

The Interface Between Bankruptcy and CERCLA: Where Does New Legislation Belong

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THE INTERFACE BETWEEN BANKRUPTCY AND CERCLA: WHERE DOES NEW LEGISLATION BELONG?†

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MY topic, bankruptcy issues¹ and CERCLA Reauthorization,² is a very easy one. Bankruptcy issues are not addressed in any of the CERCLA Reauthorization proposals that have been made so far, so I could just stop there.

But what I thought I would do is talk about where we are in the interface between bankruptcy and CERCLA, why it has gotten so much attention, and what some of the remaining issues are. After that, I will explain why these issues are unlikely to get addressed in CERCLA reauthorization. I am not going to go into any great detail on any of these issues, but I will speak about some of the main ones.

There are a couple of reasons, in general, why this area has gotten so much attention, and why people talk about the "conflict" between CERCLA and the bankruptcy laws.³ One fundamental reason is that by and large, the bankruptcy laws assume that one can know what a company's liabilities are at one point in time, namely the time that it goes into bankruptcy. CERCLA claims, like other "delayed manifes-

† This speech was presented at the Fordham Symposium, Superfund Reauthorization: Agenda for the 90's, held at Fordham University School of Law on March 11, 1994.

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1. Bankruptcy law is delineated in the Bankruptcy Reform Act of 1978, also known as the "Bankruptcy Code" or simply "the Code." Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended in 11 U.S.C. §§ 101-1330 (1988 & Supp. 1992)).

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1992)). Congress subsequently amended CERCLA by enacting the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (amending scattered sections of 42 U.S.C. §§ 9601-9675 (1988)) [hereinafter Superfund]. Congressional funding of Superfund will expire in 1994, accounting for the current debate over the details of possible CERCLA amendments. For the existing Clinton Administration reauthorization proposal, see S. 1834, 103d Cong. (1994) [hereinafter Reauthorization].

3. See, e.g., *In re Combustion Equip. Assocs.*, 838 F.2d 35, 37 (2d Cir. 1988) ("The conflict [between CERCLA and the Code] begins at a basic level, since the goal of CERCLA — holding liable those responsible for the pollution — is at odds with the premise of bankruptcy, which [is] to allow [a] debtor a fresh start by freeing them liability."); *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1002 (2d Cir. 1991) ("We agree that the Bankruptcy Code and CERCLA point toward competing objectives. The Code aims to provide reorganized debtors with a fresh start. . . CERCLA aims to clean up environmental damage . . ."); Jonathan K. Van Patten & Richard D. Puetz, *Bankruptcy and Environmental Obligations: The Clash Between Private Relief and Public Policy*, 35 S.D. L. REV. 220, 220-23 (1990).

tation" type of claims,⁴ do not fit well into that framework. CERCLA liabilities arise and continue over long periods of time. Trying to fit that type of liability scheme into a structure that assumes one can take a business at a point in time, know what its assets are, and know what its liabilities are, presents a number of problems.

The other fundamental issue that comes up in this area is the fact that bankruptcy is designed to deal with monetary claims. People owe other people money. Like bankruptcy, CERCLA deals with money, often large amounts of money,⁵ and in part deals with obligations to pay money,⁶ but not exclusively. CERCLA also deals with obligations to do clean-ups and undertake work.⁷ Therefore, CERCLA, like other environmental statutes under which liable parties can be required to undertake work,⁸ raises questions as to how one fits those types of obligations — that will often cost a great of money but that are not necessarily resolved in monetary terms — into a framework which looks at everything in monetary terms.

What are the issues that come up, then, in this particular area?⁹ A few issues are related to the fundamental concept in all of bankruptcy law: the determination of what is a claim.¹⁰ This is a fundamental concept, because only claims can be addressed in a bankruptcy situa-

4. See, e.g., *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 639 (2d Cir. 1988) (asbestos); *Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir. 1988) (faulty I.U.D.s).

5. In 1989, EPA estimated that it would cost thirty billion dollars to clean up the 1,200 sites on the National Priority List (NPL). A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM 3 (1989). Some researchers believe that the NPL will eventually encompass between 2,000 and 10,000 sites. E.W. COLGLAZIER ET AL., ESTIMATING RESOURCE REQUIREMENTS FOR NPL SITES 1 (Dec. 1991). The cost would then reach into the hundreds of billions of dollars. RICHARD C. GASKINS, ENVIRONMENTAL ACCIDENTS, PERSONAL INJURY, AND PUBLIC RESPONSIBILITY 64-65, 231 (1989). One should not forget that these costs do not include the bill for studies at each site to determine the scope of the contamination. Such studies include a Remedial Investigation (RI), dealing with the nature and breadth of the contamination, as well as a Feasibility Study (FS), that evaluates the possible remedies. SHELDON M. NOVICK, THE LAW OF ENVIRONMENTAL PROTECTION § 13.05(s)(f)(ii)(A). The average cost of an RI/FS is \$800,000. DAVID SIVE & FRANK FRIEDMAN, A PRACTICAL GUIDE TO ENVIRONMENTAL LAW 132 (1987).

