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In This Corner, We Have the Bankruptcy Code's Discharge Provisions and in This Corner, CERCLA, a Strict Liability Statue: In Re Reading Company

Jennifer A. Pasquarella

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IN THIS CORNER, WE HAVE THE BANKRUPTCY CODE'S
DISCHARGE PROVISIONS AND IN THIS CORNER, CERCLA, A
STRICT LIABILITY STATUTE: *IN RE READING COMPANY*

I. INTRODUCTION

A perpetual conflict has existed between the Bankruptcy Reform Act of 1978 (the Bankruptcy Code)¹ and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),² ever since Congress passed the latter. Congress enacted CERCLA to safeguard the public health and welfare by impos-

1. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1994)) [hereinafter Bankruptcy Code]. Congress intended the revised version of the Bankruptcy Code "to modernize the bankruptcy law by codifying a new title 11 that [would] embody the substantive law of bankruptcy" S. REP. NO. 95-989, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5787.

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 (1994)) [hereinafter CERCLA], as reauthorized and amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections within 42 U.S.C. §§ 9601-9675 (1994)) [hereinafter SARA]. Congress added SARA to CERCLA for two key reasons. First, it provides the federal government, and therefore the Environmental Protection Agency (EPA), with the necessary funding to undertake extensive environmental cleanup projects. See Catherine A. Barth, Note, *EPA Runs "CERCLAS" Around Bankruptcy Law: In Re CMC Heartland Partners*, 5 VILL. ENVTL. L.J. 203, 235 n.2 (1994). See generally H.R. REP. NO. 96-7020 (1980). Second, SARA increases CERCLA's capacity "for allocating cleanup costs among responsible parties." Philippe J. Kahn, Note, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 CARDOZO L. REV. 1999, 1999 (1993). Specifically, SARA (1) authorizes "the government to place a federal lien on the property [of a potentially responsible party (PRP)] to secure reimbursement" for the cleanup costs EPA incurs, and (2) expressly entitles one PRP to contribution from another for any cleanup expenses incurred because of both parties' actions. Denise M. Schuh, Comment, *The Cents of It: Dischargeability and Environmental Claims Under the Bankruptcy Code*, 14 N. ILL. U.L. REV. 191, 199 (1993) (citing CERCLA § 107, 42 U.S.C. § 9607 (1988)); see also CERCLA §§ 107(1), 113(f), 42 U.S.C. §§ 9607(1), 9613(f) (1994). Before Congress enacted SARA, parties seeking contribution relied on the judicially created right of contribution in section 107. See *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1535 (10th Cir. 1995). Congress responded to judicial splits over the right to contribution under section 107 by enacting section 113, which supplemented CERCLA with an express contribution provision. See *id.* Congress stated that its primary objective in including the new provision was to "clarif[y] and confirm[] the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances." S. REP. NO. 99-11, at 44 (1985), *reprinted in* 2 *Legislative History of Superfund Amendments and Reauthorization Act of 1986*, at 636, Sp. Print 101-120 (1st Cong., 2d Sess.) (1990).

ing strict liability on parties responsible for environmental catastrophes.³ The Bankruptcy Code, however, guarantees all debtors the opportunity for a “fresh start,” free of any previous debts or liabilities.⁴ What happens, though, when the two statutes come head-to-head when a party responsible for an environmental catastrophe files for bankruptcy? Are that party’s environmental obligations included in the debts and liabilities discharged as a part of this “fresh start” policy? If so, are they granted any priority status in the discharge process? These are important questions, and conflicts between the two statutes have traditionally arisen when either of their underlying policies has been compromised.⁵

Is it possible to ensure, as Congress intended, that each party responsible for an environmental disaster will pay for the cleanup

3. See Roy B. True, Comment, *Dischargeability of CERCLA Liability in Bankruptcy*, 61 UMKC L. REV. 329, 332-33 (1992) (explaining why Congress enacted CERCLA). Typical environmental catastrophes have included:

The contamination by chemicals of 54 public wells serving 100,000 of Long Island’s residents, the discovery of up to 20,000 to 30,000 barrels of discarded, leaking, and unlabeled wastes in the “Valley of the Drums” in Kentucky, the suspected leaching of arsenic and orthonitroaniline into the water supply of 300,000 people in Charles City, Iowa

Superfund: Hearings on H.R. 4571, 4566, and 5290 Before the Subcomm. On Trans. & Commerce of the Comm. On Interstate & Foreign Commerce Comm., 96th Cong. 210 (1980) [hereinafter *Superfund Hearings*] (statement of Barbara Blum, EPA Deputy Administrator).

