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Liability Without End? The Discharge of Cercla Liability in Bankruptcy After Atlantic Research

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**LIABILITY WITHOUT END?
THE DISCHARGE OF CERCLA LIABILITY IN
BANKRUPTCY AFTER *ATLANTIC RESEARCH***

*Robert P. Frank**

I. INTRODUCTION

On June 11, 2007, in *United States v. Atlantic Research Corporation*,¹ the United States Supreme Court unanimously held that “the plain terms of § 107(a)(4)(B)” of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)², as amended, allow potentially responsible parties (“PRPs”) under CERCLA to recover costs from other PRPs incurred in response to the release or threat of release to the environment of hazardous substances.³ *Atlantic Research* was not a bankruptcy case. It did not involve a debtor in bankruptcy or a company reorganized under Chapter 11 of the Bankruptcy Code. *Atlantic Research* was an environmental case: it interpreted a section of CERCLA, and resolved a controversy that had troubled federal courts since CERCLA’s inception.⁴ Although the holding in *Atlantic Research* raises, and may— or may not— resolve, issues arguably unique to

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1. 551 U.S. 128 (2007).

2. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2006).

3. The term “hazardous substance” is specifically defined by CERCLA and encompasses a wide variety of substances, including but not limited to hazardous waste. 42 U.S.C. § 9601(14) (2006).

4. *Atl. Research*, 551 U.S. 128; *see, e.g., In re Jensen*, 995 F.2d 925, 928 (9th Cir. 1993); *In re Chi., Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775, 779 (7th Cir. 1992); *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991); *In re Nat’l Gypsum*, 139 B.R. 397, 404 (Bankr. N.D. Tex. 1992).

CERCLA,⁵ the greatest impact of *Atlantic Research* may ultimately be felt in the field of bankruptcy law, not environmental law. After *Atlantic Research*, it is now unknown whether or not CERCLA liability for a site can be discharged under the Bankruptcy Code.

II. THE TENSION BETWEEN CERCLA AND THE BANKRUPTCY CODE

More than a decade before the Supreme Court's decision in *Atlantic Research*, lower courts recognized "that the Bankruptcy Code and CERCLA point toward competing objectives,"⁶ and that the two statutes "are in tension in significant respects."⁷ Courts perceived this tension as inherent in the aims of the two statutes: "[t]he conflict begins at a basic level, since the goal of CERCLA – cleaning up toxic waste sites promptly and holding liable those responsible for the pollution– is at odds with the premise of bankruptcy, which is to allow debtors a fresh start by freeing them of liability."⁸

The Supreme Court recognized "that a central purpose of the [Bankruptcy] Code is to provide a procedure" by which "'honest but unfortunate'" debtors can "reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'"⁹ Lower courts have recognized this aim as a goal of

5. 551 U.S. 128. CERCLA seeks to encourage PRPs to settle with the United States by protecting PRPs which settle the government's CERCLA claims against them from liability "for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2) (2006). Because *Atlantic Research* held that PRPs who remediate contaminated sites may be able to recover costs incurred for such remediation using § 107(a)(4)(B), the decision led to renewed concern that PRPs voluntarily remediating a contaminated site could use § 107(a)(4)(B) to circumvent the bar against contribution claims. See, e.g., Joanna M. Fuller, *The Sanctity of Settlement: Stopping CERCLA's Volunteer Remediators from Sidestepping the Settlement Bar*, 34 COLUM. J. ENVTL. L. 219 (2009).

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

7. See *Nat'l Gypsum*, 139 B.R. at 404; see also *Jensen*, 995 F.2d at 928 (noting conflict between CERCLA and the Bankruptcy Code); *Chi., Milwaukee*, 974 F.2d at 779.

8. *In re Combustion Equip. Assoc.*, 838 F.2d 35, 37 (2d Cir. 1988).