6. See 42 U.S.C. § 9604(a)(1) (Supp. 1992) (EPA has authority to clean up site); 42 U.S.C. § 9607(a) (Supp. 1992) (after clean-up, EPA can bring a cost recovery action against a potentially responsible party (PRP)).

7. See 42 U.S.C. § 9606(a) (Supp. 1992).

8. For example, under the Resource Conservation and Recovery Act, EPA can require regulated persons to take corrective action. RCRA §§ 3008(h), 3004(u); 42 U.S.C. §§ 6928(h), 6924(u) (Supp. 1992).

9. See generally Kathryn R. Heidt, *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 U. FLA. L. REV. 153 (1992).

10. A "claim" is defined in 11 U.S.C. § 101 (Supp. 1992):

(5) "claim" means —

(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

tion.¹¹ Only creditors who have claims, as the term is defined, can share in the distribution of bankruptcy estates.¹² Only creditors who have claims can have such claims discharged.¹³

So, one of the fundamental issues that has been the subject of much litigation is discovering when a CERCLA claim arises for bankruptcy purposes.¹⁴ Does it arise at the very earliest point, when companies dispose of waste at a site,¹⁵ or at the very latest when EPA has finished its cleanup at the site,¹⁶ or at some point in the middle?¹⁷

Companies in bankruptcy, particularly those filing under Chapter 11, have generally argued for claims to trigger at the earliest possible moment. The earlier the trigger, the greater amount of a company's CERCLA liabilities that may be addressed and discharged in its bankruptcy proceeding.¹⁸ This allows the company to emerge from the bankruptcy free of any form of CERCLA liability.¹⁹

From the government's perspective, this scenario creates a big problem. EPA is forced to know the potential liabilities from past disposal

remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured

A "claim" in bankruptcy is interpreted quite broadly. See *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552 (1990) (the intent of Congress was a broad view of a claim); H. REP. NO. 95-595, 95th Cong., 2d Sess. 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266 ("The [Code] 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."); S. REP. NO. 95-989, 95th Cong., 2d Sess. 21-22 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5807-08.

11. Heidt, *supra* note 9, at 158.

12. See 11 U.S.C. § 726(a)(1) - (4) (Supp. 1992) (a holder of a "claim" will be allowed to share in the distribution of [the] bankruptcy estate in a Chapter 7 case); 11 U.S.C. § 1126(a)(1992) (in a Chapter 11 case, a "claim" allows the holder to vote on the reorganization plan, conferring upon the holder distribution rights).

13. A discharge is a powerful tool because "creditors are prohibited from attempting to collect debts that were included in the discharge." Linda Johannsen, Note, *United States v. Whizco, Inc.: A Further Refinement of the Conflict Between Bankruptcy Discharge and Environmental Clean-up Obligations*, 20 ENVTL. L. 207, 211 (1990). In all bankruptcy proceedings, whether Chapter 7, 11, or 13, only "debts" are dischargeable. 11 U.S.C. §§ 727(b), 1141(d)(1)(A), 1328(a) (Supp. 1992). A debt is defined in the Code as a "liability on a claim." 11 U.S.C. § 101(12) (Supp. 1992). It follows then that only claims can be debts that in turn, are allowed to be discharged.

14. See generally Joel M. Gross and Suzanne Lacampagne, *Bankruptcy Estimation of CERCLA Claims: The Process and the Alternatives*, 12 VA. ENVTL. L.J. 235, 240-52 (1993); Kevin J. Saville, *Discharging CERCLA Liability in Bankruptcy: When Does A Claim Arise?*, 76 MINN. L. REV. 327 (1991).

15. Gross & Lacampagne, *supra* note 14, at 244-46. Meaning, does it arise when the PRP commits the blameworthy act?

16. *Id.* at 251-52. At this point, EPA has incurred the response costs for which it can seek reimbursement under section 107 of CERCLA, 42 U.S.C. § 9607 (1988).