As of 1992, \$11 billion dollars of Superfund money had been spent cleaning up eighty-four environmental disasters, and experts predict more will be spent over the next few years. See Peter Hong & Michele Galen, *The Toxic Mess Called Superfund*, Bus. Wk., May 11, 1992, at 32.

4. See Bankruptcy Code § 722, 11 U.S.C. § 727(a)-(b) (1994). Specifically, section 727(b) provides that “a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief . . . and any liability on a claim that is determined . . . [to have] arisen before the commencement of the case . . .” *Id.*

5. See Jill Thompson Losch, Comment, *Bankruptcy v. Environmental Obligations: Clash of the Titans*, 52 LA. L. REV. 137, 173 (1991) (tracing historic conflict between CERCLA and Bankruptcy Code). Losch states:

Thus far, what reconciliation has occurred has been at the price of impairment of one of the competing interests. Moreover, in some cases, “reconciliation” has resulted in the frustration of both the policies of the Bankruptcy Code and those of CERCLA, inconsistent rulings, and a resultant decline in ability of the parties (the debtor and EPA) to develop effective strategies for the future.

Id. Still, there is no way to predict which policy, if either, will be sacrificed because “the answer appears to depend on the court, the characterization of harm, and the presence or lack thereof of unencumbered assets.” *Id.* at 150. *But see* Brian A. Cahalane, Note, *CERCLA and the Fresh Start: Quelling the Eternal Conflict*, 4 AM. BANKR. INST. L. REV. 265, 277 (1996) (stating current trend favors CERCLA’s goals over those of Bankruptcy Code); Kahn, *supra* note 2, at 2008 (asserting “the tendency has been in favor of empowering the CERCLA liability scheme, [but] this has not been the case regarding the debtor’s discharge on future CERCLA liabilities”).

costs expended, if any party declared bankruptcy and reorganized under the Bankruptcy Code? This Note discusses the Third Circuit decision *In re Reading Company*,⁶ where the court addressed this question, and achieved a successful balance between the two statutes. Section II of this Note describes the relevant case law and statutory provisions that have traced the historical conflict between the Bankruptcy Code and CERCLA, and how different circuits have approached that conflict. Section III sets forth the factual and procedural history of *Reading*. Next, Section IV traces the Third Circuit's analysis, describing how the court arrived at its decision. Section V examines the soundness and consistency of the Third Circuit's analysis in *Reading*. Finally, Section VI focuses on the positive impact that the *Reading* court's decision may have upon the Third Circuit, and possibly other circuits, if confronted with this particular conflict between CERCLA and the Bankruptcy Code. Specifically, this section concludes that if courts follow the equitable solution reached in *Reading*, bankrupt corporations will have greater confidence in the fairness of the judicial system.

II. BACKGROUND MATERIAL ON THE CONFLICT BETWEEN CERCLA AND THE BANKRUPTCY CODE

A. CERCLA

On December 11, 1980, Congress enacted CERCLA in response to escalating environmental problems.⁷ This sweeping

6. 115 F.3d 1111 (3d Cir. 1997).

7. See John C. Ryland, Note, *When Policies Collide: The Conflict Between the Bankruptcy Code and CERCLA*, 24 MEM. ST. U. L. REV. 739 (1994) (explaining purpose of CERCLA was to protect public health and welfare). According to the federal government, Americans produce over 260 million tons of hazardous waste annually, and this waste poses serious environmental problems. See Schuh, *supra* note 2, at 191 n.1 (citing 138 CONG. REC. S95, 23-34 (daily ed. July 1, 1992) (statement of Sen. Specter)). Congress showed its receptiveness to the severity of increasing environmental abuses when it enacted CERCLA. Congress stated:

Over the past two decades, the Congress has enacted strong environmental legislation in recognition of the danger to human health and the environment posed by a host of environmental pollutants. This field of environmental legislation has expanded to address newly discovered sources of such danger as the frontiers of medical and scientific knowledge have been broadened.

