. Ct. at 2154 n.4; see also *Ohio v. Kovacs*, 469 U.S. 274 (1985); *Robinson v. McGugan*, 776 F.2d 30, 34-35 (2d Cir. 1985), *rev'd on other grounds sub nom. Kelly v. Robinson*, 479 U.S. 36 (1986); *In re Edge*, 60 B.R. 690, 693 (Bankr. M.D. Tenn. 1986); *In re Johns-Manville Corp.*, 57 B.R. 680, 687 (Bankr. S.D.N.Y. 1986); H.R. REP. No. 595, 95th Cong., 2d Sess. 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6266 ("By this broadest possible definition the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case."); S. REP. No. 989, 95th Cong., 2d Sess. 21-22 (1978), reprinted in 1978 U.S.C.C.A.N. 5785, 5807-08.

72. See *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 974 F.2d 775, 782 (7th Cir. 1992) ("Considering that a bankruptcy court can more equitably distribute property and assure the debtor a fresh start if all claims are before it, considering that little benefit will be gained by allowing a person who knows it has a claim to pursue the claim outside of bankruptcy or to sit on the claim until after the bankruptcy, and considering that granting a priority classification as an administrative expense to any such debts would impinge on the bankruptcy court's ability to equitably distribute limited funds among numerous creditors, it is not surprising that several courts in this posture have held that the claim arose for purposes of bankruptcy at the earliest point possible. "); see also *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198, 201-02 (4th Cir. 1988). In developing a definition for a claim cognizable in bankruptcy to be applied by the new Bankruptcy Code, Congress took its cue from the reorganization chapters of the former Bankruptcy Act of 1898. Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (codified as amended at 11 U.S.C. §§ 1-1103 (1976) (repealed 1978)) [hereinafter Bankruptcy Act]. Thus Congress effected its ultimate goal of giving debtors a fresh start by freeing them from all obligations. See S. REP. No. 95-989, 95th Cong., 2d Sess. 21 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5807-08.

73. See *In re Pettibone Corp.*, 90 B.R. 318, 923-34 (Bankr. N.D. Ill. 1988).

74. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

75. See *In re Chateaugay Corp.*, 115 B.R. 760, 768 (Bankr. S.D.N.Y. 1990) (citing *NLRB v. Bildisco*, 465 U.S. 513 (1984)).

76. "Similarly situated creditors" means all creditors with identical legal rights against the debtor. For example, creditors with identical legal rights against the debtor would be all secured creditors or all unsecured creditors, etc. See Mark J. Roe, *Bankruptcy And Mass Tort*, 84 COLUM. L. REV. 846, 851-52 (1984).

77. See *id.* at 853. This principle is known as temporal equality. Once a creditor has a right to payment from the debtor that arises prepetition, either under an agreement or as

may be equitably distributed among them.⁷⁸

Judicial definitions of a dischargeable claim and when it arises, when not explicitly covered in the Code, must comply not only with the letter of the Code, but also with the policies embodied in its provisions. Efforts to effect these policies, however, have led many courts to find that a right to payment cognizable as a claim for bankruptcy purposes arises upon conduct by the debtor giving rise to a "right of action."⁷⁹ The problem with this interpretation is that the condition or event giving rise to liability may not manifest itself until post-petition or even post-bankruptcy, and thus it countenances the existence of dischargeable claims about which neither the debtor nor the creditor may know anything.⁸⁰

In its redefinition of "claim," Congress expanded the range of creditors eligible to participate in the bankruptcy. It eliminated the necessity that a claim be "provable" in order to be allowable.⁸¹ The Bankruptcy Act had defined provable claims as debts which were "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition . . ."⁸² Thus, parties with claims that did not fit this narrow construction, such as tort claimants with injuries that did not manifest themselves pre-petition, had held non-provable rights, and had been excluded from sharing in the distribution of the debtor's assets.⁸³ While these parties could have brought their claims

a result of a tortious act, it has a claim dischargeable in bankruptcy no matter when the debtor must deliver payment. That the contract may not mature, or a judgment in a tort case may not be rendered, until after the petition, or even after the bankruptcy, does not affect the creditor's right to participate in the distribution of assets. *Id.*

78. See *In re Chateaugay Corp.*, 102 B.R. 335, 354 (Bankr. S.D.N.Y. 1989). The emphasis upon equitable distribution is embodied in the provision in section 362 which automatically stays all actions against the debtor. 11 U.S.C. § 362 (1988). The provision seeks to prevent the "race to the courthouse" that would result from all creditors trying to secure a remedy from the debtor before its assets ran out. As stated in the legislative history of the Bankruptcy Reform Act of 1978:

The automatic stay provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

S. REP. NO. 95-989, 95th Cong., 2d Sess. 49, reprinted in 1978 U.S.C.C.A.N. 5835.

79. A right of action is a liability which could, at some future point, give rise to a cause of action. See, e.g., *In re Jensen*, 127 B.R. 27, 32 (Bankr. 9th Cir. 1991). This interpretation is substantially similar to the second most popular interpretation, that a claim arises at the earliest possible moment in the relationship between the debtor and the creditor. See *In re Edge*, 60 B.R. 690, 701 (Bankr. M.D. Tenn. 1986). *Jensen* approvingly noted the similarity of this interpretation to the one upon which it based its opinion. *Jensen*, 127 B.R. at 31-32.

80. See *infra* notes 123-41 and accompanying text.

81. See Saville, *supra* note 12 at 334-35.

82. Bankruptcy Act § 63(a), 11 U.S.C. § 103(a) (1976).

83. See Saville, *supra* note 12 at 334-35.

against the debtor post-bankruptcy,⁸⁴ frequently there was nothing left to sue save an empty shell without assets.⁸⁵ Therefore, inclusion of contingent obligations in section 101(5) of the Bankruptcy Code demonstrated that Congress intended the courts to recognize potential claims where no fixed liability yet existed as present realities to be addressed and discharged in the bankruptcy case.

The concept of the contingent claim, or contingent liability, appears in a number of places in the Bankruptcy Code, but nowhere is it defined.⁸⁶ Its inclusion in the definition of claim reflects Congress' desire to enable the Code to bring as many of the debtor's obligations as possible before the court.⁸⁷ However, no Code provision requires that a contingent claim be foreseeable, or that a creditor must have notice or actual knowledge of a contingent claim, for it to exist.⁸⁸

Most sections of the Code that address the treatment of a contingent claim in bankruptcy presume that the creditor is aware of its existence. For example, section 502(c)(1) provides that courts shall estimate contingent claims for the purpose of allowing them in the bankruptcy, which presumes that such claims have been scheduled by the debtor or filed by a creditor.⁸⁹ Additionally, section 303(b)(1) prevents a creditor with a claim that is contingent as to liability from pushing a debtor into involuntary bankruptcy.⁹⁰ However, holders of unmatured or unliquidated claims are not similarly barred. Rather, the debtor must have a concrete

84. See Bankruptcy Act § 17(a), 11 U.S.C. § 35(a) (1976) (discharge released debtor only from provable debts).

85. Timothy B. Matthews, *The Scope of Claims Under the Bankruptcy Code*, 57 AM. BANKR. L.J. 221, 224 (1983).

86. See, e.g., 11 U.S.C. §§ 101(5), 303(b), 502, 1111 (1988).

87. See S. REP. NO. 95-989, 95th Cong., 2d Sess. 21 (1978), reprinted in 1978 U.S.C.A.N. 5787, 5807-5808. The Senate report states that:

The effect of the [new] definition is a significant departure from present law. Under present law, "claim" is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability [under the old Bankruptcy Act, claims were not allowable unless they were provable] in section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) [redesignated in 1990 as (5)] adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters. By this broadest possible definition the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

Id.

88. 11 U.S.C. §§ 101-1330 (1988).

89. 11 U.S.C. § 502(c)(1) (1988). The statute reads: "There shall be estimated for purpose of allowance under this section — (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case." *Id.* See *infra* notes 192-214 and accompanying text for details of estimation.

90. 11 U.S.C. § 303(b)(1) (1988). The statute reads, in pertinent part: "(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title — (1) by three or more entities, each of which

obligation to pay the creditor which will definitely accrue at some future point, not merely the possibility that he might become liable to the creditor upon the happening of some future event. Finally, section 1129(a)(11) provides that the court must establish that “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor” before confirming the plan.⁹¹ This provision prevents confirmation of “visionary” plans which promise creditors and equity holders more than the debtor can possibly achieve after confirmation.⁹² The court cannot approve a plan as feasible if significant contingent claims remain to be estimated and accounted for in the plan.⁹³ Thus, the provision anticipates the parties’ and the court’s awareness of the existence of contingent claims.

Although some party must have knowledge of the existence of the contingent claim in order for it to be included in the bankruptcy, such awareness is not explicitly necessary for a non-individual debtor’s discharge. Under section 1141(d), confirmation of a reorganization plan discharges the debtor from all dischargeable pre-petition debts whether or not a proof of claim was filed, whether or not an estimated claim was allowed, and whether or not the claim holder accepted the plan.⁹⁴ Under section 727(b), an individual debtor in a Chapter 7 case is discharged from all dischargeable pre-petition debts and estimated liabilities regardless of whether a proof of claim has been filed, and, if such proof of claim was filed, regardless of whether the claim was allowed.⁹⁵ Section

is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute ” *Id.*

91. 11 U.S.C. § 1129(a)(11) (1988).

92. *See In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (9th Cir. 1985); *see also 5 Collier on Bankruptcy* ¶ 1129.02[2] at 1129-21 and 1129-22 (Lawrence P. King et al. eds., 15th ed. 1993).

93. *In re Pizza of Hawaii, Inc.*, 761 F.2d at 1382.

94. 11 U.S.C. § 1141(d)(1)(1988). The statute reads:

Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan — (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h) or 502(i) of this title, whether or not — (i) a proof of claim based on such debt is filed or deemed filed under section 501 of this title; (ii) such claim is allowed under section 502 of this title; or (iii) the holder of such claim has accepted the plan

Id. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 418-19 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5693; S. REP. NO. 989, 95th Cong., 2d Sess. 129-30 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5915-16.

95. 11 U.S.C. § 727(b) (1988). The statute reads:

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

523(a)(3)(A) does prevent individual debtors from discharging a claim known to them during the bankruptcy. The debtor must have failed to adequately notify the creditor of its existence, and the creditor must not have had notice or actual knowledge of the case in time to have properly filed a proof of claim.⁹⁶ However, there is no similar provision requiring that the creditor of a corporate debtor have knowledge of the existence of its contingent claim in order for that claim to be discharged. Thus, in the name of the debtor's "fresh start," it appears that the language of the Code permits a creditor's interests to be discharged in this situation, regardless of whether the creditor received notice or the debtor made any effort to notify the creditor.⁹⁷

C. *Judicial Constructions of Congressional Intent Regarding Contingent Claims*

Understanding the application of a foreseeability requirement in the environmental cases as a criterion defining a dischargeable claim in bankruptcy also requires some investigation of its application in the judicial interpretation of contingent claims.

1. Notice

It should be elementary that creditors have a due process right to notice of the bankruptcy prior to the discharge of their claims. The Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*⁹⁸ has suggested that discharge of a claim without notice to the claim holder violates due process.⁹⁹ In *Mullane*, a bank had appointed a guardian for all absent persons, known or unknown, who may have had an interest in the income of a trust fund.¹⁰⁰ In an accounting action, the bank sought to notify all beneficiaries by publication.¹⁰¹ In evaluating the adequacy of notice by publication to absent beneficiaries, the Court balanced the

Id.

The Code prevents non-individual debtors from discharging liability in a liquidating Chapter 11 or a Chapter 7, presumably because there is no entity left after the bankruptcy that needs relief from pre-petition debts. See §§ 727(a)(1), 1141(d)(3)(A)-(C) (1988).

96. 11 U.S.C. § 523(a)(3)(A) (1988). The statute reads:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt — (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit — (A) if such debt is not of a kind specified in paragraph (2), (4) or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing

Id.

97. See 5 COLLIER ON BANKRUPTCY ¶ 1141.01[4] at 1141-13 to 1141-17 (Lawrence P King et al. eds., 15th ed. 1993).

98. 339 U.S. 306 (1950).

99. *Id.* at 313-15.

100. *Id.* at 310.