17. Triggering events in the middle could include the release or threatened release of hazardous substances at the site, *id.* at 246-49, or when the claim is within the fair contemplation of the parties. *Id.* at 249-51.

18. In general, a Chapter 11 debtor gets a discharge from all claims arising prior to confirmation of its reorganization plan. 11 U.S.C. § 1141(d)(1) (Supp. 1992).

19. Gross & Lacampagne, *supra* note 14, at 242.

practices before sites have been addressed. CERCLA revolves, to a very high degree, around investigatory processes that take years to undertake and to complete. Thus, from the government's perspective, how can liability be assessed until the process of identifying the site and cleaning it up has been completed?

More than on any of the other issues I will cover, the courts have ruled inconsistently on this issue, so I will not try to summarize where they stand currently. There are courts "over here" and there are courts "over there," and there are courts in the middle that have adopted other triggers as to when a claim exists for bankruptcy purposes.²⁰

That is all well and good if EPA has a claim to recover the cost of a clean-up. What if it has the right to require the liable parties to undertake the clean-up themselves? Is that, in fact, a claim? Because the definition of claim includes rights to payment,²¹ or equitable remedies for breach of performance that give rise to a right to money payment,²² does an obligation under CERCLA to clean up property²³ give rise to a right to payment of money? Again, the courts have not ruled consistently.²⁴

Next, an important question to ask is how does CERCLA's joint and several liability scheme work in the bankruptcy context?²⁵ On the

20. Kathryn R. Heidt suggests that there are no problems determining the nature of EPA's claim when the PRP's culpable activity, EPA's incurring of response costs, and EPA's uncovering of the hazard each occurs before the company has filed a bankruptcy petition. Katherine R. Heidt, *The Automatic Stay in Environmental Bankruptcies*, 67 AM. BANK. L.J. 69 (1993). CERCLA liability is a claim that can be discharged. *Id.* If all of these occurrences fall into the post-petition sphere, the claims of the government will not be discharged if they arise after the reorganization plan is confirmed, or will be given an administrative expense priority if they arise before confirmation of the plan or are considered beyond the scope of the plan. *Id.* The dissension among the courts is a product of those situations where the relevant actions of the debtor and EPA do not all occur at either the pre- or post-petition stage. See e.g., *In re Chateaugay*, 944 F.2d at 997 (prospective CERCLA liability is a claim that arises at the time of the release or threat of release of a hazardous substance); *In re National Gypsum Co.*, 139 B.R. 397 (N.D. Tex. 1992) (CERCLA claim arises when EPA is aware of the debtor's culpable conduct); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn. 1990) (claim arises when EPA incurs response costs for the clean-up of the hazardous waste site); *AL Tech Specialty Steel Corp. v. Allegheny Int'l, Inc.* (*In re Allegheny Int'l, Inc.*), 126 B.R. 919 (W.D. Pa.), *aff'd*, 950 F.2d 721 (3d Cir. 1991) (concurs with *Union Scrap Metal* analysis of when claim arises, but differing treatment of what claims are dischargeable).

21. 11 U.S.C. § 101(5)(A) (Supp. 1992).

22. 11 U.S.C. § 101(5)(B) (Supp. 1992).

23. 42 U.S.C. § 9606(a) (Supp. 1992).

24. See e.g., *Ohio v. Kovacs*, 469 U.S. 274 (1985) (an order to compel clean-up is a "claim"); *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988); *In re Chateaugay*, 944 F.2d at 997; *United States v. Hubler*, 117 B.R. 160 (W.D. Pa.), *aff'd*, 928 F.2d 1131 (3d Cir. 1990); *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir. 1993), *petition for cert. filed*.

25. The courts, not the express language of 42 U.S.C. § 9607 (Supp. 1992), are the source of the statute's strict liability standard. *United States v. Monsanto Co.*, 858

one hand, bankruptcy typically looks to substantive law to determine liabilities, and findings typically are that when a party is jointly and severally liable outside of bankruptcy, it ought to be jointly and severally liable in bankruptcy.²⁶ On the other hand, it has been argued that bankruptcy courts are courts of equity,²⁷ and many debtors have been concerned about the equity of taking a party in bankruptcy that has contributed a small percentage of the waste at a site, and subjecting it to the entire cost of the site clean-up. Another related issue is the extent to which contribution claims may be pursued in bankruptcy.²⁸ Ordinarily, the Code does not allow people who hold contribution