H.R. REP. NO. 96-1016, pt.1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6137. See also *O'Neil v. Picillo*, 682 F. Supp. 706, 719 n.2 (D.R.I. 1988), *aff'd* 883 F.2d 176 (1st Cir. 1989) (noting "Congress intended broad judicial interpretation of CERCLA in order to give full effect to two important legislative purposes . . . prompt and effective response to hazardous waste problems and to force those responsible . . . to bear the cost of their action"); *Bulk Distribution Ctrs., Inc. v. Monsanto Co.*, 589 F. Supp. 1437, 1441 (S.D. Fla. 1984) (affirming CERCLA establishes "a means of controlling and financing both governmental and private re-

piece of legislation has been described as “the first comprehensive and self-executing federal statute to address the past as well as the future release of hazardous substances.”⁸ It provides the federal government with the means necessary to both identify as well as cure releases, or threatened releases, of hazardous materials into the environment.⁹ Specifically, CERCLA empowers the President, who has delegated this authority to the Environmental Protection Agency (EPA), to: (1) respond to any hazardous release or threatened release; and (2) work toward its removal.¹⁰ EPA may

sponses to hazardous releases . . .”); *United States v. Reilly Tar & Chem. Co.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982) (holding congressional purpose of CERCLA is “to provide for liability, compensation, cleanup, and emergency response to hazardous substances released into the environment”).

8. Losch, *supra* note 5, at 139. In *Amoco Oil v. Borden*, the court explained that “CERCLA substantially changed the legal machinery used to enforce environmental cleanup efforts and was enacted to fill gaps left in an earlier statute, the Resource Conservation and Recovery Act of 1976 (‘RCRA’).” *Amoco Oil v. Borden*, Inc., 889 F.2d 664, 666 (5th Cir. 1989). Under RCRA, Congress lacked the authority to order PRPs to clean up abandoned or inactive waste sites unless the sites posed some imminent threat to the public health or welfare. *See id.* CERCLA solved this problem “by establishing a means of controlling and financing both governmental and private responses to hazardous releases at abandoned and inactive waste disposal sites.” *Bulk Distribution Ctrs.*, 589 F. Supp. at 1441. Section 107 is a key CERCLA provision because it authorizes both the government as well as private individuals to seek response costs from PRPs who create a hazardous waste site. *See Amoco Oil*, 889 F.2d at 667; *see also* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (stressing “[t]he remedy that Congress felt it needed in CERCLA is sweeping: everyone . . . potentially responsible for hazardous-waste contamination may be forced to contribute to cleanup costs.”). There are limitations, however, on the costs the government or a private party may collect under section 107. For example, neither entity is entitled to indemnification unless it “acted to contain a release threatening the public health or the environment.” *Amoco Oil*, 889 F.2d at 669-70. In addition, section 107 only applies to those costs which are necessary and in accordance with the National Contingency Plan (NCP). *See id.* at 672 (discussing NCP and its requirements).

9. *See* Janice L. Green, *CERCLA and the Bankruptcy Code*, 11 TEMP. ENVTL. L. & TECH. J. 171, 171-72 (1992); *see also* *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992) (asserting “in CERCLA Congress enacted a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten[] environment and human health”) (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 889 F.2d 1146, 1150 (1st Cir. 1989)); *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1197 (2d Cir. 1992) (same).

10. *See* Green, *supra* note 9, at 171. The specific terms of CERCLA authorize the President to do the following:

[R]emove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure . . . which the President deems necessary to protect the public health or welfare or the environment . . . The President shall give primary attention to those releases which the President deems may present a public health threat.

either order the potentially responsible party (PRP)¹¹ to personally undertake the necessary "remedial or removal actions," or to clean the contaminated CERCLA site itself and then seek reimbursement, pursuant to section 107, for costs it incurs.¹² If EPA itself takes

CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1994). Once the President has identified an environmental "hazard", there are three courses of action he may take. The President may: (1) file for an injunction against the responsible party to help minimize the environmental threat; (2) fine the responsible party or parties; or (3) have the federal government clean up the site and later seek indemnity from the responsible party or parties. See Green, *supra* note 9, at 171-72 (citing CERCLA § 104(a)-(b), 106(a), 42 U.S.C. §§ 9604(a)-(b), 9606(a)). The President has turned most of this authority over to EPA, which now serves as the primary government enforcer of CERCLA. See Shawn F. Sullivan, Comment, *The Allowance or Disallowance of Private Party CERCLA Claims in Bankruptcy: A Judicially Forged Conflict Between the Code and CERCLA*, 3 DICK. J. ENVTL. L. & POL'Y 1 n.30 (1993) (referring to EPA as "the primary enforcer of CERCLA"). Furthermore, CERCLA "imposed retroactive liability on any person who, prior to the statute's passage, had disposed of, transported, or arranged for the disposal of hazardous substances." Reading, 115 F.3d 1111, 1115 (3d Cir. 1997) (citing *In re Penn Cent. Transp. Co. (Paoli Yard)*, 944 F.2d 164, 167 (3d Cir. 1991). Specifically, Congress defines "hazardous substances" in CERCLA as "such elements, compounds, mixtures, solutions, and substances which, when released into the environment may present substantial danger to the public health or welfare or the environment" CERCLA § 102(a), 42 U.S.C. § 9602(a) (1994).

11. See Kahn, *supra* note 2, at 2054 n.9 (noting that although the term "potentially responsible parties" is used only a few times within CERCLA itself by EPA, the judicial system and commentators frequently use it "to designate parties that are liable under CERCLA"). Such liable parties include:

[T]he present owner or operator of the site, any owner or operator in the past at a time when there was hazardous waste disposed of at the site; any person who by contract, agreement, or otherwise arranged for transportation and disposal or treatment of a hazardous substance at the site; and any person or party who transported hazardous waste to a site.

Ryland, *supra* note 7, at 741 n.12 (quoting CERCLA § 107(a), 42 U.S.C. § 9607(a)(1994)). For a listing of the liable parties specified in CERCLA section 107(a), see *infra* note 14 and accompanying text.

12. Ryland, *supra* note 7, at 741-42. CERCLA describes "removal actions" as the following:

[T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release of hazardous substances The term includes . . . without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for

CERCLA § 101(23), 42 U.S.C. § 9601(23) (1994). Thus, removal actions are immediate and short term cleanup actions. See *id.* Moreover, the government may recover removal costs in full. See *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1278 (3d Cir. 1993) (describing removal activity as that in which "the government takes direct action to investigate, evaluate or monitor a release, threat of release, or a danger posed by such a problem . . .").

CERCLA section 107 empowers EPA to seek retribution from any responsible party or parties. See CERCLA § 107, 42 U.S.C. § 9607 (1994). According to section 107(a)(4), a PRP will be liable for "all costs of removal or remedial action incurred

either removal or remedial action, the expenses are reimbursed by CERCLA's Superfund.¹³

Congress created a strict liability statute to guarantee that responsible parties may not escape the financial burden of an envi-

by the United States Government or a State . . . , any other necessary costs of response incurred by any other person . . . , damages for injury to, destruction of, or loss of natural resources . . . , and the costs of any health assessment or health effects study" *Id.* § 107(a)(4)(A)-(D), 42 U.S.C. § 9607(a)(4)(A)-(D). These costs include any accumulated interest as well. CERCLA specifies three situations where a defendant is not held strictly liable. *See id.* § 107(b)(1)-(4), 42 U.S.C. § 9607(b)(1)-(4). According to CERCLA, a PRP can only escape cleanup costs if he or she:

[C]an establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting . . . were caused solely by (1) an act of God, (2) an act of war, (3) an act or omission of a third party other than an employee or an agent of the defendant, . . . or any combination of the foregoing

Id. Remedial actions are different from removal actions because they permanently remove the hazardous material or threat from the environment. *See id.* § 101(24), 42 U.S.C. § 9601(24).

13. *See Green, supra* note 9, at 172. The Supreme Court has noted that "[t]here are two primary purposes for which Superfund money may be spent — to finance 'governmental response,' and to 'pay claims.'" *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986). In essence, Congress created the Superfund to finance EPA's environmental cleanup projects with speed and efficiency. *See Cahalane, supra* note 5, at 268; Deborah E. Parker, Comment, *Environmental Claims In Bankruptcy: It's a Question of Priorities*, 32 SAN DIEGO L. REV. 221, 225 (1995). Congress imposed special taxes "on chemical and petroleum producers" to finance the Superfund. Cahalane, *supra* note 5, at 268 n.19 (citing Scott Wilsdon, Note, *When A Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1264 (1987)). Initially, the fund started with an allotted budget of \$8.5 billion for a five year period. *See Schuh, supra* note 2, at 199 (citing CERCLA § 111(a), 42 U.S.C. § 9611(a) (1994)). CERCLA specifies that "there is authorized to be appropriated from the Hazardous Substance Superfund . . . not more than \$8,500,000,000 for the next 5-year period beginning on October 17, 1986, and not more than \$5,100,000,000 for the period commencing October 1, 1991, and ending September 30, 1994, and such sums shall remain available until expended." *Id.*