101. *Id.*

State's interest in a final settlement of the claims against the individuals' interest in notification.¹⁰² The Court commented that notice obligations should not be so burdensome as to defeat the State's objectives,¹⁰³ however they should be "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."¹⁰⁴ Thus, notice by publication was inadequate when the State could have notified the individuals personally.¹⁰⁵ If, however, individual notice is impossible under the circumstances, the court would accept the selected form of notice if it is as likely to notify the missing or unknown persons as any other form.¹⁰⁶ Under such circumstances, notice would be satisfied by indirect or even futile forms of notice.¹⁰⁷ The Court acknowledged that directly notifying individuals whose interests were future or conjectural could be so problematic and costly that it would constitute an unreasonable burden.¹⁰⁸ In conclusion, the Court held that notification of future or conjectural beneficiaries by publication fulfilled due process.¹⁰⁹

Similarly, in *City of New York v. New York, New Haven & Hartford R.R.*,¹¹⁰ the Supreme Court addressed the effect of reorganization under section 77, the discharge provision of the former Bankruptcy Act, on liens held by New York City on the debtor's real estate. While the debtor had published the bar order in a newspaper, it also sent out copies of the bar order directing creditors to file their claims.¹¹¹ The City failed to file its lien claims. The Court held that although New York City was a creditor within the definition of the Bankruptcy Act, notice by publication of the bar order was insufficient when the debtor knew of the City's claims during the bankruptcy.¹¹² Justice Black noted:

even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred . . . The statutory command for notice embodies a basic principle of justice — that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights.¹¹³

Although there is no statutory protection of creditors' right to notice of the existence of a claim under the Code, due process considerations would appear to protect creditors' rights and would require a court to

102. *Id.* at 313-14.

103. *Id.*

104. *Id.* at 314.

105. *Mullane*, 309 U.S. at 318-19.

106. *Id.* at 315.

107. *Id.* at 317.

108. *Id.*

109. *Id.*

110. 344 U.S. 293 (1953). This case was superseded by statute to the extent that the Code made proper period for notice of bar date discretionary with the judge. *See In re Rockmacher*, 125 B.R. 380, 384 n.6 (S.D.N.Y. 1991).

111. *Id.* at 294.

112. *Id.* at 296.

113. *Id.* at 297.

find that a claim could not be discharged without notice of the bankruptcy to the creditor.¹¹⁴

The majority of cases addressing contingent claims have dealt with ascertainable parties who could foresee the existence of their claims.¹¹⁵ Thus, their analysis usually has failed to address whether or not notice or foreseeability is essential to the existence of a contingent claim.

2. The All Media Definition

The concept of a "contingent" claim has been most persuasively defined by the court in *In re All Media Properties, Inc.*¹¹⁶ That case addressed the meaning of a contingent claim within the context of section 303(b)(1), the section defining the type of creditor entitled to push a debtor into involuntary bankruptcy.¹¹⁷ The *All Media* court noted that although section 303(b)(1) barred holders of contingent claims from bringing an involuntary petition in bankruptcy, it implicitly permitted creditors holding claims that were unmatured or unliquidated to bring such a petition.¹¹⁸ Thus, a claim where the amount of liability either had not become due or had not been determined was not contingent as to liability.¹¹⁹ The court held that "a claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created."¹²⁰

The widely accepted *All Media* definition of a contingent claim presumes that contingent liability is foreseeable to the parties. Clearly, in

114. See 11 U.S.C. §§ 523(a)(3), 727(b), 1141(d) (1988). Section 523(a)(3) of the Code specifically bars individuals from discharging debts to creditors without their notice or actual knowledge. See 11 U.S.C. § 523(a)(3). Notice or knowledge must be actual, not constructive, unless notice is provided to the creditor's agent. However, it may be received from any source. Notice to the agent must take place while the agent is acting within the scope of his authority, and his authority includes enforcement of the claim. 3 COLLIER BANKRUPTCY MANUAL ¶ 523.04[2] at 523-20 (Lawrence P. King et al. eds., 3d ed. 1992). See, e.g., *In the Matter of Compton*, 891 F.2d 1180 (5th Cir. 1990) (claim dischargeable if the creditor had actual knowledge or notice); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. 1982). But see *United States Small Business Administration v. Bridges*, 894 F.2d 108 (5th Cir. 1990) (a debtor must take seriously its obligation to schedule all creditors, for the court will not interpret the notice exceptions to the scheduling requirements so broadly that an unlisted creditor's rights are compromised). See also 5 COLLIER ON BANKRUPTCY ¶ 1141.01[6] at 1141-13 to 1141-17 (Lawrence P. King et al. eds., 15th ed. 1993) (debtor may not be able to discharge claim if it failed to notify creditor of which it was aware during bankruptcy). If the creditor is notified, but not in time to file a proof of claim, a court may still find that he or she received insufficient notice. See *Laczko v. Gentran, Inc. (In re Laczko)* 37 B.R. 676 (Bankr. Ariz. 1984), *aff'd*, 772 F.2d 912 (Bankr. 9th Cir. 1985).

115. See *infra* notes 116-22 and accompanying text.

116. 5 B.R. 126 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981).

117. 11 U.S.C. § 303(b)(1) (1988). See *supra* note 90.

118. *All Media*, 5 B.R. at 132.

119. *Id.* at 133.

120. *Id.*

the case of a contract obligation, the existence of contingent liability is foreseeable by the parties at the time they draft the agreement.¹²¹ However, in the case of a tort claim for negligence, the parties could have foreseen the alleged tortfeasor's liability only if the tort victim/creditor recognized that he had been injured at the time of the negligent act. The tort claim is contingent not only upon a judicial award to fix liability and amount,¹²² but also upon the victim's awareness of the injury.

3. Unmanifested Tort Claims: Expanding the Scope of the Contingent Claim Cognizable in Bankruptcy

Courts have sought ways to implement Congress' policy of including and discharging as many contingent claims as possible through bankruptcy, whether or not the claims were foreseeable, to improve the equality of distribution among creditors and to effectuate a fresh start.¹²³ However, admitting claims into the bankruptcy before claimholders know of their existence risks discharging liabilities that cannot exist until years after the bankruptcy, such as in a products liability case, where the defective product injures an individual years after the bankruptcy of the manufacturer.¹²⁴ Discharging the claims of such a tort claimant without notice would appear to violate due process. To avoid this problem, the

121. In a contract the right to payment exists when the agreement is made; its breach is the contingent act triggering liability. See *In re Edge*, 60 B.R. 690, 701 (Bankr. M.D. Tenn. 1986). For example, "in the case of the classic contingent liability of a guarantor of a promissory note executed by a third party, both the creditor and guarantor [know] there [will] be liability only if the principal maker [defaults]. No obligation arises until such default." *All Media*, 5 B.R. at 133.

122. See *In re Blehm*, 33 B.R. 678, 680 (Bankr. D. Colo. 1983). Note that the courts have refused to recognize any distinction between contingency as to liability and contingency as to amount. See *Matter of Ford*, 967 F.2d 1047, 1051-52 n.12 (5th Cir. 1992).

123. See *supra* notes 98-122 and accompanying text.

124. See, e.g., *In re Chateaugay Corp.*, 944 F.2d 997, 1003 (2d Cir. 1991); *In re UNR Industries, Inc.*, 29 B.R. 741, 746 (D.C.N.D. Ill. 1983).

Whether or not a prospective claimholder will be able to foresee the existence of his or her claim depends upon when the claim arises under bankruptcy law. Case law manifests competing concepts of when a claim arises for the purpose of bankruptcy. While the timing of when a claim arises for the purpose of bankruptcy remains undetermined, a significant number of courts find that a claim arises upon the debtor's conduct giving rise to liability in order to include more creditors in the distribution of assets and to provide the debtor with a fresh start. See, e.g., *In re Jensen*, 127 B.R. 27, 32 (Bankr. 9th Cir. 1991) (claim arises at time when acts giving rise to liability were performed); *In re Chateaugay Corp.*, 112 B.R. 513, 521 (S.D.N.Y. 1990) (contingent claim must result from pre-petition conduct fairly giving rise to the claim), *aff'd*, 944 F.2d 997, 1005 (2d Cir. 1991); *In re A.H. Robins Co.*, 63 B.R. 986, 993 (Bankr. E.D. Va. 1986) (claim arose at the time Dalkon Shield was inserted into claimant), *aff'd*, *Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir. 1988); *In re Johns Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) (in determining when liability arose, focus should be on when the acts giving rise to the alleged liability were performed). Cf. *In re Edge*, 60 B.R. at 701. The *Edge* court stated that a claim arose at the "earliest point in the relationship between victim and wrongdoer," *id.* at 699, later identifying this point as the moment when the tortious act occurred. *Id.* This suggests that the "relationship" approach is merely another way to date liability from the debtor's conduct creating the liability. *But see, e.g., Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 943 (3d Cir.) (existence of a contin-

courts have recharacterized these contingent claims as "interests" While they have not held that future tort claimants in mass tort cases possess dischargeable claims, they have acknowledged that unforeseen claimants may possess a significant interest in the debtor's estate, which deserves consideration in the bankruptcy.¹²⁵ While courts have noted the considerable problem of providing all possible claimants with proper notice,¹²⁶ none as yet have articulated any specific balancing test for evaluating when, if ever, a claim may be discharged without notice.

a. *In re Johns Manville Corp.*

In *In re Johns Manville Corp.*,¹²⁷ the bankruptcy court addressed whether it could appoint a representative for future tort claimants injured by Manville's asbestos products. It found that unforeseeable plaintiffs were interested parties to the bankruptcy¹²⁸ under section 1109(b),¹²⁹ and thus were entitled to representation.¹³⁰ The court declined to address whether those interests were dischargeable claims,¹³¹ because the reorganization plan treated future claims as non-dischargeable.¹³² To reach this result the court focused on the impact of determining the rights of parties absent from the case and ignorant of its ramifications.¹³³ The court balanced Congress' intention that bankruptcy

gent claim is premised on the existence of a legal relationship relevant to the purported interest from which that interest flows), *cert. denied*, 474 U.S. 864 (1985).

Most of the environmental cases discussed in this note determined the classification of the EPA's claim as a pre-petition unsecured claim on the timing of the debtor's conduct. See *In re Chicago, Milwaukee, St. Paul & Pacific Rail Road Co.*, 974 F.2d at 786; *Chateaugay*, 944 F.2d at 1005; *In re National Gypsum Co.* 139 B.R. at 407; *Jensen*, 127 B.R. at 32. But see *In re Penn Central Transp. Co.*, 944 F.2d 164, 167-68 (3d Cir. 1991) (response costs arising out of pre-petition or pre-consummation activities of debtor not discharged by bankruptcy because claims based on CERCLA, which was not enacted until after the consummation order was entered); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835-36 (D. Minn. 1990) (CERCLA claim did not arise until costs were incurred).

125. See, e.g., *In re Amatex Corp.*, 755 F.2d 1035, 1042-43 (3d Cir. 1985) (future claimants are sufficiently affected by the reorganization proceedings to require some voice in them); *In re Johns-Manville Corp.*, 36 B.R. 743, 747-53 (Bankr. S.D.N.Y. 1984) (future tort claimants are parties in interest to the bankruptcy for a variety of reasons).

126. See *In re UNR Industries, Inc.*, 725 F.2d 1111, 1119-20 (7th Cir. 1984). See generally Anne Hardiman, Note, *Recent Development: Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 VAND. L. REV. 1369, 1382-89 (1985).

127. 36 B.R. 743 (Bankr. S.D.N.Y. 1984).

128. *Id.* at 745-47.

129. 11 U.S.C. § 1109(b) (1988). The section addresses a party's right to be heard and states: "A party in interest, including the debtor, the trustee, a creditors committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter." *Id.*

130. *In re Johns-Manville Corp.*, 36 B.R. at 757-59.

131. *Id.* at 754.

132. *Id.* However, since the plan entitled the claimants to recover their damages from a pool of assets and limited their recovery to this pool, their future claims were effectively discharged. *Id.*

133. See *id.* at 749-59.

courts address all of the debtor's obligations in a Chapter 11 case, and the potential detriment to creditors and parties in interest if these interests were not included in the proceeding, against the need for notice and the logic that claims arise upon their discovery by the claimholder.¹³⁴ To the *Manville* court, legal authority and logic demanded that claims accrue from the point of discovery rather than exposure, since no plaintiff could bring a case against a tortfeasor before he or she had manifested some injury.¹³⁵ However, where injuries might not manifest themselves for years, failing to provide for future claimants in the bankruptcy could jeopardize their ultimate recovery. *Manville* might distribute its assets to the known tort claimants and have little left over with which to pay the later claims.¹³⁶ *Manville* might even be forced to liquidate and go out of business, leaving future tort claimants uncompensated.¹³⁷ Although provision of adequate notice to all parties impacted by the proceedings when neither the claimants themselves nor the debtor were aware of their status might be a challenging problem, the court found that it was not an insurmountable one.¹³⁸ Therefore, efficient resolution of the interests of the debtor, trade creditors, and tort creditors, in accordance with the broad scope of the policies of the Code, warranted recognition of future tort claimants' interests in the bankruptcy, regardless of whether they themselves knew of those interests.