F.2d 160, 167 (4th Cir. 1988) ("We agree with the overwhelming body of precedent that has interpreted [CERCLA] section 107(a) as establishing a strict liability scheme."), *cert. denied*, 490 U.S. 1106 (1989); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) ("Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the [congressional] compromise."). Courts have followed this by reasoning that the strict liability mandate of CERCLA implicitly allows for a joint and several liability scheme unless the liability is divisible and can be apportioned among the responsible parties. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) ("Although Congress removed joint and several liability from the CERCLA proposal, this did not mean that it had rejected such an approach [but instead meant] to have the scope of liability determined under common law principles, where a court will assess the propriety of applying joint and several liability on an individual basis."). As a practical matter, apportionment is unlikely given the difficulty of accurately dividing up the responsibility for environmental harms. *See O'Neil v. Picillo*, 682 F. Supp. 706, 725 (D.R.I. 1988) (holding that "the consequent injury [from contamination] is indivisible."), *aff'd*, 883 F.2d 176 (1st Cir. 1989). Also hampering a defendant's efforts to avoid joint and several liability is the fact that the defendant has the burden of demonstrating the feasibility of apportionment. *See Monsanto*, 858 F.2d at 172-73. In three recent cases, the courts of appeals in the second, third and fifth circuits have addressed the scope of joint and several liability under CERCLA. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1990); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993); *In re Bell Petroleum Servs.*, 3 F.3d 889 (5th Cir. 1993). These cases suggest that courts may be more willing to entertain defendants' fact-based assertions that the environmental harm is subject to apportionment.

26. *In re National Gypsum Co.*, 139 B.R. 397, 415 (N.D. Tex. 1992). The view that non-bankruptcy law should be effective in the bankruptcy process, absent some overriding bankruptcy policy, has been espoused by commentators and the Supreme Court. *See Butner v. United States*, 440 U.S. 48, 55 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interest should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding."); Douglas G. Baird, *Environmental Regulation, Bankruptcy Law, and the Problem of Limited Liability*, 18 ENVTL. L. REP. 10,352, 10,353 (1988).

27. *See generally* 11 U.S.C. § 105(a) (1988) (providing for a bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title [the Code]."); *see also* S. REP. NO. 95-989 at 51, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5837; H.R. REP. NO. 95-595 at 342, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6298.

28. Contribution claims exist when more than one party is liable for a particular action or harm, and those forced to actually pay seek "contribution" from the other liable parties. A right of contribution is explicitly created in section 113(f) of CERCLA, 42 U.S.C. 9613(f)(1988).

claims to pursue their claims in bankruptcy because of concerns that they would conflict with those of the principal creditor.²⁹

On the other hand, in the Superfund context, the principal creditor — often the government — does not have the resources to pursue every party that may be liable for a particular Superfund site. A company may only be one of a hundred or more of the liable parties at the site that files for bankruptcy. Should an exception be made for allowing contribution claims to be pursued under CERCLA in the bankruptcy context?³⁰

Another issue that has come up is the abandonment issue, and I notice that a pertinent article on that has been published in the latest issue of the Fordham Environmental Law Journal.³¹ This is actually an issue that I think has gotten a great deal of notoriety for semantical reasons. When Superfund was passed, it was touted as a statute that was going to deal with abandoned hazardous waste sites.³² Love Canal was called an abandoned hazardous waste site.³³

The bankruptcy laws use the term "abandonment" in a very formalistic legal sense, to allow a company that does not want property that is part of the estate, to essentially transfer the property out of the estate.³⁴ But because of the history of the use of the word, the issue

29. The relevant section of the Code is 11 U.S.C. § 502(e)(1)(1988): "[T]he court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution." See *In re Baldwin-United Corp.*, 55 B.R. 885, 891 (Bankr. S.D. Ohio 1985) ("By force, such claims are subject to treatment under § 502 and are subject to the discharge provisions of the Code as well.")

30. At least one commentator thinks so. 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 (1991); see *In re Charter Co.*, 862 F.2d 1500 (11th Cir. 1989) (disallowing CERCLA contribution claims as contingent).

31. Stephen D. Kong, Note, *A Chapter 7 Trustee's Abandonment of Environmentally-Impaired Property: Midlantic, Post-Midlantic Interpretation and the Plague of Results-Oriented Legal Analysis*, 5 FORDHAM ENVTL. L.J. 221 (1994).

32. See *Outboard Marine Corp. v. Thomas*, 610 F. Supp. 1234, 1238 (N.D. Ill.), rev'd, 773 F.2d 883 (7th Cir. 1985), judgment vacated, 479 U.S. 1002 (1986) ("CERCLA was designed to remedy hazardous waste sites, specifically abandoned or 'orphan' dump sites.") (quoting *United States v. Wade*, 546 F. Supp. 785, 792 (E.D. Pa. 1982), appeal dismissed, 713 F.2d 49 (3d Cir. 1983)).