9. *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (quoting in part *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

corporate reorganizations under the Bankruptcy Code which involve CERCLA liabilities.¹⁰

While bankruptcy proceedings propose to limit and discharge liability, § 107(a) serves the opposite purpose and “lists four broad categories of persons as PRPs, by definition liable to other persons for various costs. . . .”¹¹ As the United States noted in its petition for certiorari in *Atlantic Research*:

107(a) of CERCLA imposes liability for cleanup costs on four categories of “[c]overed persons –typically known as potentially responsible parties (PRPs)– associated with the release or threatened release of hazardous substances. . . . PRPs are defined as (1) owners and operators of facilities at which hazardous substances are located; (2) past owners and operators of such facilities at the time that disposal of hazardous substances occurred; (3) persons who arranged for disposal or treatment of hazardous substances; and (4) certain transporters of hazardous substances.¹²

As the description of the four categories of PRPs demonstrates, the universe of PRPs is not limited to current and former owners or tenants of contaminated sites. Rather, CERCLA “defines PRPs so broadly as to sweep in virtually all persons likely to incur cleanup costs.”¹³ Courts applying CERCLA often identify a PRP as the generator of any hazardous substances that were disposed of or manufactured at a contaminated site.¹⁴ However, the breadth of § 107(a) is not limited to those who generate, transport, or dispose of hazardous substances but can reach “even parties not responsible for contamination.”¹⁵ PRPs can be liable for cleanup costs to the

10. See, e.g., *Chateaugay*, 944 F.2d at 1002 (stating that “[t]he Code aims to provide reorganized debtors with a fresh start, an objective made more feasible by maximizing the scope of a discharge.”); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (D. Minn. 1990).

11. *United States v. Atl. Research*, 551 U.S. 128, 134 n.2 (2007).

12. Petition for Writ of Certiorari, *Atl. Research*, 551 U.S. 128 (No. 06-562) (quoting 42 U.S.C. § 9607(a)(1)-(4) (2006)).

13. *Atl. Research*, 551 U.S. at 129.

14. See Kyle E. McSlarrow, David E. Jones & Eric J. Murdock, *A Decade of Superfund Litigation: CERCLA Case Law From 1981-1991*, in SUPERFUND DESKBOOK 510 (Env'tl. L. Inst., 1992).

15. *Atl. Research*, 551 U.S. at 136.

government, to other PRPs, and to private persons who are not PRPs.¹⁶

Before *Atlantic Research*, the Supreme Court acknowledged the tension between CERCLA and the Bankruptcy Code, and lower courts had discerned in that acknowledgment a direction to reconcile if possible the conflicting objectives of the two statutes.¹⁷ In *Atlantic Research*, the Court refrained from any mention of bankruptcy.¹⁸ Whereas before, reconciliation may have been possible,¹⁹ the tension between the two statutes has now grown, so much so that in certain cases it may no longer be an option.

To see the tension between the two statutes, consider how bankruptcy law identifies which claims may be discharged. In corporate reorganizations under Chapter 11 of the Code, “the confirmation of a plan” of reorganization “discharges the debtor from any debt *that arose before the date of such confirmation.*”²⁰ Similarly, in individual bankruptcies under Chapter 7, with certain limited exceptions that do not expressly include CERCLA liability,²¹ an individual may be discharged “from all debts *that arose before the*

16. See 42 U.S.C. §§ 9607(a)(4)(A)-(B), 9613(f)(1) (2006).

17. *In re Jensen*, 995 F.2d 925, 928 (9th Cir. 1993). *Jensen* notes the conflict between CERCLA and the Bankruptcy Code and observes that, despite these tensions, “the Supreme Court has indicated more than once that, if possible, these two conflicting objectives should be reconciled.” *Id.* (citing *Erman v. Lox Equip. Co.*, 142 B.R. 905, 907 (N.D. Cal. 1992) (internal citations omitted)).

18. The Court was nevertheless aware of the implications its decision in *Atlantic Research* could have on bankruptcy. On behalf of Reading Company, a corporation formed in 1833, operated as a railroad until the late 1970s, and discharged from a reorganization in bankruptcy on January 1, 1981, three weeks after CERCLA was enacted, this author filed an amicus brief in *Atlantic Research* which discussed these implications and alerted the Court to how the tension between bankruptcy and environmental law had manifested itself in *In re Reading Co.*, 115 F.3d 1111 (3d Cir. 1997). See Brief for Reading Co. as Amicus Curiae Supporting Petitioner, *Atl. Research*, 551 U.S. 128 (No. 06-562).

19. See *In re Chi., Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775 (7th Cir. 1992); *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991) (discussing the potential to reconcile the underlying policy goals of Bankruptcy and CERCLA).