In reaching its conclusion, the *Manville* court criticized the analysis of the district courts in *In re UNR Industries, Inc.*¹³⁹ and *In re Amatex*

134. See generally *Manville*, 36 B.R. at 751-59.

135. *Id.* at 751-52 n.4. The court also noted that in many states, the statute of limitations does not begin to run on such a tort claim until discovery. However, to limit the definition of a claim cognizable in bankruptcy by the differing statutes of limitation in each state would generate inconsistent results, *id.*, and would allow state law to restrict the scope of Congress' definition of a claim. *Id.* at 754 n.6.

136. *Id.* at 746.

137. *Id.*

138. *Id.* at 755 n.6. The court noted that the varieties of electronic media available to the legal representative of future claimants improved the likelihood that claimants would receive reasonable notice. The court also noted that under the case law developed from the Supreme Court's decision in *Mullane* the court was to balance the overall interest in resolution of the case with the individual's interest in adequate protection. *Id.* at 756 n.6 (citing *In re DCA Development Corp.*, 489 F.2d 43, 46 (1st Cir. 1973)). Where parties were unknown, constructive or informal notice would suffice if "it is reasonably calculated under all the circumstances to afford interested parties an opportunity to be heard." *Manville*, 36 B.R. at 756 (citing *In re GAC Corp.*, 681 F.2d 1295 (11th Cir. 1982)).

139. 29 B.R. 741 (D.C.N.D. Ill. 1983). In *In re UNR Industries, Inc.*, District Judge Hart denied the debtor's request that the court appoint a representative for future tort claimants. The court stated that tort claims were not contingent claims under the Code. *Id.* at 745. Furthermore, future tort claimants without discernable injury had no tort claims cognizable in bankruptcy, thus their claims did not arise in time to participate in the case. *Id.* Additionally, there would be no way to ensure adequate representation. *Id.* at 747. (The court noted that in a non-bankruptcy context courts had refused to grant class certification in mass tort actions because it was impossible to ensure adequate representation of disparate interests. In a bankruptcy context, there was no greater assurance that an appointed representative would be able to represent adequately the interests of future claimants.) Finally, the variety of ways in which asbestos related injuries could

*Corp.*¹⁴⁰ Both courts refused to recognize the interests of future tort claimants in the bankruptcies based on narrow interpretations of Congress' intent under the Code.¹⁴¹

D. *Limiting Dischargeable Claims to Foreseeable Claims Subverts Bankruptcy Policy*

A debtor's liability for CERCLA response costs at sites which the debtor does not own fits the definition of a dischargeable, contingent claim as developed by Congress and the courts.¹⁴² The *Chicago* and *Gypsum* decisions added a foreseeability standard to prevent the debtor from discharging responsibility for CERCLA cleanup costs before they could be assessed in an effort to protect the EPA's right to payment of those claims. However, such a conclusion begs the question of whether payment can be secured from another PRP. CERCLA holds owners, operators, transporters and those who arranged for transport of hazardous

occur would defeat all attempts at personal notice. *Id.* at 747. *But see Mullane*, 339 U.S. at 318 (holding that constructive notice is appropriate where the parties are unknown and personal notice would be burdensome enough to defeat the resolution of the government's purpose).

In contrast, on appeal the Seventh Circuit in *In re UNR Industries, Inc.*, 725 F.2d 1111 (7th Cir. 1984), commented in dicta that whether or not a plaintiff had a manifested injury, and thus a cause of action in tort, equitable considerations might warrant recognition of unmanifested claims in bankruptcy. *Id.* at 1119. First, the date upon which the tort manifests itself is arbitrary. *Id.* Thus, similarly situated creditors whose disease was merely more aggressive would get the first, and perhaps the only, opportunity to collect from the debtor. Second, the corporation itself might not be able to reorganize successfully if future claims are not discharged before they ripen. *Id.* at 1119-20. If the corporation were liquidated, present creditors could be damaged, because the liquidation value of the enterprise might not exceed the going concern value. *Id.* at 1120. However, the court was stymied by the impossible and "quixotic" prospect of providing constitutionally adequate notification to future claimants. *Id.*

140. 30 B.R. 309 (Bankr. E.D. Pa. 1983). The bankruptcy court in *In re Amatex Corp.* denied the debtor's request for a *guardian ad litem* to represent the interests of future tort claimants. *Id.* at 315. Based upon the legislative history, the court held that Congress intended the term "creditor" to mean a holder of prepetition claims against the debtor. *Id.* at 314. Since a tort claim does not arise under non-bankruptcy law until the plaintiff manifests an injury, future tort claimants presented no claim recognized by the Code. *Id.* As a plan can affect only prepetition claims or interests, their interests would not be discharged by confirmation of the reorganization plan. *Id.* at 315. Therefore, the court saw no reason to appoint a representative to represent interests unrecognized by the Code. *Id.*

On appeal, the Third Circuit held that future claimants were parties in interest under section 1109(b) and were sufficiently affected by the bankruptcy proceedings to warrant appointment of their own representative. *In re Amatex Corp.*, 755 F.2d 1034, 1042-43 (3d Cir. 1985). It specifically avoided making any determination regarding whether or not future tort claimants were creditors with claims under the Code. *Id.* at 1041. However, it did note that failing to recognize them in the bankruptcy proceeding could jeopardize the success of the reorganization and could prejudice the position of future claimants. *Id.* at 1041-42.

141. *See generally* notes 139-40.

142. *See generally supra* notes 23-141 and accompanying text.

waste strictly liable for cleanup costs,¹⁴³ even if they neither caused nor contributed to the release of hazardous waste at the site.¹⁴⁴ Most courts have held that CERCLA imposes joint and several liability upon PRPs, although this is not explicitly set forth in the statute.¹⁴⁵ This liability runs with the land; if the debtor owns the site and sells it to another, that buyer assumes the debtor's liability as owner of the site.¹⁴⁶ Thus, if the EPA cannot collect the debtor's share of response costs from the debtor, it can look to other responsible parties for payment.

Consequently, the debtor's discharge may cause another responsible party to be held liable for a disproportionate share of the pollution.¹⁴⁷ While section 113(f) of CERCLA allows responsible parties left with the cleanup bill to sue other responsible parties for contribution,¹⁴⁸ section

143. 42 U.S.C. § 9607(a) (1988). An entity becomes liable for response costs under CERCLA if it is:

(1) the owner or operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for transport for disposal or treatment, or arranged with a transporter for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance

42 U.S.C. § 9607(a)(1)-(4) (1988). See *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 840 (4th Cir. 1992); *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 838 (1987); *New York v. Shore Realty*, 759 F.2d 1032, 1042 (2d Cir. 1985).

144. See *Olin Corp. v. Consolidated Aluminum Corp.*, 807 F Supp. 1133, 1136 (S.D.N.Y. 1992).

145. See *United States v. Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1377-78 (8th Cir. 1989). See, e.g., *Northeastern Pharmaceutical*, 810 F.2d at 732 n.3; *Shore Realty*, 759 F.2d at 1052 n.13; *United States v. Chem-Dyne Corp.*, 572 F Supp. 802, 808-10 (S.D. Ohio 1983). As the *Gypsum* court recounts, *Chem-Dyne* was the first court to introduce the joint and several liability standard into the CERCLA liability analysis and subsequent decisions have accepted this finding. *In re National Gypsum Co.*, 139 B.R. at 414.

146. See *In re CMC Heartland Partners*, 966 F.2d 1143, 1146-47 (7th Cir. 1992). This is so unless the owner can assert one of the defenses listed in section 107(b). These allow a party to escape liability for releases resulting from an act of God, war, or the act or omission of a third party with whom the party had no prior relationship. In this last circumstance, the party must prove that she exercised due care in handling the hazardous substance and took precautions against foreseeable acts or omissions. 42 U.S.C. § 9607(b)(1)-(4) (1988).

147. See *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

148. 42 U.S.C. § 9613(f)(1) (1988). The section provides in pertinent part:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under 9606 of this title or section 9607 of this title.

502(e)(1)(B) disallows contingent claims for contribution from participation in the bankruptcy.¹⁴⁹ In other words, if the responsible party seeking contribution has not yet liquidated the amount of the cleanup costs either by performing the cleanup or by paying the EPA, the claim is contingent, and is therefore disallowed.¹⁵⁰ Since the bankruptcy discharges the debtor's liability for all debts, whether allowed or disallowed,¹⁵¹ the PRP's claim against the debtor is extinguished.¹⁵² Furthermore, with respect to undiscovered sites, the contribution rights of fellow PRP's against the debtor-PRP are then terminated by the discharge before anyone can contemplate the release, let alone the need for contribution.¹⁵³ Although Congress added the contribution provision to CERCLA to facilitate expeditious settlement and cleanup of toxic sites¹⁵⁴ by allowing responsibility for the cleanup costs of a given site to be more equitably distributed between responsible parties,¹⁵⁵ CERCLA's strict liability standard places payment above such equitable considerations. Discharging contingent claims in bankruptcy thwarts the equitable distribution of the costs, but not necessarily the payment of those costs. While Congress should remedy this conflict so that costs may be distributed equitably, as CERCLA intends, judicial resolution of this problem through the foreseeability requirement is inappropriate.

If, however, the debtor currently owns the site, the Code requires that the debtor pay incurred response costs in full because they are expended to preserve property belonging to the estate.¹⁵⁶ Section 503(b)(1)(A) of the Bankruptcy Code allows the costs of preserving the estate to be treated as administrative expenses.¹⁵⁷ Section 507(a)(1) specifies that

Id.

149. 11 U.S.C. § 502(e)(1)(B) (1988). The section states in pertinent part: "The court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that— (B) such claim for reimbursement or contribution is contingent at the time of the allowance or disallowance of such claim for reimbursement or contribution" *Id.*

150. *Id.* See *In re Charter Co.*, 862 F.2d 1500, 1502-03 (11th Cir. 1989). See also *In re Dant & Russell, Inc.*, 951 F.2d 246, 248-50 (9th Cir. 1991) (upholding the allowance of contribution claim for incurred response costs and disallowance of claim for unincurred response cost); *In re Hemmingway Transport, Inc.*, 105 B.R. 171, 175, 178 (Bankr. D. Mass. 1989) (claim for costs for remedial action undertaken by PRP at site was allowable in the debtor's bankruptcy, however claim for costs as yet unincurred by the EPA for which the PRP might be adjudged liable in the future was not allowable).

151. 11 U.S.C. § 1141(d)(1)(A)(ii) (1988). The provision states in pertinent part, "the confirmation of a plan— (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not— (ii) such claim is allowed under section 502 of this title" *Id.*

152. See Jonas, *supra* note 7, at 883.

153. See *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 784 (7th Cir. 1992) (the court refused to adopt the Second Circuit's standard for dischargeability set forth in *Chateaugay* because it might cut off future creditor's claims).

154. See Jonas, *supra* note 7, at 860.

155. *Id.* at 881-82.

156. See generally 11 U.S.C. § 541 (1988) (defining property of the estate).

157. 11 U.S.C. § 503(b)(1)(A) (1988). The statute provides in pertinent part: "After

these claims are the first ones paid out of the estate,¹⁵⁸ and section 1129(a)(9) requires that the plan provide for their payment in full in order for the plan to be confirmed.¹⁵⁹ What constitutes "actual and necessary expenses" of preserving the estate is narrowly construed.¹⁶⁰ Actual benefit must accrue to the estate.¹⁶¹ The expenses must be incurred to remedy a condition that has arisen post-petition,¹⁶² or to remedy a continuing violation of the environmental laws,¹⁶³ and not merely a pre-petition condition which does not threaten to degrade the estate.¹⁶⁴ Thus, response costs incurred to remedy a release or threatened release at a site owned by the debtor which poses an imminent public health hazard and which constitutes a continuing violation of an environmental law are administrative expenses which the debtor must pay in full.

Discharging response costs arising out of the debtor's conduct at sites the debtor does not own not only comports with the letter of the Code, but also furthers its primary policies. To hold such claims non-dischargeable might impair the fresh start by loading the reorganized debtor with such significant and long term liability that the reorganization might not succeed.¹⁶⁵ In the face of these response costs, post-bankruptcy creditors might consider the debtor a bad risk, and might refuse to lend to the

notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including— (1)(A) the actual, necessary costs and expenses of preserving the estate " *Id.*

158. 11 U.S.C. § 507(a)(1) (1988). The statute provides in pertinent part: "The following expenses and claims have priority in the following order: (1) First, administrative expenses allowed under section 503(b) of this title " *Id.* However, these expenses may not be the first paid where the court has allowed another creditor higher priority in order to protect a secured creditor whose security is rendered inadequate as a result of the automatic stay, to allow the trustee to use, sell or lease property of the debtor that secures a creditor's claim against the debtor, or to finance the running of the debtor's business. See 11 U.S.C. §§ 362, 363, 364(d) (1988). See also 11 U.S.C. § 507(b) (1988) (describing this alteration in the priority scheme).