33. See *Hazardous and Toxic Waste Disposal Field Hearings: Joint Hearing Before Subcommittee on Environmental Pollution and Resource Protection of the Senate Committee on Environmental and Public Works*, 96th Cong., 1st Sess. 2-4 (1979) (statements of Sens. D. Moynihan and J. Javits).

34. See 4 COLLIER ON BANKRUPTCY, ¶ 554.02[2] at 554-57 (L. King et al., eds., 15th ed. 1993) (abandonment is "a divestiture of all interests in property that were property of the estate."); see also *In re Paolella*, 79 B.R. 607, 609 (Bankr. E.D. Pa. 1987) ("[T]he principle of abandonment was developed by the courts to protect the bankruptcy estate from the various costs and burdens of having to administer property which could not conceivably benefit unsecured creditors of the estate."). The relevant provision of the Code is 11 U.S.C. § 554(a) (1988): "After notice and a hear-

has gotten perhaps more notoriety than it deserves. It centers upon whether a company that owns a contaminated site can essentially divest itself of that property and have it removed from the estate.³⁵ This debate does not tend to come up very often in the larger Chapter 11 cases. I think companies have learned that even if abandonment is allowed and the company divests itself of the property, at the end of the case the property will wind up in the possession of the reorganized company. So, although the Supreme Court has addressed this issue,³⁶ it is not one that has come up quite as often as one might anticipate.³⁷

But the related issue is what priority these claims should be given in a bankruptcy context.³⁸ Again, from a public policy perspective, should companies be allowed in the bankruptcy context to say, "Here's property that we own that is contaminated; you, the government, and you, the public, deal with it?"³⁹ On the other hand, from the perspective of a debtor and other creditors who are looking at a

ing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."

35. The Supreme Court, in *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Protection*, 474 U.S. 494, 496 (1986), stated the issue a little differently: "[W]hether section 554(a) of the Bankruptcy Code authorizes a trustee in bankruptcy to abandon property in contravention of state laws or regulations that are reasonably designed to protect the public's health or safety."

36. The *Midlantic* majority held that "a trustee [in bankruptcy] may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Id.* at 507. The Court added that "[a] Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety." *Id.* However, there was a limitation on the Court's exception to section 554: "[t]his exception to the abandonment power vested in the trustee by section 554 is a narrow one. It does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." *Id.* at 507 n.9.

37. Yet, there is still much conflict among those courts trying to deal with section 554 of the Code and the ambiguity of the *Midlantic* decision. See *In re Franklin Signal Corp.*, 65 B.R. 268, 272 n.4 (Bankr. D. Minn. 1986) (*Midlantic* was a compromise, "requir[ing] something more than mere consideration of state law, but something less than full compliance."); *In re Peerless Plating Co.*, 70 B.R. 943, 947-48 (Bankr. W.D. Mich. 1987) ("[U]nder *Midlantic* the Trustee could not abandon the Peerless site in violation of CERCLA."); *Borden, Inc. v. Wells-Fargo Bus. Credit (In re Smith-Douglass, Inc.)*, 856 F.2d 12, 13 (4th Cir. 1988) (abandonment authorized, but administrative expense priority granted to state agency).

38. The problem of priority comes up most frequently in Chapter 7 liquidation proceedings. After secured claims have been honored, 11 U.S.C. § 507(a) delineates the nature and order of distributing the estate to various priority claimants. First priority is granted to those who have incurred administrative expenses. 11 U.S.C. §§ 507(a)(1), 503(b) (1988). After priority claimants get their share, whatever is left (often nothing) is distributed to the non-priority unsecured creditors.

39. The contention that EPA and state environmental agencies have nothing more than an unsecured claim when they try to get a site cleaned up is the minority view. See e.g., *In re Johnson*, 758 F.2d 137 (3d Cir. 1985); Daniel Klerman, Note, *Earth First? CERCLA Reimbursement Claims and Bankruptcy*, 58 U. CHI. L. REV. 795 (1991).

typically inadequate estate, should the clean-up obligations have priority over all other obligations, which would often mean no money would be available to any other creditors? Is that fair?⁴⁰ Is it fair when the government has a Superfund that can be used to address the site and other creditors, that often tort creditors who have been victims of the very conduct that the Superfund clean-up is designed to address, are not able to share in the bankruptcy estate?