20. 11 U.S.C. § 1141(d)(1)(A) (2006) (emphasis added).

21. *Id.* (enumerating limited exceptions which do not include CERCLA liability).

date of the order of relief.”²² After a bankruptcy, a court deciding whether or not CERCLA liabilities were discharged by a bankruptcy must therefore first decide if those liabilities existed in any form during the bankruptcy to be discharged.²³ As one bankruptcy court noted, “[b]ecause bankruptcy discharges liability only for claims that arose before the bankruptcy petition was filed, the focus of the [c]ourt’s inquiry must be on when the CERCLA obligations arose.”²⁴

The time at which “liability on a claim” – i.e., a “debt” under the Bankruptcy Code – arises is therefore critical when determining whether a claim can be discharged in bankruptcy.²⁵ In considering the tension between CERCLA and bankruptcy, the Seventh Circuit found: “[a] question at the heart of this tension: at what point does a party have a CERCLA claim for purposes of bankruptcy so that the failure to raise the claim before bankruptcy bar dates forever bars the claim from being brought against the successors to a reorganized company?”²⁶

Before *Atlantic Research*, courts answered this question in three different ways.²⁷ Under the test most favorable to the CERCLA claimant, articulated by the United States District Court for the Western District of Tennessee in *United States v. Union Scrap Iron & Metal*,²⁸ a “claim exists only when the pre-bankruptcy relationship between the debtor and third party contained all the elements necessary to give rise to a legal obligation under [CERCLA].”²⁹ In *Union Scrap*, the United States Environmental Protection Agency (“EPA”) was the CERCLA claimant seeking to recover costs from a

22. *Id.* § 727(b) (emphasis added).

23. *See id.* By the plain language of the Bankruptcy Code, debts must exist, otherwise they could not be discharged.

24. *In re Chateaugay Corp.*, 112 B.R. 513, 520 (S.D.N.Y. 1990), *aff’d* 944 F.2d 997 (2d Cir. 1991).

25. *See* 11 U.S.C. §§ 101(5), (12) (2006) (defining “claim” and “debt”).

26. *In re Chi., Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775, 779 (7th Cir. 1992).

27. For a review of these three tests: *Compare In re Hassanally*, 208 B.R. 46, 50-54 (B.A.P. 9th Cir. 1997), *with Signature Combs, Inc. v. United States*, 253 F. Supp. 2d 1028, 1033-38 (W.D. Tenn. 2003), Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331, 379-89 (2004), and Philippe J. Kahn, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 CARDOZO L. REV. 1999, 2023-32 (1993).

28. *United States v. Union Scrap Iron & Metal*, 123 B.R. 831 (D. Minn. 1990).

29. *Id.* at 835.

reorganized company years after its bankruptcy had ended.³⁰ The court found that “[b]ecause the EPA had incurred no response costs at the time of . . . confirmation, the EPA “could have no claim in the bankruptcy proceedings—”there was no legal obligation under CERCLA.”³¹ *Union Scrap* renders the incurrence of costs in response to the release, or threat of release, of a hazardous substance the key to determining whether a CERCLA claim dischargeable in bankruptcy exists. However, this test has been criticized because it “arguably gives the creditor too much control over the accrual of its claim.”³²

Under a second test, the identification and discharge of a CERCLA claim in bankruptcy depends on when the release or threat of release, of hazardous substances first occurred.³³ This test is sometimes referred to as the “conduct” test because it deems CERCLA claims to have arisen at the point when the conduct which gave rise to the CERCLA claim first occurred.³⁴ The “conduct” test stands at the opposite extreme of *Union Scrap* because it deems a dischargeable CERCLA claim to have arisen without the decision of the putative CERCLA claimant to incur any costs in response to the release and without knowledge of the release.³⁵ The “conduct” test can thereby set a date for the emergence of a CERCLA claim in a bankruptcy which is so early that at least one federal appellate court has rejected

30. *Id.* at 834.

31. *Id.* at 836.