159. 11 U.S.C. § 1129(a)(9)(A) (1988). The statute provides in pertinent part:

The court shall confirm a plan only if all of the following requirements are met:

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that— (A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim

Id.

160. See *In re Dant & Russell, Inc.*, 853 F.2d 700, 706 (9th Cir. 1988).

161. *Id.*

162. See *In re Chateaugay Corp.*, 944 F.2d 997, 1009-10 (2d Cir. 1991).

163. See *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985); see also *Midlantic National Bank v. N.J. Dep't of Environmental Protection*, 474 U.S. 494, 507 (1986) (the Bankruptcy Code does not entitle a debtor to abandon property in violation of an environmental law reasonably designed to protect public health or safety from identified hazards).

164. See, e.g., *In re Chateaugay Corp.*, 944 F.2d 997, 1009-10 (2d Cir. 1991) (cleanup costs incurred post-petition to clean up pre-petition spill on site owned by the debtor were allowed as administrative expenses because the EPA was remedying the ongoing effects of a release of hazardous substances).

165. See *Chateaugay*, 944 F.2d at 1002.

creditor at all, or only at exorbitant rates.¹⁶⁶ Ultimately, the debtor might be forced to liquidate under Chapter 7, or to dissolve under state law.¹⁶⁷

Finding unforeseeable costs to be non-dischargeable would similarly defeat the policy of equality among creditors, principally temporal equality. Temporal equality requires equal treatment among similar claims no matter when the debtor's obligation to pay will arise.¹⁶⁸ For example, a contract creditor whom the debtor was supposed to pay just prior to bankruptcy is treated identically to one whom the debtor was supposed to repay in the distant future, so long as the debtor entered in to both contracts prior to the filing of the petition.¹⁶⁹ In contrast, despite the fact that the EPA's right to payment may have arisen at the same time as those of other unsecured creditors,¹⁷⁰ under a foreseeability standard, the EPA would not have a dischargeable claim merely because it could not foresee the extent of the debtor's liability.¹⁷¹ The EPA would be able to assert its claims against the debtor later, and receive full payment, instead of settling for a pro-rata share of the assets in the bankruptcy. However, the EPA would risk that the entity might ultimately convert the case to Chapter 7 and liquidate its assets, leaving nothing to collect after the bankruptcy.¹⁷² Thus, the debtor would have no assets against which the EPA could recover. Congress sought to foreclose this possibility in its rejection of provability.¹⁷³ Therefore, the only way to implement these bankruptcy policies is to discharge response costs resulting from the debtor's pre-petition conduct at sites the debtor does not own.

Classifying CERCLA response costs arising out of cleanups conducted at sites which the debtor does not own as pre-petition dischargeable claims, regardless of whether such costs have been incurred, limits the latitude of cost distribution envisioned by the statute.¹⁷⁴ Nevertheless, discharging these costs does not preclude their recovery from another source.¹⁷⁵ The inequity of allowing debtor-PRPs to extinguish or limit their liability under CERCLA has disturbed the courts, leading them to curtail the scope of dischargeable response costs to what was foreseeable through testing or other investigation.¹⁷⁶ However, this judi-

166. See Mark J. Roe, *Bankruptcy And Mass Tort*, 84 COLUM. L. REV. 846, 856-57 (1984).

167. *Chateaugay*, 944 F.2d at 1002.

168. See Roe, *supra* note 166, at 853.

169. *Id.*

170. The EPA's right to payment, or claim, arises upon the release or threatened release of hazardous substances, however, it is also contingent because the EPA has not yet incurred the response costs. See *In re Chateaugay Corp.*, 944 F.2d 997, 1004-05 (2d Cir. 1991).

171. See *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 784 (1992); *In re National Gypsum Co.*, 139 B.R. 397, 407-08 (N.D. Tex. 1992).

172. *Chateaugay*, 944 F.2d at 1002.

173. See *supra* notes 81-85 and accompanying text.

174. See *supra* notes 147-155 and accompanying text.

175. *Id.*

176. See *supra* notes 43-47 and 61-65 and accompanying text.

cial harmonization of the statutes fails to resolve the procedural conflict which impairs CERCLA's function. Identifying unincurred response costs as dischargeable claims thwarts CERCLA by interrupting its procedures for determining liability and performing cleanups. Congress must harmonize the Code and CERCLA, because regardless of whether the EPA has notice or can foresee unincurred response costs, the bankruptcy procedures so truncate essential processes governing CERCLA clean-ups that CERCLA's substantive goals are undermined. Specifically, the process of estimating contingent claims for the purpose of including them in the bankruptcy case allows the debtor to challenge its liability with respect to sites the EPA may have neither investigated nor even discovered. Twisting the Bankruptcy Code to suggest that foreseeable response costs are dischargeable while unforeseeable response costs are not leaves unaddressed the more significant procedural conflict between the two statutes.

II. DISCHARGING UNINCURRED CERCLA CLAIMS UNDERMINES PROCEDURAL ASPECTS OF CERCLA THAT ARE INTEGRAL TO ITS SUBSTANTIVE GOALS

Discharging unincurred response costs creates a loophole through which debtor-PRPs can challenge their liability under CERCLA prior to any EPA enforcement action, and in some cases, even prior to discovery of the toxic site. The language of section 113(h) does not clearly resolve whether estimation of response costs in bankruptcy constitutes a pre-enforcement challenge to the debtor's CERCLA liability.¹⁷⁷ However, the legislative history behind the provision indicates that the section was included to prevent pre-enforcement challenges of liability and the concomitant waste of the EPA's time and resources in duplicative litigation.¹⁷⁸ Therefore, while an estimation hearing may not violate the letter of CERCLA's pre-enforcement review provision, it does violate the purpose of the provision as envisioned by Congress.

A. *Pre-enforcement Review of CERCLA Liability in the Bankruptcy Context*

In *In re Chateaugay Corp.*,¹⁷⁹ the court rejected the Government's argument that the factual inquiry required for the EPA to "liquidate and fix" all claims it potentially might have against LTV for post-confirmation response costs would constitute pre-enforcement review.¹⁸⁰ The court disagreed with the Government's argument that an estimation proceeding in bankruptcy court would result in disputes over the wisdom

177. See *infra* notes 242-66 and accompanying text.

178. See *infra* notes 254-60 and accompanying text.

179. 944 F.2d 997 (2d Cir. 1991). For a description of the case see *supra* notes 23-36 and accompanying text.

180. *Id.* at 1006.

and scope of possible remedies.¹⁸¹ The court found that determining the dischargeability of response costs did not require the court to review a direct challenge to a removal or remedial action selected under section 104 of CERCLA, and did not require the court to review any order issued under section 106(a).¹⁸² Furthermore, the court held that determination of the dischargeability of the EPA's option to seek payment did not involve an assessment of the debtor's liability.¹⁸³ Therefore, the decision did not constitute a review of agency action under CERCLA.¹⁸⁴

In contrast, the district court in *In re National Gypsum Co.*¹⁸⁵ found that a declaratory proceeding to determine the dischargeability of CERCLA liability obstructed normal CERCLA enforcement proceedings by precluding future assertion of liability against debtors with respect to undiscovered or unexamined sites.¹⁸⁶ The EPA again argued that designation of future response costs as dischargeable claims would impermissibly interfere with CERCLA enforcement, conflicting with the jurisdictional bar of section 113(h).¹⁸⁷ The court agreed that a challenge to liability also constituted a challenge to a response action, impermissible under section 113(h), suggesting that the debtor's attempt to declare that future response costs were dischargeable constituted a challenge to liability.¹⁸⁸ Discharge of unincurred response costs arising from unlisted sites would preclude the EPA from asserting liability in the future at sites not listed in its proof of claim.¹⁸⁹ However, the court interpreted the EPA's filing of a proof of claim as an act of enforcement which implicated the exceptions of section 113(h).¹⁹⁰ The court added that to exclude future re-

181. *Id.*

182. *Id.* (citing 42 U.S.C. § 9613(h) (1988)). Section 9613(h) of CERCLA bars courts from reviewing EPA removal or remedial actions unless certain criteria are met. *See* 42 U.S.C. § 9613(h) (1988).

183. *Id.* *See In re Chateaugay Corp.*, 112 B.R. 513 (S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991).

184. *Chateaugay*, 944 F.2d at 1006.

185. 139 B.R. 397 (N.D. Tex. 1992).

186. *Id.* at 411.

187. 42 U.S.C. 9613(h) (1988).

188. *Gypsum*, 139 B.R. at 411; *see also* Voluntary Purchasing Groups, Inc., v. Reilly, 889 F.2d 1380, 1389-90 (5th Cir. 1989) (court held review of PRP complaint in a declaratory proceeding barred by § 113(h) since a PRP was not liable party until EPA had brought a cost recovery action). *Cf. Manville Corp. v. United States*, 139 B.R. 97 (S.D.N.Y. 1992). The case involved Manville's liability as a PRP at four sites. At each site the EPA had performed sufficient investigation to determine Manville's liability as a PRP, but had failed to file a proof of claim either before or after the bar date. The court held that unless Manville contested its liability at the sites or the methods the EPA used to clean up those sites, the present dischargeability proceeding exceeded its purview despite the fact that discharging EPA claims would be tantamount to a determination of no liability. *Id.* at 104-05.

189. *Gypsum*, 139 B.R. at 410-11.

190. *Gypsum*, 139 B.R. at 411; *see* 42 U.S.C. § 9613(h) (1988). The exceptions to CERCLA's general jurisdictional bar under § 9613(h) are:

- (1) An action under section 9607 of this title to recover response costs or damages or for contribution.
- (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.
- (3) An

sponse costs from the bankruptcy would allow the EPA to retain its claims for post-bankruptcy proceedings. Thus, the EPA could effectively circumvent the Code "to the detriment of all other creditors whose claims are discharged, and [to the detriment] of the [d]ebtors to the extent post-bankruptcy environmental claims impacts their ability to effectively reorganize."¹⁹¹

B. *The Estimation Process in Bankruptcy*

Section 101(5) of the Bankruptcy Code defines a claim cognizable in bankruptcy broadly in order to discharge as many of the debtor's outstanding obligations as possible.¹⁹² To facilitate accomplishment of this goal, Congress granted the bankruptcy court the power to estimate the value of unliquidated¹⁹³ or contingent¹⁹⁴ claims to facilitate the rapid administration of the case.¹⁹⁵ Courts first evaluate whether leaving liquidation of the claim to processes outside the bankruptcy court would unduly delay the administration of the bankruptcy.¹⁹⁶ Determining what constitutes undue delay is left to judicial discretion based upon the circumstances of the case. For example, the courts may scrutinize the likely duration of the liquidation process in relation to the future uncertainty of the contingency which will ultimately determine the amount of the claim.¹⁹⁷ A court must also evaluate whether leaving the claim unestimated would hamper the court's ability to evaluate the feasibility of any

action for reimbursement under section 9606(b)(2) of this title. (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site. (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

Id.

191. *Gypsum*, 139 B.R. at 411.

192. See *supra* notes 70-78 and accompanying text.

193. While the Bankruptcy Code does not define the term "unliquidated," the "courts have consistently defined an unliquidated claim as one that is not subject to 'ready determination and precision in computation of the amount due' or 'capable of ascertainment by reference to an agreement or by simple computation.'" *In re Interco, Inc.* 137 B.R. 993, 997 (Bankr. E.D. Mo. 1992) (quoting *In re Fostvedt*, 823 F.2d 305, 306 (9th Cir. 1987)); see *In re Wenberg*, 94 B.R. 631, 634 (Bankr. 9th Cir. 1988), *aff'd*, 902 F.2d 768 (9th Cir. 1990).

194. The term "contingent" is similarly undefined in the Bankruptcy Code, however the characteristics of a contingent claim are that "the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and [that] such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created." *In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981).

195. See, e.g., SEN. REP. NO. 95-989, 95th Cong., 2d Sess. 65 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5851, 5787, 6310.

196. 11 U.S.C. § 502(c)(1) (1988).