Although it appears that EPA has unrestricted access to Superfund money, CERCLA imposes several limitations. *See Green, supra* note 9, at 172 n.13. CERCLA states that "[t]he President [and EPA] shall not pay for any administrative costs or expenses out of the Fund unless such costs and expenses are reasonably necessary for and incidental to the implementation of this subchapter." CERCLA § 111(a), 42 U.S.C. § 9611(a)(1994). Furthermore, EPA cannot use Superfund money on remedial actions unless the targeted CERCLA site is recorded on the National Priorities List (NPL). *See Green, supra* note 9, at 172 (citing *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1382 n.2 (5th Cir. 1989)). Specifically, "[h]azardous waste sites placed on the EPA's NPL consist of the [most severe and] heaviest polluted sites in United States." *Schuh, supra* note 2, at 198. Once a site is included on the NPL, EPA can take immediate efforts toward its cleanup using Superfund money. *See id.* at 198 n.38. As of 1993, the NPL listed approximately 1,200 sites, and that number has increased over the last three years. *See id.* at 198 (citing 40 C.F.R. § 300, apps. A, B (1990)). For a general understanding of the Superfund's uses and limitations, see CERCLA § 111(a), 42 U.S.C. § 9611 (1994).

ronmental disaster caused by their own deliberate or careless acts.¹⁴ Not only is the federal government permitted to seek recovery costs from PRPs, but sections 107(a)(1)-(4)(B) additionally empower private plaintiffs incurring cleanup costs to use this course of action as well.¹⁵ Private parties can seek indemnification from the actual responsible party or parties pursuant to section 107(a).¹⁶ This private

14. See Nancy Hisey Kratzke, *Dischargeability Issues and Superfund Claims: The Conflict Between Environmental and Bankruptcy Policies*, 17 COLUM. J. ENVTL. L. 381, 385 (1992). To ease the severity of environmental hazards, "CERCLA creates an action in strict liability and enables 'the Administrator to pursue rapid recovery of the costs incurred for the costs of such actions undertaken by him from persons liable therefor.'" *Id.* (quoting H.R. REP. NO. 96-7020, *supra* note 2, at 17). Thus, Congress's principle goal was "assuring that those who caused chemical harm bear the costs of that harm . . ." S. Doc. No. 97-14, at 320 (1983).

Although CERCLA does not specifically provide for joint and several liability among PRPs, courts have interpreted it to do so. See Green, *supra* note 9, at 201 n.19 (citing Katherine Simpson Allen, *Belly Up and Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 VAND. L. REV. 1037, 1070 n.205 (1985)); Ryland, *supra* note 7, at 772 n.18; see, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985) (asserting "Congress intended that responsible parties be held strictly liable, even though an explicit provision for strict liability was not included in the compromise . . ."); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) (holding Congress's deletion of strict liability provisions from CERCLA "was not intended as a rejection of joint and several liability"). *But see United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1280 (3d Cir. 1993) (holding "that although joint and several liability is generally appropriate . . . apportionment may be warranted in certain circumstances"); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992) (noting "CERCLA does not specifically provide for joint and several liability . . . [and] both the House and Senate deleted provisions imposing joint and several liability from their respective versions of the statute . . ."). More specifically, CERCLA section 107(a) imposes joint and several liability upon:

- (1) [T]he 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 disposal or treatment, or arranged with a transporter for transport 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 substance,
- (4) and 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, shall be liable for

(A) all costs of removal or remedial action incurred

CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994).

15. See John C. Cruden, *CERCLA Overview*, SA85 A.L.I.-A.B.A. 517, 532 (1996) (noting federal government may recover from PRPs under section 107 past and future response costs, remedial costs, prejudgment interest and enforcement costs).