32. *In re Chi., Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775, 786 (7th Cir. 1992). As the Seventh Circuit noted, the *Union Scrap* court did not apply the same rule in a later case “involving a creditor who was not aware of the debtor’s relationship to a known hazardous site until after the close of bankruptcy....” *Id.* at 785 (citing *Sylvester Bros. v. Burlington N. R.R.*, 133 B.R. 648, 653 (D. Minn. 1991)). In *Sylvester Bros.*, as the Seventh Circuit noted, it was not the CERCLA claimant’s lack of incurred response costs at the time of the reorganization, but the claimant’s lack of knowledge that it had a CERCLA claim to assert, that formed the rationale for holding that the CERCLA claim had not been discharged in the bankruptcy. *Chi., Milwaukee* 974 F.2d at 785-86 (citing *Sylvester Bros.*, 133 B.R. at 653).

33. *See In re Chateaugay Corp.*, 944 F.2d 997, 1005 (2d Cir. 1991).

34. *See In re Hassanally* 208 B.R. 46, 51 (B.A.P. 9th Cir. 1997); Hillinger & Hillinger, *supra* note 26, at 383; Kahn, *supra* note 26, at 2023-25.

35. Kahn *supra* note 26, at 2010-11 (comparing the three different tests for determining CERCLA liability).

it as incompatible with CERCLA's goal of cleaning up the environment.³⁶

The third test, arguably a middle ground between the extremes of *Union Scrap* and *Chateaugay*, is popularly referred to as the "fair contemplation" test³⁷ because it dates the dischargeable CERCLA claim to the moment when the parties could be deemed to "fairly" contemplate the existence and incurrence of costs in response to environmental contamination.³⁸ This test views CERCLA claims as dischargeable in bankruptcy "when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance which the potential claimant knows will lead to CERCLA response costs."³⁹

III. THE GREATER COMPLEXITY OF BANKRUPTCY AFTER *ATLANTIC RESEARCH*

Allowing PRPs to recover costs using § 107(a)(4)(B) strains the analytical framework of the "conduct" and "fair contemplation" tests, and arguably exposes the inability of each test to recognize every CERCLA claim conceivable under § 107(a)(4)(B) and to decide whether the claim existed during a reorganization to be discharged by the bankruptcy. Because certain § 107(a)(4)(B) claims cannot be detected by either test, it will become increasingly difficult for a debtor reorganizing in bankruptcy to emerge from reorganization and plan for a future without CERCLA liability for pre-bankruptcy acts or omissions.

36. See *In re Jensen*, 995 F.2d 925, 930-31 (9th Cir. 1993). The Ninth Circuit rejected the "conduct" test used by the Second Circuit in *Chateaugay*, overturning the adoption of that test by the Bankruptcy Appellate Panel of the Ninth Circuit in *In re Jensen* because that test encompasses costs "that could not 'fairly' have been contemplated by the EPA" during the reorganization. *Jensen*, 995 F.2d at 930-31 (citing *In re Nat'l Gypsum*, 139 B.R. 397, 408 (N.D. Tex 1992)).

37. See, e.g., Alan N. Resnick, *Mass Torts: Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2072 (2000) (noting that "[s]everal courts have adopted the 'fair contemplation test' to determine when a future claim arises.").

38. *Nat'l Gypsum*, 139 B.R. at 409.

39. *In re Chi.*, Milwaukee, St. Paul & Pac. R.R., 974 F.2d 775, 786 (7th Cir. 1992). See *Nat'l Gypsum*, 139 B.R. at 407-08 (stating a CERCLA claim arises when "fair contemplation of future costs based on pre-petition conduct can occur at any particular site by the parties."); see also *Jensen*, 995 F.2d at 930.

PRPs continuously come into existence as they generate, transport, release, and dispose of substances hazardous under CERCLA at a contaminated site, own such contaminated sites, or lease them. Years before emerging from reorganization, a reorganized company may cease to generate waste found at a contaminated site, or to transport waste to a site, but that site may remain open and accept waste for years after the reorganization ends.⁴⁰ Consider too that CERCLA sites can involve dozens or even hundreds of PRPs.⁴¹ Given these possibilities, a generator or transporter, for example, who was not a PRP during a bankruptcy can become one post-bankruptcy. The number of PRPs can multiply, and each PRP may have a §107(a)(4)(B) claim against other PRPs to recover costs.