197. 3 COLLIER ON BANKRUPTCY ¶ 502.03 at 502-73 (Lawrence P. King et al. eds., 15th ed. 1993); see *In re Interco, Inc.*, 137 B.R. 993, 997 (Bankr. E.D. Mo. 1992).

proposed reorganization plan.¹⁹⁸ If confirmation must await the liquidation of a claim, the claim should be estimated.¹⁹⁹ Indeed, the court may not be able to determine the feasibility of the confirmation plan where significant claims remain unliquidated.²⁰⁰ Finally, courts may also consider whether estimation of a given claim would prevent "piecemeal litigation" capable of jeopardizing a debtor's reorganization.²⁰¹

To estimate a claim, the bankruptcy court conducts a hearing at which creditors present evidence as to the claim's true value.²⁰² The procedures used to estimate claims are similarly left to judicial discretion within certain guidelines. While section 502 of the Bankruptcy Code provides no guidance with respect to the appropriate method for estimating claims, bankruptcy courts have determined that judges should use the methods best suited to obtain a reasonably accurate evaluation of the claims. The court may accept a claimant's assessment of her claim at face value, estimate the claim at zero and waive its discharge under section 1141(d),²⁰³ or employ arbitration or a jury trial in order to accurately resolve its value.²⁰⁴ The hearing need not provide the same degree of certainty as

198. *Interco*, 137 B.R. at 998.

199. *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374, 1382 (Bankr. 9th Cir. 1985).

200. *See, e.g., In re Lane*, 68 B.R. 609, 611 (Bankr. D. Haw. 1986) (claim must be estimated where awaiting the outcome of pending state trial proceedings would unduly delay case); *In re Pizza of Hawaii, Inc.*, 40 B.R. 1014 (D. Haw. 1984), *aff'd*, 761 F.2d 1374, 1382 (Bankr. 9th Cir. 1985) (without benefit of estimate of the claim which could result from a favorable judgment in a civil case, the bankruptcy could not have adequately estimated the plan's feasibility). Section 1129(a)(11) of the Bankruptcy Code preconditions confirmation of a reorganization plan upon a bankruptcy court's determination that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129(a)(11) (1988).

201. *See In re Johns-Manville Corp.*, 57 B.R. 680, 687 (Bankr. S.D.N.Y. 1986).

202. *See Bittner*, 691 F.2d at 135. 28 U.S.C. § 157(b)(2)(B) grants the bankruptcy court the authority to hear and determine all core proceedings arising in cases under the code, including estimation of claims or interests for the purpose of allowance or confirmation. 28 U.S.C. § 157(b)(2)(B) (1988). The provision states:

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title. (2) Core proceedings include, but are not limited to (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11

Id., *see In re Federal Press Co.*, 116 B.R. 650 (Bankr. N.D. Ind. 1989); *see also* Bankruptcy Rule 3018(a): "Nonwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan." *Id.*

203. *See Bittner*, 691 F.2d at 135.

204. *In re Federal Press Co.*, 116 B.R. at 653. Jury trials and arbitration are generally reserved for unusual cases where no other methods will suffice. *See Bittner v. Borne*

would a trial on the merits; it need only be sufficiently comprehensive to provide a reasonable basis for estimating claims.²⁰⁵ The substantive requirements of the hearing are also left to the court's discretion. The court must evaluate the evidence put forth and argued by the parties in accordance with the legal rules governing the ultimate value of the claim.²⁰⁶ For example, the worth of a claim based upon an alleged breach of contract is estimated in accordance with contract law²⁰⁷ In the context of CERCLA liability, therefore, the court must base its evaluation upon CERCLA and the related regulations which establish the legal framework of the claims.²⁰⁸

In theory, the estimation has limited effect. It fixes the value of claims solely for the purpose of their allowance in the bankruptcy case, and is relevant only for determining the claim's share in the assets of the bankruptcy²⁰⁹ The estimation is not for non-bankruptcy purposes,²¹⁰ and thus has no effect upon the ultimate liquidation of the claim in a non-bankruptcy forum. In practice, however, the estimated value often caps the amount recoverable on the claim regardless of its outcome in state court.²¹¹ The Code's discharge provisions make no exception for claims estimated for purposes of confirmation which are ultimately liquidated in a non-bankruptcy proceeding.²¹² Thus, once a Chapter 11 case closes, the amount which the plan allots to a particular claimant on a particular claim caps what that creditor may recover from the debtor regardless of any subsequent larger judgment, unless an exception is made in the reorganization plan.²¹³ More than one court has concluded that section 502(c), when read with section 502(j), establishes the claim's outer lim-

Chemical Co., Inc., 691 F.2d at 135 (citing 3 COLLIER ON BANKRUPTCY ¶ 502.03 (Lawrence P. King et al. eds., 15th ed. 1981)).

205. *Baldwin*, 55 B.R. at 899.

206. *Bittner*, 691 F.2d at 135.

207. *Id.*

208. *See In re National Gypsum Co.*, No. 390-97213-SAF-11, 1992 WL 426464 (Bankr. N.D. Tex. June 24, 1992).

209. *See* 3 COLLIER ON BANKRUPTCY ¶ 502.02, 502-18 to 502-23 (Lawrence P. King et al. eds., 15th ed. 1993); *see, e.g., In re Thomson McKinnon Securities, Inc.*, 143 B.R. 612, 619 (Bankr. S.D.N.Y. 1992); *In re Johns-Manville Corp.*, 45 B.R. 823, 826 (S.D.N.Y. 1984).

210. *See In re Nova Real Estate Inv. Trust*, 23 B.R. 62, 66 (Bankr. E.D. Va. 1982); *In re Lane*, 68 B.R. 609, 613 (Bankr. D. Haw. 1986); *In re Interco, Inc.*, 137 B.R. at 998-99.

211. *See, e.g., In re Poole Funeral Chapel, Inc.*, 63 B.R. 527, 532 (Bankr. N.D. Ala. 1986) (limiting ultimate distributions to creditors on basis of estimated value for purposes of confirming plan, rather than ultimate liquidated value, is sensible because there is a limit to what may be distributed regardless of the amount recovered in state court); *In re Baldwin-United Corp.*, 57 B.R. 751, 758 (S.D. Ohio 1985) ("If liability is ultimately found [in the non-bankruptcy court proceeding], claimants would then be able to receive payment up to the amount of the judgment or the estimated value, whichever is lower") (emphasis added).

212. *See* 11 U.S.C. §§ 727, 1141(d), 1328 (1988 & Supp. III 1991).

213. *See, e.g., In re Chateaugay Corp.*, 944 F.2d 997, 1006 (2d Cir. 1991) ("[N]othing prevents the speedy and rough estimation of CERCLA claims for purposes of determining EPA's voice in the Chapter 11 proceedings, with ultimate liquidation of the claims to await the outcome of normal CERCLA enforcement proceedings in which EPA will be

its, subject only to a section 502(j) motion for reconsideration.²¹⁴

C. Congress' Reasons for Prohibiting Pre-enforcement Review

Congress enacted CERCLA to combat the threat to public health and the environment presented by improper disposal of hazardous waste.²¹⁵ Congress added CERCLA's jurisdictional bar, section

entitled to collect its allowable share (full or pro-rata, depending upon the reorganization plan) ").

214. *In re Baldwin-United Corp.*, 55 B.R. 885, 898 (Bankr. S.D. Ohio 1985); *see, e.g., In re Poole Funeral Chapel, Inc.*, 63 B.R. 527, 532 (Bankr. N.D. Ala. 1986) (referring to Congressman Kindness' statements: "Mr. Kindness' view permit[s] the bankruptcy court to distribute to the creditors on the basis of its estimates for the purposes of confirming a Chapter 11 plan. It makes good sense because there is a limit to what may be distributed no matter how much is recovered in the district court or the state court").

As an alternative to this harsh outcome, some courts have cited § 502(j), which provides for the reconsideration of both allowed and disallowed claims by the court for cause. *See, e.g., In re M Corp. Financial, Inc.*, 137 B.R. 219, 226 (Bankr. W.D. Tex. 1992); *In re MacDonald*, 128 B.R. 161, 168 (Bankr. W.D. Tex. 1991); *In re Lane*, 68 B.R. 609, 613 (Bankr. D. Haw. 1986). Section 502(j) provides:

A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

11 U.S.C. § 502(j) (1988).

However, it is unclear that "cause" within the meaning of the provision means the awaited liquidation of a claim by judgment in another court. Traditional grounds for reconsideration of claims have included the discovery of new facts, the discovery of new evidence to support the facts that could not have been discovered sooner, or the discovery of clear errors in the order of allowance. 3 COLLIER ON BANKRUPTCY ¶ 502.10 at 502-107 (Lawrence P King et al. eds, 15th ed. 1993). After a case has closed, however, there is no indication in the Code or the Rules that Congress intended that creditors should be able to reopen a case to improve their distribution under a confirmation plan. *See* 11 U.S.C. § 350(b) (1988). The statute reads, "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." *Id.* Cause sufficient to reopen a case is generally found in circumstances of fraud, newly discovered evidence with respect to a claim, or mistake. *See* 2 COLLIER ON BANKRUPTCY ¶ 350.03 at 350-7 (Lawrence P King et al. eds., 15th ed. 1993). Reopening cases to increase a creditor's distributive share of the estate after liquidation of the amount in another court would destroy the finality of confirmation under Chapter 11.

215. *See, e.g., Voluntary Purchasing Groups v. Reilly*, 889 F.2d 1380 (5th Cir. 1989). CERCLA's provisions serve two goals:

First, Congress intended that the federal government be immediately given the tools necessary for prompt and effective response to problems of a national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons

113(h),²¹⁶ through the Superfund Amendments and Reauthorization Act of 1986 (SARA)²¹⁷ to preclude judicial review of removal or remedial actions prior to their completion, unless one of the designated exceptions applies.²¹⁸ Section 113(h) of CERCLA bars judicial review of removal or remedial action selected under section 104,²¹⁹ or to review any action under section 106(a),²²⁰ unless the EPA is attempting to recover costs or damages, is attempting to enforce an order issued under section 106(a), or is attempting to compel a remedial action.²²¹ Removal action includes site assessment as well as physical cleanup of the site.²²² Remedial action

bear the costs and responsibility for remedying the harmful conditions they created.

United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982); see also Walls v. Waste Resources Corp., 823 F.2d 977, 980-81 (6th Cir. 1987).

216. Section 113(h) of CERCLA provides in pertinent part: "No federal court shall have jurisdiction under federal law to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action " 42 U.S.C. § 9613(h) (1988).

217. Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 42 U.S.C.).

218. See 42 U.S.C. § 9613(h)(1)-(5) (1988). The statute provides in pertinent part:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution. (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order. (3) An action for reimbursement under section 9606(b)(2) of this title. (4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site. (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

Id.

219. 42 U.S.C. § 9604(a)(1) (1988). The statute reads in pertinent part:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment

Id.

220. 42 U.S.C. § 9606(a) (1988). The statute provides in pertinent part:

[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat

Id.

221. 42 U.S.C. § 9613(h) (1988). For pertinent text of statute see *supra* note 219.

222. 42 U.S.C. § 9601(23) (1988). The statute provides in pertinent part:

The terms "remove" or "removal" means [sic] the cleanup or removal of released substances from the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous

focuses upon physical intervention in and amelioration of the site.²²³ The bar lasts until the remedy set forth in the record of decision (ROD) is fully implemented.²²⁴

Prior to SARA's enactment, courts had found an implicit jurisdictional bar within CERCLA.²²⁵ Because Congress allowed the EPA to proceed with cleanup prior to any express determination identifying the responsible parties, courts held that Congress had intended that determinations of liability for a given site should not delay remedial action. "To delay remedial action until the liability situation is unscrambled would be inconsistent with the statutory plan to promptly eliminate the sources of danger to health and environment."²²⁶

substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment

Id.

223. 42 U.S.C. § 9601(24) (1988). The statute provides in pertinent part: "The terms "remedy" or "remedial action" means [sic] those actions consistent with permanent remedy taken instead of or in addition to removal actions to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health." *Id.*

224. See H.R. CONF. REP. NO. 99-962, 99th Cong., 2d Sess. 224 (1986), reprinted in 1986 U.S.C.A.N. 3276, 3317 (response actions may be challenged only after all activities set forth in the ROD specific to that phase of the cleanup have been completed).

225. See, e.g., *Wheaton v. EPA*, 781 F.2d 354, 356-57 (3d Cir. 1986); *Lone Pine Steering Committee v. EPA*, 777 F.2d 882, 887 (3d Cir. 1985) (pre-enforcement review contrary to the policies underlying CERCLA).