Those are some of the main issues that have come up in this area and are likely to continue to surface. The good news is that those of us who have spent a lot of time learning these issues and coming to grips with them are unlikely to have to start from scratch after Superfund Reauthorization, because as I said, Superfund Reauthorization does not address these issues.

I have a few thoughts on why that is. First, I think if these issues were going to be addressed legislatively, the appropriate place to do it would be in the bankruptcy code amendment process and not in Superfund Reauthorization. If such issues were addressed in Superfund Reauthorization, we would still have state Superfund statutes⁴¹ and RCRA,⁴² which incorporates clean up provisions as well as other environmental statutes raising similar issues.⁴³

I think the logical place to face these issues would be in bankruptcy legislation, which is also undergoing review and is a subject of much attention in Congress.⁴⁴ There have been proposals on both sides as to how these issues could be addressed,⁴⁵ but I think the perception probably is that while these are issues that people focus great attention on, things are not fundamentally broken. On the one hand, it is difficult to point to cases where viable companies attempted to reor-

40. This is the majority view, that "since compliance with environmental laws is a prerequisite to abandonment, the costs expended in achieving compliance and in ultimately assuring the public health are a necessary cost of preserving the estate [and given administrative expense priority]." Jill Thompson Losch, Comment, *Bankruptcy v. Environmental Obligations: Clash of the Titans*, 52 LA. L. REV. 137, 163 (1991). For additional support of this stance, see Gary E. Claar, *The Case for a Bankruptcy Code Priority for Environmental Cleanup Claims*, 18 WM. MITCHELL L. REV. 29 (1992); Joseph P. Cistulli, Note, *Striking a Balance Between Competing Policies: The Administrative Claim as an Alternative to Enforce State Clean-up Orders in Bankruptcy Proceedings*, 16 B.C. ENVTL. AFF. L. REV. 581 (1989).

41. See, e.g., Carpenter-Presley-Tanner Hazardous Substance Account Act, CAL. HEALTH AND SAFETY CODE §§ 25,300 - 25,395 (West 1992); The Michigan Environmental Response Act, MICH. COMP. L. §§ 299.601-299.618 (1979 & Supp. 1992); Spill Compensation and Control Act, N.J. STAT. ANN. §§ 58:10-23.11-23.29 (West 1992); see generally Linda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 WM. & MARY L. REV. 823 (1990).

42. Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6991i (Supp. 1992)).

43. See *supra* note 9.

44. See S. 540, 103d Cong., 1st Sess. (1993) (bankruptcy bill emerging from the Senate Judiciary Committee on Sept. 15, 1993).

45. A comprehensive proposal for addressing these issues was put forth last year by the National Bankruptcy Conference.

ganize—which is really the fundamental goal of the bankruptcy laws—but could not because of CERCLA liabilities.⁴⁶ Conversely, from the environmental perspective, bankruptcies have not, to a fundamental degree, interfered with EPA's ability to enforce the Superfund program. I make this claim even though bankruptcy cases can be somewhat of a nuisance and take up a significant part of my work.⁴⁷ They have, to a fundamental degree, interfered with EPA's ability to enforce the Superfund program.

And perhaps for those reasons, and also because of the lack of clarity in the two statutes, those of us who practice in this area have been forced to deal with what bankruptcy in general intends, particularly in the reorganization context, which is for the parties involved to come up with negotiated resolutions of these problems. Thus, in the larger Chapter 11 cases, *LTV* being one example, the very fact of the uncertainty in the law has forced the parties in those cases to come up with solutions that meet both the goals of the Bankruptcy Code — allowing viable companies to reorganize — and the goals of the environmental laws, focusing efforts on clean up rather than on litigation.⁴⁸

That represents a quick overview of some of the issues in this area, and the only other thing I would like to note, maybe as a lead in to Mr. White's talk on where Reauthorization is going,⁴⁹ is to remark that when Superfund was last amended in 1986 through the SARA amendments,⁵⁰ some of us observed that instead of naming the statute "SARA," Congress ought to have named it "RACHEL," on the theme of Biblical matriarchs; RACHEL being the Reauthorization Amendments Clarifying How Everyone is Liable. The ball has now swung in the other direction, and I think those of us who have been working in this area might now look at the new amendments and think that they should be entitled "REBECCA," the Reauthorization Eliminating Banks and Eliminating Cities from CERCLA Altogether.

There are many pending cases in the federal courts that could possibly further inform the bar about law in this area. The Supreme Court

46. See also Thomas Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982) (espousing the "creditors' bargain" model); Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775 (1987) (the traditional conception of the purposes of bankruptcy).