When PRPs were limited to claims for contribution under CERCLA, the issues created by a multitude of PRPs arising at various times – before, during, and after a bankruptcy reorganization – could be avoided.⁴² As long as they were only contribution claims, the CERCLA claims of various PRPs seeking to recover after bankruptcy from a reorganized company could all be decided by looking to see if the reorganized company and the PRPs asserting CERCLA claims against it were jointly liable to the government.⁴³ In such instances, if the court found that no joint liability could exist

40. See *In re Reading Company*, 115 F.3d 1111, 1115-16 (3d Cir. 1997) (noting that operations at the site began in 1941 but did not stop until 1985, more than four years after Reading Company emerged from bankruptcy on January 1, 1981); see also *In re Reading Company*, 900 F. Supp. 738, 741-42 (E.D. Pa. 1995) (noting chronology of waste shipments and bankruptcy).

41. The site at the center of *Reading*, for example, involved more than 600 PRPs, only thirty-six of which the United States ordered and later sued. 115 F.3d at 1116. Such a large number of PRPs is not unique. See *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 762 (7th Cir. 1994) (involving a site where “more than 200 firms generated hazardous wastes” and the EPA unilaterally ordered approximately twenty-one PRPs to conduct emergency cleanup).

42. Before *Atlantic Research*, several appellate courts limited PRP contribution claims. See *Cooper Indus. v. Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004) (citing cases decided in the First, Second, Third, Fourth, Sixth, Ninth, Tenth and Eleven Circuit Courts of Appeal which barred PRPs from pursuing a CERCLA § 107(a) action against other PRPs for joint and several liability and limited them to claims for contribution under CERCLA § 113(f)(1)).

43. See *Reading*, 115 F.3d at 1124 (adopting the “same traditional sense of contribution” as the Uniform Contribution Among Tortfeasors Act § 1, 12 U.L.A. 194 (1955)).

because the bankruptcy had discharged the reorganized company's liability to the government, the post-bankruptcy CERCLA claimants, because they were limited to a claim for contribution sustainable only if joint liability existed, lost all of their CERCLA claims.⁴⁴ When a court limited its analysis in this way, the ability of PRPs to multiply and come into existence at anytime neither reduced nor precluded the possibility of using a discharge in a bankruptcy reorganization to resolve all of a debtor's CERCLA liability for a particular site.⁴⁵

Under § 107(a)(4)(B), however, the analysis cannot be limited in this way. "A private party may recover under § 107(a) without any establishment of liability to a third party."⁴⁶ Thus, the Supreme Court stressed that the recovery of costs under § 107(a)(4)(B) is "distinct from contribution" and refused the invitation of the United States⁴⁷ to use "the word 'contribution' as if it were synonymous with any apportionment of expenses among PRPs."⁴⁸ Recovery under 107(a), in short, does not depend in any way on the plaintiff establishing that it and the defendant are both jointly liable to a third party which may or may not be litigating—or have any sort of claim—against either the plaintiff or the defendant. As the need for common liability to a third party recedes, the multitude of issues presented by a multitude of PRPs comes to the forefront.

The express inclusion of contingent claims within the Bankruptcy Code's definition of "claim" at 11 U.S.C. § 101(5)⁴⁹ might initially appear to preclude any question of post-bankruptcy exposure to

44. The Third Circuit used this reasoning ten years before *Atlantic Research in Reading*. In *Reading*, the Third Circuit found the post-bankruptcy CERCLA claims of PRPs against Reading Company, a reorganized company, were limited to claims for contribution and held that those CERCLA claims failed "as a matter of law" because the CERCLA liability of Reading Company to the United States for the site in question had been discharged by Reading's bankruptcy. *Reading*, 115 F.3d at 1123.

45. *Id.* at 1116-23 (noting that the reorganized company was one of over 600 PRPs at the site in question and affirming the ruling of the lower court that the contribution claims of these PRPs failed "as a matter of law" without proceeding to consider the timing of when those claims came into existence).

46. *United States v. Atl. Research*, 551 U.S. 128, 139 (2007).

47. Reply Brief for the United States at 11 n.6, *Atl. Research*, 551 U.S. 128 (No. 06-562).

48. *Atl. Research*, 551 U.S. at 138-39.