226. *Lone Pine*, 777 F.2d at 886. The process of remedying a CERCLA site can be long and complicated. The EPA is authorized to take any response measure consistent with the national contingency plan which the EPA considers necessary to safeguard the public health and welfare or the environment whenever any hazardous substance is released or there is a substantial threat of such a release. 42 U.S.C. § 9604(a) (1988). Upon discovery of a release or threatened release of a hazardous substance EPA performs a preliminary evaluation of the site's overall risk according to the Hazardous Ranking System (HRS). 42 U.S.C. §§ 9604, 9605(c) (1988); see 40 C.F.R. § 300.405 (1992). See generally *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 910-11 (D.C. Cir. 1985). Sites with a sufficiently high HRS score may be placed upon the National Priority List (NPL) of sites demanding immediate attention after notice and comment. 40 C.F.R. § 300.425(c)-(d) (1992). CERCLA requires either the EPA or a PRP to prepare an RI/FS to determine the nature and extent of the threat presented by the release and to evaluate proposed remedies. 40 C.F.R. § 300.430(d)-(e) (1992); see 42 U.S.C. § 9604(a) (1988). The EPA then selects an appropriate remedy from among the range of alternatives considered for that site. See 40 C.F.R. § 300.430(f) (1992). This decision is based upon the administrative record developed during the RI/FS and must meet all applicable federal, state, and local statutory cleanup requirements. 42 U.S.C. § 9621(d) (1988). The EPA must publish notice of all proposed remedial plans and provide the public an opportunity for notice and comment prior to any plan's adoption. 42 U.S.C. § 9617 (1988). The remedy ultimately selected is embodied in a record of decision (ROD). 40 C.F.R. § 300.430(f)(ii) (1992).

After issuing its ROD, the EPA has a number of options available. It can solicit or compel PRPs to undertake the removal or remedial action through a unilateral administrative order. 42 U.S.C. § 9606(a) (1988). It can seek judicial relief through the Attorney General "as may be necessary to abate [the] danger or threat" of a release or threatened release of a hazardous substance to public health and welfare. *Id.* EPA can also perform the cleanup itself and sue the PRPs for reimbursement of expended Superfund monies. 42

Congress took this articulation of CERCLA's goals to heart in drafting the provision banning pre-enforcement judicial review.²²⁷ The legislative history of the SARA amendments demonstrates that Congress sought to prevent the delay²²⁸ and piecemeal review²²⁹ associated with allowing PRPs to challenge their liability or EPA selection of remedies for a particular site before its cleanup had been completed.²³⁰ During the floor debate, Senator Strom Thurmond, Chairman of the Senate Judiciary Committee which drafted the provision, expanded this ban to determinations of "potential liability for a response action— other than in a suit for contribution— unless the suit falls within one of the [exempt] categories of this section . . ."²³¹ Thus, Congress implicitly valued prompt cleanup over determinations of liability or the review of potentially inadequate or flawed response plans²³² because resolution of such issues did not advance Superfund's prime goal— expeditious cleanup of hazardous wastes. Congress allowed limited attack on removal or reme-

U.S.C. § 9607(a) (1988). However EPA chooses to respond to the site, it must "address the long-term effectiveness of various alternatives" in selecting a remedy. 42 U.S.C. § 9621(b)(1) (1988). Should the selected action fail to remove all pollutants or contaminants from the site, the EPA must review the remedial action "no less often than each 5 years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented." 42 U.S.C. § 9621(c) (1988). The EPA may take further action at a site if it believes such action is warranted. *Id.*

227. See S. REP. NO. 11, 99th Cong., 1st Sess. 58 (1985).

As several courts have noted, the scheme and purposes of CERCLA would be disrupted by affording review of orders or response actions prior to commencement of a government enforcement or cost recovery action. See, e.g., *Lone Pine Steering Committee v. EPA*, 22 Env't Rep. Cas. (BNA) [1113] 1118 [sic] (D.N.J. Jan. 21, 1985). These cases correctly interpret CERCLA with regard to the unavailability of pre-enforcement review. This amendment [§ 9613(h)] is to expressly recognize that pre-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups.

Id., see 132 CONG. REC. 29,735 (statement of Sen. Glickman reaffirming that 9613(h) essentially ratifies existing case law on the timing of review).

228. "Without such a provision, responses to releases or threatened releases of hazardous substances could be unduly delayed, thereby exacerbating the threat of damage to human health or the environment." H.R. REP. NO. 99-253(V), 99th Cong., 2d Sess. 25 (1985), reprinted in 1986 U.S.C.C.A.N. 3124, 3148.

229. 132 CONG. REC. 28,441 (statement of Sen. Thurmond).

230. H.R. REP. NO. 99-253 (III), 99th Cong., 2d Sess. 23 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3046.

231. 132 CONG. REC. 28,441 (Oct. 3, 1986) (statement of Sen. Thurmond).

When the essence of a lawsuit involves contesting the liability of the plaintiff for cleanup costs, the courts should apply the other provisions of section 113(h), which require such plaintiff to wait until the Government has filed a suit under sections 106 or 107 to seek review of the liability issue.

132 CONG. REC. 29754 (statement of Sen. Stafford, chairman of the Conference Committee); see also 132 CONG. REC. 28,409 (statement of Sen. Stafford).

232. *North Shore Gas Co. v. EPA*, 753 F. Supp. 1413, 1417 (N.D. Ill. 1990), *aff'd*, 930 F.2d 1239 (7th Cir. 1991).

dial actions through CERCLA's citizen suit provision, and then only if the suit alleged that the EPA was conducting a cleanup in a manner inconsistent with another CERCLA provision.²³³

While the court opinions have been broadly guided by the legislative history of section 113(h), courts have still searched the statute itself for policies to guide their interpretation.²³⁴ The policies they have discovered include: avoiding patchwork litigation which increases response costs and depletes the resources of all parties,²³⁵ avoiding inconsistent results,²³⁶ deference to EPA decisions in its area of expertise;²³⁷ minimizing the amount of environmental damages which could result from delay caused by litigation;²³⁸ ensuring that review, when it does occur, is based upon sufficient information;²³⁹ and the courts' assessment that Congress

233. 132 CONG. REC. 28,409 (statement of Sen. Stafford). Senator Stafford's remarks cautioning courts to distinguish carefully between a citizen challenge to the legality of EPA action and a PRP challenge to a remedy selection "in sheep's clothing" demonstrated Congressional intent to preclude all PRP interference with EPA remedial or removal action:

Complaints should be examined to preclude efforts to present such cases as "citizen suits" challenging illegal response action. The crucial distinction between these two types of suits is that plaintiffs concerned with the monetary consequences of a response can be made whole after the cleanup is completed by reducing the amount of the Government's recovery. But citizens asserting a true public health or environmental interest in the response cannot obtain adequate relief if an inadequate cleanup is allowed to proceed and, in effect, create a nuisance or a violation of this or other laws. Delay in the timing of suits seeking monetary damages does not diminish the court's ability to grant later and adequate relief. However, delay in the timing of suits seeking an equitable order modifying the proposed response action would undermine the court's ability, either legally or practically, to grant adequate and timely relief at a later date.

Id.

234. *Voluntary Purchasing*, 889 F.2d at 1389 (where declaratory judgment would not have delayed any actual cleanup of hazardous substances or discouraged voluntary cleanup by PRPs, the overall philosophy of the statute, as demonstrated by its structure and legislative history, guided the court).

235. *See id.* at 1390 ("[S]anctioning [Voluntary Purchasing Group's] declaratory judgment actions could lead to inefficient uses of EPA resources and would certainly detract from the EPA's ability to apportion its enforcement resources as it deems most appropriate."); *see also* *Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289, 293 (6th Cir. 1991). EPA resources may be wasted by defending against a declaratory judgment action brought by PRP's who although "identified as potentially liable suffer no harm before the EPA initiates an enforcement action since the agency might never seek to collect from them." Richard D. Faulkner, Jr., Comment, *Cercla and the Constitution: Reardon v. United States Permits Constitutional Jurisdiction and Invalidates the Federal Lien*, 26 GA. L. REV. 861, 871 (1992) (citing *Barnet Aluminum Corp. v. Reilly*, 927 F.2d 289, 293-94 (6th Cir. 1991) and *J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985)).

236. *See Voluntary Purchasing*, 889 F.2d at 1390.

237. *See, e.g., North Shore*, 753 F. Supp at 1418 ("Congress apparently intended both to facilitate prompt cleanup action and to give some deference to the judgment of the USEPA [sic], which it created to protect the public interest in enforcing federal environmental laws.")

238. *See Dickerson v. EPA*, 834 F.2d 974, 978 (11th Cir. 1987).

239. *See Reardon v. United States*, 947 F.2d 1509, 1513 (1st Cir. 1991). For example:

Notices of liens are likely to be filed early in the history of a response action
At that point, EPA is likely not yet to know the full extent of the contami-

weighted protecting the environment more heavily than determining liability.²⁴⁰ The breadth of policies which the courts have found to support CERCLA's bar against pre-enforcement review indicate the significance of the provision to the operation of the statute.²⁴¹

D. *Estimation Hearings Constitute Pre-enforcement Review*

As written, section 113(h) of CERCLA appears to preclude only judicial review which would interfere with the actual physical cleanup. Section 113(h) forbids a court from reviewing challenges to selected removal or remedial actions.²⁴² As defined by CERCLA, both "removal"²⁴³ and "remedial"²⁴⁴ actions are generally those designed to directly or indirectly ameliorate the physical aspects of the site, contain the toxic release, or otherwise protect public health in the area of the site. Estimating the value of a claim for response costs determines the dollar amount of the debtor's liability and does not affect the physical remediation of a site. While "removal action" encompasses investigation of sites, "such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of toxic substances,"²⁴⁵ an estimation hearing does not necessarily obstruct investigation. Rather, a looming estimation hearing may force parties to expedite their efforts. Therefore, according to the letter of the statute, the Second Circuit's interpretation in *In re Chateaugay Corp.*²⁴⁶ was correct; an estimation hearing does not effect pre-enforcement review

Viewed from the broader perspective of the congressional intent ani-

nation, let alone when that contamination occurred, or whether it is likely that the owner exercised due care or took reasonable precautions. One purpose of § 9613(h), we believe, is to delay review until enough is known to decide these issues.

Id.

240. See *North Shore*, 753 F Supp at 1417; *Chemical Waste Management, Inc. v. EPA*, 673 F Supp. 1043, 1055 (D. Kan. 1987).

241. Indeed, these policies have been so influential that some cases have held that not even constitutional challenges would be allowed to interrupt EPA remedial action. See, e.g., *South Macomb Disposal Authority v. EPA*, 681 F Supp. 1244, 1251 (E.D. Mich. 1988) (because section 9613(h) limits when rather than whether a constitutional challenge may be brought, it did not completely and unconstitutionally deprive plaintiffs of due process guaranteed by the fifth amendment, and it is a proper exercise of Congressional power); *Barmet*, 927 F.2d at 295-96 (where EPA has undertaken no cost recovery actions, no due process implications result from delay in availability of a hearing to contest constitutionality of EPA action). But see *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (holding that while § 9613(h) does remove the court's jurisdiction to review the substance or merits of EPA response actions or orders, the section did not bar the court from hearing constitutional facial challenges to CERCLA, and that CERCLA lien provisions violate the fifth amendment due process clause). See generally, Faulkner, *supra* note 235.

242. See *supra* notes 216-24 and accompanying text.

243. 42 U.S.C. § 9601(23) (1988).

244. *Id.* at § 9601(24) (1988).

245. *Id.* at § 9601(23) (1988).

246. 944 F.2d 977 (2d Cir. 1991).

mating the provision, it becomes apparent that estimation hearings raise other obstacles to implementation of CERCLA, which are more indirect but no less intrusive. The entire purpose of an estimation hearing is to determine the monetary amount of a claim against the debtor which cannot be liquidated prior to the close of the bankruptcy, i.e., the debtor's financial liability with respect to the claim.²⁴⁷ However, Congress has clearly stated that cleanup must take precedence over determinations of liability.²⁴⁸ As the court noted in *In re National Gypsum Co.*,²⁴⁹ the discharge of unincurred response costs fixes the debtor's financial liability under CERCLA wherever the debtor's pre-petition conduct has caused a release or threatened release of a hazardous substance, regardless of whether those sites have been investigated or even discovered.²⁵⁰ When the EPA finally establishes the debtor's liability as a responsible party at those sites post-bankruptcy, it will be precluded from asserting liability against the debtor by the debtor's discharge.²⁵¹ To the extent that the EPA receives payment from the debtor, the estimation proceeding caps the amount recoverable.²⁵² Any subsequent judgment in excess of the estimated value is unrecoverable because the EPA's claim against the debtor will have been discharged upon the close of the bankruptcy.²⁵³ Therefore, the estimation process clearly constitutes pre-enforcement review to the extent that it defines the scope of a debtor-PRP's financial liability under CERCLA prior to cleanup.