16. See *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667 (2d Cir. 1989). Section 107(a) is a key provision because it establishes the framework whereby both

right of action is, however, only available to innocent parties. Responsible parties must instead rely upon section 113(f).¹⁷ Specifici-

the "government and private plaintiffs [may] recover from responsible parties the costs incurred in cleaning up and responding to hazardous substances . . ." *In re Reading*, 115 F.3d 1111, 1117 (3d Cir. 1997). See, e.g., *City of Philadelphia v. Stephan Chem. Co.*, 544 F. Supp. 1135, 1143 (E.D. Pa. 1982) (asserting private right of action exists under section 107(a)(4)(b) and stating "the liability provision is an integral part of the statute's method of achieving this goal for it gives a private party the right to recover its response costs from responsible third parties which it may choose to pursue . . ."). Section 107 sets forth the four elements that are necessary to impose CERCLA liability for past environmental offenses. The statute requires the following:

- (1) [T]he defendant falls within one of the four categories of 'responsible parties'
- (2) the hazardous substances [must be] . . . disposed [of] at a 'facility'
- (3) there [must be] . . . a "release" or threatened release of hazardous substances from the facility into the environment
- (4) [and] the release [must] cause[] the incurrence of "response costs."

CERCLA § 107, 42 U.S.C. § 9607 (1994); see also *Reading*, 115 F.3d at 1118 (quoting language of CERCLA section 107); *United States v. Alcan Aluminum Co.*, 964 F.2d 252, 258-59 (3d Cir. 1992) (recognizing same criteria as *Reading* court). For a discussion of the parties included in CERCLA's definition of responsible parties, see *supra* notes 11 and 14 and accompanying text.

Once those criteria are established, section 107(a)(4)(B) lists four potential categories of damages for which the guilty party may be held financially liable. CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1994). This liability includes:

- (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
- (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
- (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
- (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id. Before the SARA amendments in 1986, and in particular the express contribution provision of section 113(f), the federal government or a private plaintiff could have asserted a contribution claim against a PRP pursuant to section 107(a)(4)(B). See *Reading*, 115 F.3d at 1117. As originally enacted, CERCLA lacked any express provision granting one PRP the right to recover costs from another PRP. See *id.* In response, "[c]ourts filled the gap by interpreting section 107(a)(4)(B) as providing a private right of action by which a party who had expended resources on cleanup efforts, could obtain contribution from others." *Id.* at 1118; see, e.g., *Key Tronic Corp. v. United States*, 511 U.S. 809, 816 n.7 (1994) (stating courts "have been virtually unanimous in holding that § 107(a)(4)(B) creates a private right of action for the recovery of necessary response costs") (citing *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir. 1985)); *United States v. New Castle County*, 642 F. Supp. 1258, 1269 (D. Del. 1986) (recognizing "[a] right to contribution would encourage expeditious settlement of Superfund suits"). Therefore, this judicially-created right was the only vehicle parties had available to them to secure contribution before the 1986 SARA amendments. See *Reading*, 115 F.3d at 1119.

17. See *Reading*, 115 F.3d at 1119. For example, in *United Tech. Corp. v. Browning-Ferris Ind., Inc.*, the First Circuit held that it was evident from the plain

cally, section 113(f) enables one PRP to seek contribution costs from another PRP who has escaped paying for an environmental hazard to which they contributed.¹⁸

language of the two statutory provisions that Congress intended sections 107 and 113 to address two different causes of action, one for complete indemnification and the other for contribution. 33 F.3d 96, 98 (1st Cir. 1994). The First Circuit stated that “[a]lthough Congress did not explicitly plot the boundary that divides these two types of action, we are not wholly without guidance. Under accepted canons of [statutory] construction, legal terms used in framing a statute are ordinarily presumed to have been intended to convey their customary legal meaning.” *Id.* at 99. See also, *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120-23 (3d Cir. 1997) (holding Congress intended “contribution” to mean that responsible parties may recoup only portion of their costs under section 113(f), via plain meaning interpretation); *United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1997) (holding specific language of section 113(f) controls between “jointly and severally liable parties”); *Redwing Carriers, Inc. v. Saraland Apts.*, 94 F.3d 1489, 1496 (11th Cir. 1996) (stating section 113(f) governs contribution claims); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (noting “quintessential claim for contribution” is claim where one liable party seeks allocation of cleanup costs between itself and another PRP).