49. 11 U.S.C. § 101(5)(A) (2006) (listing contingent claim as one of the definitions of "claim").

liability under § 107(a)(4)(B) for operations ending before a bankruptcy ends; but this conclusion is not so simple. A § 107(a)(4)(B) claim asserted by a PRP post-bankruptcy can be classified as a discharged contingent claim *only if* a relationship existed between the private CERCLA claimant and the debtor *during the bankruptcy*.⁵⁰

The preexisting relationship between debtor and claimant during bankruptcy led the United States Court of Appeals for the Second Circuit in *Chateaugay* to classify CERCLA claims held by the EPA as “‘contingent,’ rather than as . . . outside the Code’s definition of ‘claim.’”⁵¹ The *Chateaugay* court noted that even though the EPA did “not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon” the debtor, and might:

not yet even know the location of all the sites at which such wastes may yet be found. . . [t]he relationship between the environmental regulating agencies and those subject to regulation provides sufficient ‘contemplation’ of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of ‘claims.’⁵²

50. A contingent claim concerning a future injury is not found to exist under bankruptcy law unless and until the private claimant who would suffer discharge of the claim is first found to have some sort of relationship to or knowledge of the debtor while the debtor was in bankruptcy. See *In re Chi., Milwaukee, St. Paul & Pac. R.R.*, 974 F.2d 775, 782 (7th Cir. 1992) (CERCLA claim in § 77 railroad reorganization); *In re Chateaugay Corp.*, 944 F.2d 997, 1003-06 (2d Cir. 1991) (CERCLA claims in Ch. 11 reorganization); *In re Penn Cent. Transp. Co.*, 944 F.2d 164, 167-68 (3d Cir. 1991) (refusing to find CERCLA liability, asserted after a completed § 77 reorganization, was discharged in 1979 during reorganization as a contingent claim because relationship necessary to sustain a contingent claim did not come into existence until CERCLA’s enactment in 1980); *Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 943 (3d Cir. 1985) (tort claim in § 77 railroad reorganization); see also 2-101 A. N. Resnick & H. J. Sommer, *Collier on Bankruptcy* ¶101.5[1] (15th ed. rev. 2009).

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

52. *Id.*

The claimant and the debtor knew each other: EPA was “acutely aware” of the debtor “and vice versa.”⁵²

Between PRPs in a § 107(a)(4)(B) action, however, there is *no relationship* remotely similar to that which exists between the government and the regulated debtor-PRP. A PRP who generates hazardous waste and sends it to a landfill which later becomes subject to CERCLA, and a PRP who generates hazardous waste and uses the same landfill, may each know the landfill’s owner or operator. But these generator-PRPs have no reason to know or learn the identity of the other until someone—perhaps the government under § 107(a)(4)(A) or a PRP under § 107(a)(4)(B)—incurs costs in response to contamination and seeks to recover them via a § 107(a) claim. As a result, the post-bankruptcy § 107(a)(4)(B) claims of generator-PRPs against each other may not be treated as contingent claims to be discharged in bankruptcy.⁵³ For this reason, after *Atlantic Research*, neither of the legal tests articulated in *Chateaugay* and *Chicago, Milwaukee* offer a way to view all § 107(a)(4)(B) claims for a particular site as discharged contingent claims under the Bankruptcy Code.

Of the three tests used before *Atlantic Research*, only the *Union Scrap* test appears to survive *Atlantic Research*. The *Union Scrap* test was developed and applied to a site where EPA did not know of the debtor’s link to the contaminated site in question.⁵⁴ The reasoning in *Union Scrap*, however, does not foreclose post-bankruptcy assertions of CERCLA liability by private PRPs.⁵⁵ Instead, it enables that

52. *Id.*

53. *See id.* The Second Circuit in *Chateaugay* discussed how broad the contingencies of a contingent claim could be and noted that “[d]efining claims to include any ultimate right to payment arising from pre-petition conduct by the debtor [“ is] “an interpretation of ‘claim’” [which] “yields questionable results.” *Id.* at 1003. *Chateaugay* approvingly cites Third and Fifth Circuit decisions, reached outside of the environmental context, in which dischargeable claims were found not to exist for the purposes of a bankruptcy in circumstances where the injured victims had no contact with the tortfeasor. *Id.* at 1003 (citing *Schweitzer*, 758 F.2d at 943 (asbestos claims of railroad workers)); *In re Mooney Aircraft, Inc.*, 730 F.2d 367, 375 n.6 (5th Cir. 1984) (victims of post-bankruptcy airplane accident). The use of CERCLA § 107(a)(4)(B) raises these same questions in the context of CERCLA.