47. See *Bankruptcy, Environmental Lawyers Focus on Clash Between Two Areas*, BANKR. L. DAILY (BNA) (June 6, 1990) (Joel M. Gross states that 12-15% of the Justice Department's Environmental Enforcement Division's cases involve bankruptcy law); Firestone, *Government Perspectives on Bankruptcy and Environmental Law Interaction*, 10 ENVTL. L. REP. (Envtl. L. Inst.) 10,358 (1988) (in 1988, 58 of the 600 pending environmental cases for the Department of Justice were bankruptcy cases).

48. *In re Chateaugay*, 944 F.2d at 997; Settlement Agreement and Stipulated Order, *In re Chateaugay Corp.*, (No. 88-083V) (April 15, 1993).

49. See William H. White, *Reauthorization Overview, EPA's Perspective*, 5 FORDHAM ENVTL. L.J. 299 (1994).

50. See *supra* note 2.

took on two cases in this area during the mid-1980s, the *Kovacs* case⁵¹ and the *Midlantic* case,⁵² the former case dealing with the ability of an individual who had operated a Superfund site to get a discharge of his obligation to clean it up,⁵³ and the latter case dealing with the issue of abandonment of contaminated property.⁵⁴

There are a number of pending issues in this area. One particularly noteworthy case that I would point to that is the *Torwico* case.⁵⁵ There, the Third Circuit Court of Appeals held that a debtor who no longer owned the contaminated property could be required by the State of New Jersey to clean up that property.⁵⁶ This is really the first case that has gone that far, and the ramifications could be, if looked at from a certain perspective, that CERCLA liabilities would essentially survive a bankruptcy unaffected. The debtor in *Torwico* has filed a petition for certiorari in the Supreme Court.⁵⁷

In addition to well over a hundred cases in this area that have been decided, there are numerous cases pending in the federal courts.

Our goal in the bankruptcy context has been to reach settlements to the extent possible,⁵⁸ and we have been negotiating them very much along the lines suggested by the proposed legislation.⁵⁹

The bankruptcy practice in general has often been criticized for high transaction costs.⁶⁰ Such costs have also led to critical discussion

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

52. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986).

53. *Kovacs*, 469 U.S. at 276.

54. *Midlantic*, 474 U.S. at 496.

55. *Torwico*, 8 F.3d at 146.

56. *Id.* at 150-51.

57. The petition was filed on January 24, 1994.

58. As one commentator points out, EPA has an incentive to settle because of the costs of litigating CERCLA liability, inability of single PRPs to shoulder the total responsibility for a particular site, and the realization that, given limited Superfund resources, PRP-led remedial actions rather than Superfund expenditure and reimbursement actions must increase if a significant impact is to be made on existing NPL sites.

Phillippe J. Kahn, Note, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 CARDOZO L. REV. 1999, 2050 (1993). Kahn also recognizes that such settlements are good for both the reorganizing debtor and the creditors because there is: (1) accurate assessment of liability; (2) greater likelihood of apportioned liability; (3) protection from contribution actions; (4) reduced transaction costs in determining liability; (5) options for reimbursement or remedial action; and (6) consideration of equitable factors in determining liability. *Id.* at 2052-53.

59. See Gross and Lacampagne, *supra* note 14, at 267-69.

60. See 11 U.S.C. § 330 (Supp. 1992) (the court has the power to award compensation to attorneys and other professionals employed by the relevant interested parties); 11 U.S.C. § 331 (Supp. 1992) (authorizing interim payments before administrative expense hearings); 11 U.S.C. § 503(b)(2) (Supp. 1992) (allowing § 330(a) compensation as administrative expenses); 11 U.S.C. § 507(a)(1) (Supp. 1992) (administrative expenses granted first payment priority).

regarding Superfund.⁶¹ Our view has been that the last thing we really needed was to be spending a lot of time litigating Superfund issues in the context of bankruptcy cases. So, we have tried to avoid that process and to achieve fair results.

Frequently, we are confronted by Superfund sites where the party in bankruptcy is one of a hundred parties who contributed waste to the site, and under existing law, we have looked to the other ninety-nine to make up the shortfall. We could say, "Well this is not our problem, it's your problem."⁶²

However, the law has tended to indicate that those ninety-nine parties would have a difficult, if not impossible, time pursuing a contribution claim in the bankruptcy.⁶³ Our view has been that either we pursue the debtor in bankruptcy or this company gets off entirely. Accordingly, we tell the debtor that it is more than fair that we participate in the bankruptcy process like other creditors. It is not fair that they get a complete exemption on these claims, so we participate in the bankruptcy process to get a reasonable distribution to the extent the case will allow. The mandatory but non-binding allocation envisioned by the Superfund Reform Act would provide a useful means for determining what the contribution would be for the debtor.