Courts have also acknowledged the need to assure that review of response costs or enforcement actions is based upon sufficient information.²⁵⁴ Under the expedited conditions of an estimation hearing, the EPA may not be in a position to provide the court with complete information regarding a specific site. Remedies and the attendant response costs are site-specific.²⁵⁵ To estimate the response costs for a given site, the court should have site-specific scientific evidence and evidence concerning the procedure and cost of proposed remedies.²⁵⁶ Unfortunately, site investigation and remedy development are quite slow.²⁵⁷ To determine the estimated costs, the EPA may have to decide upon a given remedy proposal in the absence of sufficient investigation.²⁵⁸ Therefore, the

247. See *supra* notes 192-214 and accompanying text.

248. See *supra* notes 227-31 and accompanying text.

249. 139 B.R. 397 (N.D. Tex. 1992).

250. *Id.* at 410-11.

251. *Id.*

252. See *supra* notes 209-14 and accompanying text.

253. *Id.*

254. See *supra* note 239.

255. See *supra* note 226.

256. See generally *In re National Gypsum Co.*, No. 390-93213-SAF-11, 1992 WL 426464 (Bankr. N.D. Tex. June 24, 1992) (providing a transcript of estimation proceedings concerning CERCLA claims).

257. See Jonas, *supra* note 7, at 882 n.236.

258. Indeed, the EPA may still be in the process of unearthing all the possible PRPs for a given site. The number of PRPs, as well as their conduct at the site, affects the

bankruptcy court's estimation of the debtor's liability may not accurately determine the amount of response costs.

Finally, Congress and the courts have noted that section 113(h) prevents piecemeal review and wasteful litigation.²⁵⁹ If the EPA is currently litigating this issue in another federal court, the litigation and discovery involved in that case may be identical to the information necessary for an estimation hearing.²⁶⁰ Thus the hearing is duplicative and wasteful of EPA resources.

The district court in *In re National Gypsum Co.*,²⁶¹ however, argued that even if discharging claims for CERCLA response costs constitutes pre-enforcement review with respect to sites where the EPA has not yet assessed liability against the debtor, by filing a proof of claim, the EPA engages in an enforcement or cost-recovery measure triggering the exceptions of section 113(h). Under section 113(h) of CERCLA, all federal courts are deprived of jurisdiction to review challenges to the enumerated actions available to the EPA unless the action fits one of the listed exceptions.²⁶² The listed exceptions outline various enforcement or cost recovery actions, including actions to recover response costs or damages for contribution.²⁶³ However, the EPA's procedural posture in the situation where this exception would normally apply is noticeably different from its posture when it files a proof of claim in bankruptcy. Under section 107(a) of CERCLA, the EPA can pursue a PRP for response costs if they have been *incurred*, i.e., liquidated by completion of the site cleanup.²⁶⁴ When the EPA files a claim in bankruptcy, it merely preserves its right to recover against the debtor and its right to vote on the plan. Indeed, the Code obligates it to file a proof of claim or find its claim

liability equation. For example, the agency may not know if the debtor is one of 10 PRPs, and should bear a tenth of the burden, or if the debtor is one of 100 PRPs, and should bear a hundredth of the burden (assuming equal culpability).

Furthermore, this expedited remedy determination forecloses the requisite public comment procedure. The EPA must allow the public to comment upon proposed remedies before finalizing the remedy to be undertaken in a record of decision. 42 U.S.C. § 9617 (1988).

259. See *Voluntary Purchasing Groups v. Reilly*, 889 F.2d 1380, 1389-90 (5th Cir. 1989); see generally *supra* notes 227-41 and accompanying text.

260. For example, the determination of the amount of the debtor's CERCLA liability in an estimation procedure in bankruptcy court may duplicate an ongoing recovery and damage action under CERCLA in a district court. See, e.g., *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1025-26 (2d Cir. 1991) (upholding the district court's injunction of further litigation of the City's claims in a California bankruptcy court for reasons of judicial economy).

261. 139 B.R. 397 (N.D. Tex. 1992).

262. See 42 U.S.C. § 9613(h) (1988).

263. See 42 U.S.C. § 9613(h)(1)-(5) (1988). See *supra* note 218 for pertinent text of statute.

264. 42 U.S.C. § 9607(a) (1988). The statute reads in pertinent part: "[Any person fitting the description of a PRP] shall be liable for— (A) all costs of removal or remedial action *incurred* by the United States Government not inconsistent with the national contingency plan " *Id.* (emphasis added).

against the debtor forever barred.²⁶⁵ Furthermore, section 107(a) of CERCLA precludes the EPA from recovering response costs before it has incurred them,²⁶⁶ thus, when the agency files its proof of claim, it cannot yet enforce any rights it subsequently may have under section 107(a) with respect to those costs. Filing a proof of claim cannot trigger the exceptions to section 113(h). Therefore, in discharging unincurred response costs, bankruptcy courts conduct pre-enforcement review. However, since courts have generally accorded the Bankruptcy Code preeminence over CERCLA when determining the dischargeability of claims, they refuse to recognize that section 113(h) deprives them of jurisdiction to determine the amount of the debtor's liability for these costs.²⁶⁷

III. POSSIBLE AVENUES FOR LEGISLATIVE COMPROMISE BETWEEN THE BANKRUPTCY CODE AND CERCLA

By tying the dischargeability of response costs to their foreseeability, the courts in *Chicago, Milwaukee, St. Paul & Pacific R.R.*²⁶⁸ and *In re National Gypsum Co.*²⁶⁹ sought to prevent the discharge of costs that would be incurred at undiscovered sites, and thus increase the proportion of response costs ultimately paid by the debtor. Initially, this appears counterintuitive. In theory, the Code ensures that creditors are paid as much as possible by including contingent claims in the bankruptcy, rather than by excluding them.²⁷⁰ When a creditor files a proof of claim, the Code guarantees that the creditor is entitled to share in the distribution of the debtor's assets.²⁷¹ Indeed, the Code demands that the creditor participate in the bankruptcy or be forever barred from asserting her claim against the debtor.²⁷²

265. See 11 U.S.C. § 524(a) (1988). The statute reads in pertinent part:

(a) A discharge in a case under this title— (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived; (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived

Id.

266. 42 U.S.C. § 9607(a).

267. See, e.g., *In re Chateaugay Corp.*, 944 F.2d 977, 1002 (2d Cir. 1991) (refusing to make exceptions to the Code in favor of CERCLA without clear evidence of congressional intent that it should be done); *In re National Gypsum Co.*, 139 B.R. 397, 411 (N.D. Tex. 1992) (stretching the concept of what constitutes an exception to section 113(h) of CERCLA in order to have jurisdiction over the claims for response costs because to find otherwise would defeat the objectives of the Code).

268. 974 F.2d 775 (7th Cir. 1992).

269. 139 B.R. 397 (N.D. Tex. 1992).

270. See *supra* notes 70-141 and accompanying text.

271. See *supra* notes 70-78 and accompanying text.

272. See 11 U.S.C. § 524(a) (1988). The statute reads in pertinent part:

The courts' holdings in *In re Chateaugay Corp.*,²⁷³ *Chicago and Gypsum* demonstrated the occasionally pyrrhic effect that the operation of the Code can have on contingent environmental claims where the debtor is a sizeable corporation who, post-bankruptcy, might be financially able to pay at least part of the response costs. Although participation in the bankruptcy guarantees that the EPA is entitled to receive the estimated value of its response costs to the extent possible in the plan, it also prohibits the EPA from collecting more than the estimated amount of its response costs if the actual costs exceed the estimated amount. The estimated value itself is in all likelihood inaccurate. The costs are estimated by the judge rather than liquidated at the conclusion of the EPA cleanup.²⁷⁴ Furthermore, the EPA may not have fully investigated, or even discovered, the debtor's liability as a PRP at certain sites. The lack of investigation handicaps the EPA's ability to substantiate its estimate of the response costs. If, however, the EPA could withhold its claims from the bankruptcy and proceed against the reorganized debtor through the EPA's normal channels, it might recover more because the agency would have better evidence to support its claims, and because it would not have to share the debtor's assets with other unsecured creditors. Therefore, the very process intended to protect the EPA's right to payment of its claims also guarantees that, where the debtor's CERCLA liability has not been fully discovered, it will not receive full payment. While the Code contemplates that creditors may receive only partial payment or even nothing at all in satisfaction of their claims,²⁷⁵ the made-

(a) A discharge in a case under this title— (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived; (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and— (3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge

Id.

273. 944 F.2d 997 (2d Cir. 1991).

274. See *supra* notes 176-214 and accompanying text.

275. For example, in a Chapter 7 liquidation, assets are distributed to creditors in the order specified in section 726(a) until they run out. 11 U.S.C. § 726(a) (1988). If a particular class of creditors designated under section 726(a) cannot be paid in full from the remaining assets, section 726(b) provides that they share the remainder on a pro rata basis. *Id.* at § 726(b). Similarly, in a Chapter 11 reorganization, section 1129(b)(2)(B)(ii) allows the court to confirm a plan despite objections from an impaired class, if no member of a class junior to the class of unsecured creditors receives or retains any property. In short, equity security holders, who are more junior to unsecured creditors, cannot receive or retain property from the debtor's assets if the unsecured creditors are not paid. 11 U.S.C. § 1129(b)(2)(B)(ii) (1988); see *Roe, supra* note 166, at 850-51.

quacy of such outcomes is exacerbated where insufficient information may have artificially depressed a claim's estimated value.

The courts' responses to this problem indicate possible avenues for legislative improvement of the treatment of CERCLA liability under the Bankruptcy Code. The introduction of a foreseeability standard in the analysis of what constitutes a contingent claim effects two principal alterations to the normal treatment of such claim under the Code. Foreseeability narrows the definition of a contingent claim by placing an evidentiary requirement upon it; only those response costs arising out of sites where a certain degree of investigation has taken place constitute dischargeable claims. Foreseeability also assures that the claims which are discharged are more likely to have been sufficiently investigated, and thus it should improve the accuracy of the estimation of the response costs. Therefore, the *Chicago* and *Gypsum* courts' holdings suggest that an effective compromise between the two statutes must provide that the estimation of environmental claims be supported by sufficient evidence. In other words, if the costs will arise out of sites where the debtor is a known or suspected PRP, an evidentiary standard should require that the EPA have completed a certain amount of investigation at that site before the court may estimate the potential response costs. If the costs will arise out of undiscovered sites, or sites which have been discovered but at which the debtor has not yet been identified as a PRP, they should not be dischargeable. The onus shifts to the debtor to assist the EPA in discovering and investigating sites by disclosing all relevant information to the agency.

A. Amendments to the Bankruptcy Code

This section proposes two amendments to the Code to improve the recovery of response costs. First, Congress should add a provision to section 523 excepting from discharge response costs at undiscovered sites, or at sites where the debtor's liability is unknown. Second, Congress should develop an evidentiary standard for the estimation of response costs at discovered sites where the debtor's liability is known in order to improve the accuracy of the estimate.

1. Congress Should Except From Discharge Response Costs Which Will Arise From Undiscovered Sites

Congress should except from discharge claims for CERCLA response costs which will arise from undiscovered sites, or sites at which the debtor has not yet been identified as a PRP. Under the Code's definition of a contingent claim cognizable in bankruptcy, foreseeability is irrelevant; due process requires only that the creditor have notice of the bankruptcy, not of her claim.²⁷⁶ To except a contingent claim for response costs from discharge on the basis of whether or not the site is known to

276. See *supra* notes 70-177 and accompanying text.

the EPA is to except an otherwise dischargeable claim on the illegitimate basis of its foreseeability. Understandably, such concessions are motivated by the desire to facilitate the protection of the environment. Fortunately, this sort of compromise already exists in the Code. Through section 523, Congress has abridged the power of the Bankruptcy Code in order to protect certain social obligations and to punish certain bad acts.²⁷⁷ Section 523 of the Code prevents individual debtors from using it to undermine society's means of punishing illegal conduct,²⁷⁸ or to undermine significant social obligations such as child support, by discharging these debts.²⁷⁹ While it remains unclear whether Congress considers a debtor's responsibility to refrain from polluting the environment to be an appropriate social obligation for such protection, it is clear that Congress views the exception from discharge as the tool to enforce such an obligation.

A proposed amendment to section 523 should apply to all debtors in Chapter 11. It should except from discharge unincurred response costs at sites which are undiscovered or at which the debtor has not been identified as a PRP at the time of the bankruptcy. The section might read:

(f) a discharge under section 1141 of this title does not discharge a debtor from any and all costs for which it may be liable under section 107(a) of CERCLA arising from sites which, at the time of confirmation, are undiscovered by the Environmental Protection Agency or, if discovered, at which the debtor has not yet been determined to be a responsible person.