54. *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 834 (D. Minn. 1990).

55. *Id.* at 838.

assertion. In cases where the claimant has not incurred response costs until after bankruptcy has ended, *Union Scrap* places the CERCLA claim outside the scope of a bankruptcy discharge simply by identifying a dischargeable CERCLA claim with the incurrence of costs. Under the holding of *Union Scrap*, the § 107 claim of a private PRP would not exist *until* that PRP first incurred a cost it later tried to recover under § 107.⁵⁶ If the PRP asserting § 107(a)(4)(B) liability first incurred costs *after* confirmation of a plan of reorganization or discharge of an individual, that claimant “could have no claim in the bankruptcy proceedings” that would have been discharged.⁵⁷ This outcome may occur even if the private claimant, as EPA did in *Union Scrap*, knew of the bankruptcy.⁵⁸

It appears, therefore, that none of the three tests can prevent a PRP’s post-bankruptcy assertion of a § 107(a)(4)(B) claim from circumventing a bankruptcy discharge. *Atlantic Research* does not, however, make circumvention possible because it makes § 107(a)(4)(B) available to a PRP which might, by refusing to spend money, delay the birth of a § 107(a)(B) claim dischargeable under *Union Scrap*. In cases where the PRPs asserting § 107(a)(B) claims post-bankruptcy could be found to have known of contamination of the site in question during the bankruptcy and could have linked the reorganized company to the site, the post-bankruptcy § 107(a)(4)(B) claim might still be found to have been discharged by a court employing the “fair contemplation” test of *National Gypsum* or *Chicago Milwaukee*.

But *Atlantic Research* may nevertheless have made the tests of *Chateaugay*, *National Gypsum* and *Chicago Milwaukee* inherently unworkable. Consider the continued use of the “fair contemplation” test. By examining if a PRP asserting a § 107(a)(4)(B) claim against a reorganized company after reorganization could have “fairly contemplated” incurring response costs during the reorganization process, the “fair contemplation” test assumes that the PRP existed during the bankruptcy.⁵⁹ Juxtapose this consideration against the following exchange between Chief Justice Roberts and counsel for Atlantic Research during oral arguments before the Supreme Court:

56. *Id.* (finding that cost must be incurred before suit for recovery was brought).

58. *Id.* at 836.

58. *See id.* at 833-34.

59. *See Resnick, supra* note 36 (discussing the development of the “fair contemplation” test).

CHIEF JUSTICE ROBERTS: You could set up a company that cleans these sites, right, and go traveling around the country and clean them up and then send people a bill and cite your reading of § 107[(4)(B)], right?

MR. ARMSTRONG: § 107(a)(4)(B) would include both PRPs and what we might call non-PRPs. I believe that one of the amicus parties studies 364 cases between the years of 1995 and 2000 and there was one case out of that 364 that involved precisely your hypothetical, Your Honor.

CHIEF JUSTICE ROBERTS: Well, if we rule in your favor presumably there will be a lot more, right?⁶⁰

It is beyond the scope of this article to consider whether the number of cleanups voluntarily initiated by private parties increased after *Atlantic Research* once § 107(a)(4)(B) became available to private parties as a way to recover cleanup costs. What merits scrutiny here is the Chief Justice's premise that someone "could set up a company" which cleans up a site and then use § 107(a)(4)(B) to recover its costs. *Atlantic Research* appears to support the use of § 107(a)(4)(B) in this way. In summarizing its detailed analysis of the relationship of subparagraphs (A) and (B) of § 107, the Supreme Court unequivocally found the cause of action available under § 107(a)(4)(B) to be available to any private party: "[a]tlantic Research believes that subparagraph (B) provides a cause of action to anyone except the United States, a State, or an Indian tribe – the persons listed in subparagraph (A). We agree with Atlantic Research."⁶¹

Atlantic Research thereby recognizes that a § 107(a)(4)(B) cause of action is available to any private person who voluntarily and unilaterally, without a settlement agreement or court judgment, incurs costs recoverable under CERCLA in response to a release of a hazardous substance to the environment.⁶² After *Atlantic Research*, if a § 107(a)(4)(B) claim is asserted after a reorganization ends by a company formed to solely clean up a site and recover the cost of that cleanup from all PRPs, it remains to be seen whether the "fair

60. Transcript of Oral Argument at 35, *United States v. Atl. Research*, 551 U.S. 128 (2007) (No. 06-562) (statements of Chief Justice John Roberts and Owen T. Armstrong, Jr., counsel to Atlantic Research Corporation).