Therefore, anything which would allow the bankruptcy process to work in a way which is fair to all of the parties at a site is something that we have supported and will continue to support in this area.

In addition to improving the fairness of the bankruptcy process, we have made progress in achieving some certainty as well, as evidenced by the *LTV* decision.⁶⁴ We filed a complaint in that case seeking a determination as to what claims could and could not be discharged in the bankruptcy.⁶⁵ One of the reasons we did that was because we found ourselves in a dilemma. As I said earlier, there is an issue as to when the claim arises.⁶⁶ Having a claim is both good and bad. It is good because you can share in the estate;⁶⁷ it is bad because then the

61. William N. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective on the Superfund Liability Scheme*, 21 ENVTL. L. REP. (Envtl. L. Inst.) 10,413, 10,414 (1991); Kit R. Krickenberg & Pamela Rekar, *Superfund Settlements: Breaking the Logjam*, 19 ENV'T REP. (BNA) 2384, 2386 (1989); William W. Balcke, Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 124 (1988). As Justice O'Connor recently noted: "An entity in bankruptcy can ill afford to waste resources on litigations: every dollar spent on lawyers is a dollar creditors will never see." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1505 (1993) (O'Connor, J., dissenting).

62. See *supra* notes 25-27 and accompanying text.

63. See *supra* notes 28-30 and accompanying text.

64. *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997 (2d Cir. 1991).

65. *Id.* at 999.

66. See *supra* notes 14-20 and accompanying text.

67. Heidt, *supra* note 9, at 159.

claim is discharged.⁶⁸ In some cases, if one is looking at it purely from a self-interest perspective, having the claim would be better. In Chapter 7 cases, where the company liquidates and dissolves, discharge is irrelevant.⁶⁹ This is your one bite at the apple. It is better to have a claim. In a case where a company is reorganizing and will remain in existence, not having a claim means you can go after it for the claim in full after the bankruptcy.⁷⁰ We had a conflict, but we also recognized that having certainty in this area would allow the system to work better. We filed a complaint and took the case to the Second Circuit, which adopted the middle-ground stance that the standard was the release of hazardous substances.⁷¹ Frankly, the decision went closer to what the debtors in that case were arguing for, but still we thought this was a good thing, because at least now we would have some guidance as to what can and what cannot be addressed in the bankruptcy.

Finally, in the area of bankruptcy trustee's personal liability, there is nothing specifically addressing bankruptcy trustees, but there is something to deal with the liability of trustees more generally⁷² that would cover bankruptcy trustees as well, and that will be addressed by other speakers later in the course of the day. The only thing I would add is that while there is a great deal of concern about personal liability of bankruptcy trustees,⁷³ in the fourteen years that Superfund has been active, there has not been a single case where the federal government, at least, has asserted a claim against a bankruptcy trustee in his or her individual capacity.⁷⁴ So, although there certainly is anxiety out there,⁷⁵ it is not anything for which we will take responsibility.

68. *Id.*

69. *Id.*

70. *Id.*

71. *In re Chateaugay*, 944 F.2d at 1005.

72. S. 1834 § 605.

73. See generally Douglas M. Garrou, Note, *The Potentially Responsible Trustee: Probable Target for CERCLA Liability*, 77 VA. L. REV. 113 (1991); D. Ethan Jeffery, *Personal Liability of a Bankruptcy Trustee Since Midlantic National Bank v. New Jersey Department of Environmental Protection: The Environmental Law and Bankruptcy Code Conflict Threatens to Engulf Bankruptcy Trustees*, 2 VILL. ENVTL. L.J. 403 (1991).

74. The same cannot be said for all state agencies, although their efforts to hold the trustees personally liable have failed. See, e.g., *In re Sundance Corp.*, 149 B.R. 641 (Bankr. E.D. Wash. 1993); *State v. Better-Brite Plating, Inc.*, 483 N.W. 2d 574 (Wis. 1992).

75. See *In re Milbar Blvd., Inc.*, 91 B.R. 213 (Bankr. E.D.N.Y. 1988) (the court authorizes unique conveyance of the possessory interest in the contaminated property to EPA in order to avoid any possibility of the bankruptcy trustee incurring personal liability).