The amendment would introduce two new elements into section 523: an exception for CERCLA response costs, and an exception from discharge applicable to non-individual debtors. Excepting the costs of cleaning sites contaminated by the debtor resembles other exceptions which similarly prevent the debtor from using bankruptcy to shirk debts which are ar-

277. Indeed, Congress recently has appeared willing to expand § 523 in an attempt to prevent individuals guilty of savings and loan fraud from discharging criminal judgments and restitution orders. See 136 CONG. REC. S. 255 (daily ed. Jan. 24, 1990) (statement of Sen. Dole addressing the Taxpayer Recovery Act). However, it must be noted that this proposed bill would have rendered non-dischargeable criminal penalties levied against individuals guilty of defrauding a thrift institution. This sort of exception was clearly contemplated by the original drafters of the section. Thus, adding this provision to § 523 breaks no new ground in terms of expanding the type of claim, or the type of public policy goals, preserved under the section. See 11 U.S.C. § 523(a)(2), (4), (7) (1988).

278. See 11 U.S.C. § 523(a) (1988 & Supp. III 1991). The section bars discharge of debts incurred through use of fraudulent written representations of the debtor's financial condition, *id.* at (a)(2), of debts for fraud while acting in a fiduciary capacity, *id.* at (a)(4), of debts resulting from willful and malicious injury of another, *id.* at (a)(6), of personal injury claims against the debtor arising out of the debtor's drunk driving, *id.* at (a)(9), of a judgment, order or settlement arising from debtor's act of fraud in connection with a thrift, *id.* at (a)(11), and of debts for failure to fulfill a fiduciary commitment in connection with a thrift, *id.* at (a)(12).

279. See 11 U.S.C. § 523(a). These sections bar discharge of debts owed creditors known to the debtor whom the debtor failed to notify of the bankruptcy, *id.* at (a)(3), and debts for alimony or child support, *id.* at (a)(5).

guably also social obligations.²⁸⁰ However, Congress has indicated that the exceptions apply only to individual debtors.²⁸¹ When drafting the Code, Congress refused to extend the exceptions of section 523(a) to non-individual debtors,²⁸² because it would undermine the stability of reorganizations. If section 523 debts could be excepted from discharge, the debtor would not be able to provide creditors with a definite picture of its liabilities prior to confirmation, and thus creditors would not be able to make an informed judgment regarding the debtor's financial health.²⁸³ If significant liabilities, such as environmental liabilities, were not discharged, the resulting uncertainty would also make it difficult to determine the likelihood of the debtor requiring further financial reorganization or liquidation.²⁸⁴

The proposed amendment's narrow focus, however, eliminates much of the destabilizing effects feared by Congress. Because the amendment excepts only claims for response costs which will arise from undiscovered sites, or sites at which the debtor has not been identified as a PRP, it limits the excepted liability to costs unknown at the time of the bankruptcy. As this liability has no cognizable value until its discovery by the EPA, creditors cannot evaluate its impact in any meaningful way when assessing the debtor's financial stability. For the same reason, a judge cannot evaluate its impact when assessing the feasibility of the reorganization. Thus, this limited extension of a 523 exception to a non-individual debtor should not subvert congressional goals for reorganizations.

Preventing the discharge of unincurred response costs arising out of a debtor's undiscovered liability under CERCLA is the most advantageous compromise of the two statutes for several reasons. First, as an exception from discharge, it does not narrow the overall concept of a dischargeable contingent claim as does a foreseeability standard. Second, it limits the dischargeability of response costs unknown to the EPA. Third, it bases the non-dischargeability of environmental claims upon a clear standard, discovery of the site. Fourth, it still allows a significant amount of the debtor's liability, that stemming from discovered sites, to be discharged. Furthermore, a debtor who informs the EPA of its potential liability can increase the proportion of CERCLA liability discharged in the bankruptcy, thus promoting discovery and full investigation of hazardous sites. Finally, preserving undiscovered liability from the bankruptcy will

280. See *supra* notes 278-79.

281. See 11 U.S.C. §§ 523(a), 1141(d).

282. See *Delco Dev. Co. of Harrison Rd. v. Kuempel Co. (In re Kuempel)*, 14 B.R. 324 (Bankr. S.D. Ohio 1981). The draft of 1141(d) in Senate bill, as reported by the Senate Judiciary Committee, contained a provision extending 523 to non-individual debtors. See S. 2266, 95th Cong., 2d Sess. § 1141(d)(2) (1978) (as reported by the Judiciary Committee). This provision was dropped in the final version adopted by the Senate. See S. 2266, 95th Cong., 2d Sess. § 1141(d)(2) (1978).

283. See *Kuempel*, 14 B.R. at 327; Harvey J. Kesner, *Future Asbestos Related Litigants as Holders of Statutory Claims Under Chapter 11 of the Bankruptcy Code and Their Place in the Johns-Manville Reorganization*, 62 AM. BANKR. L.J. 159, 165 (1988).

284. See 11 U.S.C. § 1129(a)(11) (1988).

not degrade the debtor's ability to secure financing or to attract investors; neither creditors nor potential investors can meaningfully assess undiscovered liability resulting from pre-petition conduct any more than they can accurately predict liability resulting from post-confirmation conduct. The risk of unknown CERCLA liability is always present no matter when the creditors lend or the investors invest.²⁸⁵

2. Develop an Evidentiary Standard for Estimation of Environmental Claims

Because the foregoing solution addresses only claims resulting from undiscovered sites, Congress should also develop an evidentiary standard for the estimation of environmental response costs arising out of discovered sites. By setting a floor for the amount of investigation that the EPA must have completed at a particular discovered site before the claims could be estimated, Congress could improve the accuracy of the estimation. Three points during a typical CERCLA cleanup present themselves as a possible baseline for investigation. In order for a site to be placed upon the National Priorities List (NPL) of toxic sites requiring immediate action, a preliminary assessment is conducted, followed by public notice and comment.²⁸⁶ Subsequently, the EPA conducts a remedial investigation and feasibility study (RI/FS). Normally, after completion of an RI/FS, the EPA makes its initial selection of an appropriate remedy from among the range of alternatives considered for the site.²⁸⁷ After public notice and comment, the final remedy selection is embodied in a

285. See *Roe, supra* note 166, at 855-63. Failing to discharge significant liability, such as environmental liability, can gut the effectiveness of a reorganization. The continued existence of such liability can have numerous repercussions upon the reorganized debtor. It can limit the debtor's access to credit by making financing costly, since a borrower with significant liabilities is a bad risk. It may discourage investment, since investors will worry that future dividends will be applied to pay off the debt. Consequently, the reorganized debtor may choose to sell assets or forego new projects to increase cash. The debtor may also participate in high risk strategies to assure shareholders some return on their investment. Full discharge of all liabilities reduces the financial uncertainty that makes the reorganized debtor appear to be a bad risk. *Id.* at 856-63.

Nevertheless, these outcomes, which were postulated in the context of the asbestos bankruptcies, see generally *id.*, presume that all the relevant parties can foresee that the undischarged liability, like chickens, will eventually come home to roost. See, e.g., *Kane v. Johns Manville Corp.*, 843 F.2d 636, 639 (2d Cir. 1988) (stating that based upon Manville's studies, the corporation anticipated that it would be named in over 100,000 personal injury suits arising out of their production of asbestos with a total potential liability of \$2 billion). Thus, the undischarged liability influences lending and investment choices. In contrast, the debtor's pre-petition liability for CERCLA response costs at sites that are undiscovered, or at discovered sites where the debtor has not yet been identified as a PRP, cannot affect such decisions because it is unknown. In essence, liability for such pre-petition claims is no different from liability which may arise out of the debtor's post-petition conduct. Therefore, excepting such claims from discharge should not burden the reorganized debtor any more than does the possibility that CERCLA liability might arise from the debtor's post-confirmation conduct.

286. See *supra* note 230 at 3043-44.

287. See *supra* note 226.

Record of Decision (ROD).²⁸⁸

Ideally, an estimation hearing could take place after completion of the RI/FS. Waiting for issuance of the ROD could unduly delay the proceedings, while basing an estimation upon the preliminary assessment appurtenant to listing on the NPL would not allow the EPA to investigate the appropriate remedy for the conditions presented by the site. The debtor should be required to facilitate the investigation by disclosing the location of sites it has used for waste disposal, and the types of waste disposed there. Again, the debtor will be motivated to cooperate to the fullest extent possible in the RI/FS in order to facilitate maximum discharge of response costs.

This solution, however, interferes with the primary goal of section 502(c)—to allow the court to estimate claims whose liquidation would unduly delay confirmation.²⁸⁹ Any evidentiary standard requires that the bankruptcy court wait for the EPA to investigate. A “fast track” investigation procedure for newly discovered sites where the debtor has been identified as a PRP might need to be introduced into CERCLA to guard against inordinate delay of the bankruptcy process.

B. Amendments to CERCLA: Develop a Fast-Track Investigation Procedure Applicable to Debtor-PRPs

Introducing an evidentiary standard into the estimation process, as suggested above, places the entire bankruptcy proceeding at the mercy of environmental agency procedure. The court must wait for the agency to sufficiently investigate the claim before it can estimate it and proceed with confirmation and closure of the bankruptcy case. For evidentiary standards to be introduced into the estimation process without defeating the entire purpose of that section of the Code, an expedited, or fast track, investigation procedure is required. For such a procedure to work, however, the EPA must either discover or be notified that a debtor has filed for bankruptcy. Upon such discovery, the EPA must then have to expedite investigation of the debtor's liability for those particular sites. While such a procedure would shift liability determination from following cleanup to preceding cleanup, in contravention of congressional intent,²⁹⁰

288. *Id.*

289. See 11 U.S.C. § 502(c) (1988); see generally notes 194-218 and accompanying text. It is difficult to gauge the significance of this delay to the progress of Chapter 11 cases since, in the past decade, they have become notoriously slow and costly. See Michele Galen & Catherine Yang, *A New Page for Chapter 11?*, BUS. WEEK, Jan. 25, 1993, at 36; see generally Phyllis Furman & Peter Grant, *A Bankrupt Court*, CRAIN'S NEW YORK BUS., Apr. 5-11, 1993, at 1. While delaying estimation hearings to allow the EPA to collect sufficient information concerning a particular site through a fast-track investigation procedure might exacerbate this problem, increased efficiency in the handling of other aspects of Chapter 11 cases could offset this effect. Furthermore, the benefits of improved accuracy in the estimation of response costs must also deserve consideration.

290. The provision of CERCLA barring pre-enforcement review was specifically in-

such a compromise is necessary if debtor-PRPs are to be prevented from dodging liability for CERCLA response costs in bankruptcy.

CONCLUSION

As recognized by the Second Circuit in *In re Chateaugay Corp.*²⁹¹.

[i]f the Code, fairly construed, creates limits on the extent of environmental cleanup efforts, the remedy is for Congress to make exceptions to the Code to achieve other objectives that Congress chooses to reach, rather than for courts to restrict the meaning of an across-the-board legislation like a bankruptcy law in order to promote objectives evident in more focused statutes.²⁹²

Congress must clarify the proper balance between CERCLA and the Bankruptcy Code through specific provisions designed to resolve the conflicts between them. The primary conflict between the two statutes is procedural. As written, both statutes reflect congressional recognition that delay of their respective procedures may defeat or substantially frustrate each statute's entire purpose. The Code attempts to discharge all eligible claims and, in a Chapter 11 case, facilitate the debtor's reorganization without undue delay.²⁹³ CERCLA attempts to clean up toxic sites as quickly and economically as possible without the interference of liability determinations.²⁹⁴ Reconciliation of the two statutes should preserve their procedural integrity to the greatest possible extent. It should also introduce the concept that, in its own way, CERCLA liability is a debt which the party responsible for contamination owes to society. It should not be discharged without adequate investigation and provision for its payment. By making it harder to discharge CERCLA liability in Chapter 11, Congress not only will guarantee that the debtor bears more of its fair share of response costs, but also will dispel the concept that the costs of pollution are no more significant than ordinary consumer debts.

Kerry H. Mithalal

cluded to prevent such a reordering of EPA priorities. *See supra* notes 218-41 and accompanying text.

All of the amendments proposed thus far contemplate that the EPA will frequently have to litigate a debtor's liability as a PRP in an estimation hearing prior to completion of the cleanup. This is de-facto pre-enforcement review. As discussed above, under the language of section 9613 of CERCLA, an estimation hearing, which requires the EPA to litigate the debtor's liability response costs of uncompleted remedies at sites, does not constitute pre-enforcement review because it does not challenge a remedial or removal action as defined by the statute. Therefore, technically, no amendment to the section barring pre-enforcement review need be made in connection with the amendments discussed above. However, Congress should acknowledge that forcing the EPA to litigate the cost of site-specific remedies necessitates a determination of the debtor's liability as a PRP, and thus constitutes de facto pre-enforcement review.

291. 944 F.2d 997 (2d Cir. 1991).

292. *Id.* at 1002.

293. *See* 11 U.S.C. § 502(c) (1988).

294. *See supra* notes 215-41 and accompanying text.