61. *Atl. Research*, 551 U.S. at 135.

62. *See id.* at 139.

contemplation” test of *National Gypsum* or the “conduct” test of *Chateaugay* could possibly be used to find that the § 107(a)(4)(B) claim was discharged or is dischargeable in bankruptcy. But such an outcome appears unlikely. A person which did not exist at the time of a reorganization cannot have fairly contemplated during a reorganization the incurrence of costs recoverable under § 107(a)(4)(B) against a reorganized debtor. Similarly, it is difficult, if not impossible, to see how the “conduct” test of *Chateaugay* could be used to discharge a § 107(a)(4)(B) claim bought against a reorganized debtor by a private CERCLA claimant of the sort envisioned during the oral argument of *Atlantic Research*. The Second Circuit indicated as much in *Chateaugay* when it discussed what sorts of claims could and could not be recognized and discharged by a bankruptcy and noted that expecting the Bankruptcy Code to reach all conceivable claims would lead to “questionable results”⁶³ which the Court would not endorse.⁶⁴

IV. CONCLUSION

The Supreme Court in *Atlantic Research* did not imply a private right of action in § 107(a)(4)(B). Instead, the Court found that a private right of action exists in “the plain terms of § 107(a)(4)(B).”⁶⁵ In light of the greater complexity the use of § 107(a)(4)(B) creates for the discharge of CERCLA claims in a bankruptcy reorganization after *Atlantic Research*, it is worth asking if debtors can still hope to use their reorganization under the Bankruptcy Code to resolve all of their CERCLA liability for a particular site. The issues presented by cost recovery under § 107(a)(4)(B) –a cause of action “distinct from contribution”⁶⁶ now stand squarely at the intersection of bankruptcy and environmental law.

Given the myriad private parties that may use § 107(a)(4)(B), the inability of the existing analytical approaches in bankruptcy to identify and discharge all of the § 107(a)(4)(B) claims which could

63. *In re Chateaugay Corp.*, 944 F.2d 997, 1003 (2d Cir. 1991).

64. “To expect ‘claims’ to be filed by those who have not yet had any contact whatever with the tortfeasor has been characterized as ‘absurd.’” *Id.* (citing *Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 943 (3d Cir. 1985) (internal quotations omitted)).

65. *Atl. Research*, 551 U.S. at 141.

66. *Id.* at 139.

be asserted at a given contaminated site, and the fact that it is the plain language of Congress rather than the judicial implication of the Supreme Court that created a private cause of action under § 107(a)(4)(B), perhaps the next court to consider the collision of bankruptcy law with CERCLA should ask if the enactment of § 107(a)(4)(B) on December 11, 1980 added an exception to the scope of a discharge not expressly enumerated in the Bankruptcy Code.⁶⁷ If this court answers in the affirmative, it would thereby recognize the enactment of § 107(a)(4)(B) as an implicit repeal of the authority of the Bankruptcy Code to discharge all of the CERCLA liability a debtor could have for a particular site. Admittedly, “the only permissible justification for a repeal by implication exists when earlier and later statutes are irreconcilable.”⁶⁸ But if bankruptcy cases have now grown so complex that the CERCLA liabilities arising at a particular site cannot be identified and discharged or even affected by reorganization under the Bankruptcy Code, it is increasingly difficult to see how CERCLA and the Bankruptcy Code can be reconciled. In short, courts considering the possibilities for reconciliation of the two statutes after *Atlantic Research* may find that the tension which did exist between the Bankruptcy Code and CERCLA has been resolved in favor of the latter statute.

67. See 11 U.S.C. § 523(a) (2006) (enumerating nineteen exceptions to the scope of a discharge in bankruptcy).

68. *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Intern. Inc.*, 534 U.S. 124, 141-42 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)).