Once Congress amended CERCLA with SARA, section 113(f) in particular, parties gained an express statutory provision authorizing contribution recovery. See *Reading*, 115 F.3d at 1119. Section 113(f) states in pertinent part:

Any person may seek contribution from any other person who is liable or potentially liable . . . during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. *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 section 9606 of this title or section 9607 of this title.*

CERCLA § 113(f) (1), 42 U.S.C. § 9613(f) (1) (1994) (emphasis added).

Congressional intent supports a plain reading of the statute. Congress stated: This amendment clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share The amendment should encourage private party settlements and cleanups. . . . Private parties may be more willing to assume the financial responsibility for cleanup if they are assured that they can seek contribution from others.

S. REP. NO. 99-11, at 44 (1985). Clearly, Congress passed the SARA amendments to both clarify and guarantee the available private right of action under CERCLA. See *Reading*, 115 F.3d at 1119. Therefore, “the language of § 113(f), permitting contribution, replaced the judicially created right to contribution under § 107(a)(4)(B).” *Id.*

18. See *Reading*, 115 F. 3d, at 1120-21; see also *David B. Lilly Co. v. Fisher*, 18 F.3d 1112, 1123 (3d Cir. 1994) (holding contribution is only available if contributor and defendant share joint liability with plaintiff); *Green v. United States*, 775 F.2d 964, 971 (8th Cir. 1985) (stating “contribution require[s] a common liability of the party charged and the party sought to be charged to the injured party for the same damages”). The Seventh Circuit defined “contribution” as a claim “by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.” *Akzo Coatings*, 30 F.3d at 764. More specifically, Black’s Law Dictionary defines contribution as:

B. The Bankruptcy Code

Congress originally created the Bankruptcy Act in 1898 with two specific purposes: (1) to provide a debtor with a "fresh start"; and (2) to distribute the debtor's remaining assets among his or her creditors in the most equitable and orderly manner possible.¹⁹ In *Williams v. United States Fidelity & Guaranty Co.*, the Supreme Court held:

The sharing of a loss or payment among several. The act of any one or several of a number of co-debtors, co-sureties, etc., in reimbursing one of their number who has paid the whole debt or suffered the whole liability, each to the extent of his proportionate share.

BLACK'S LAW DICTIONARY 328 (6th ed. 1990). CERCLA section 113(f)(1) addresses contribution actions and provides in 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. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

CERCLA § 113(f), 42 U.S.C. § 9613(f)(1994).

In essence, CERCLA provides private parties with two distinct avenues of legal action. See *Halliburton*, 111 F.3d at 1120. Private parties may either reclaim all of their costs through a section 107(a) cost recovery action, or reclaim only part of the costs pursuant to a section 113(f) action for contribution. See *id.* Section 107 is only available to innocent parties because it imposes strict liability on the responsible party or parties. See *id.* at 1120-21; *United Tech.*, 33 F.3d at 99-100; see also *Colorado & E. R.R. Co.*, 50 F.3d at 1535 (holding "it is now well settled that § 107 imposes strict liability on [potentially responsible persons]"); *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 92 (3d Cir. 1994) (defining CERCLA as strict liability statute and holding PRPs "financially accountable for the costs associated with a remedial or removal action . . .").

In contrast, section 113 permits courts to apportion the response costs between the PRPs in an equitable manner. See *Halliburton*, 111 F.3d at 1121 (quoting CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1)). For example, in *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, the Seventh Circuit held that section 113(f) was intended to allocate recovery costs among responsible parties. 107 F.3d 1235, 1240 (7th Cir. 1997). According to the *Rumpke* court, while a PRP should not be permitted to fully escape liability by recovering all of its response costs, it should not have to bear the full burden when other parties are involved. See *Halliburton*, 111 F.3d at 1122. This was the sole purpose of the SARA amendment. See Kahn, *supra* note 2, at 2002. SARA's legislative history supports the proposition that Congress specifically recognized and provided for the right of contribution in section 113(f), stating:

[Section 113(f)] clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup costs that may be greater than its equitable share under the circumstances.

H.R. REP. NO. 99-253(I), at 79 (1986). After it is determined that multiple parties are in fact involved, it is then within the court's discretion to determine how the costs should be apportioned.

19. See Ryland, *supra* note 7, at 742; Green, *supra* note 9, at 174.

It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and to permit him to start afresh from the obligations and responsibilities consequent upon business misfortunes.²⁰

20. *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55 (1915); *see also*, *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (reaffirming main purpose of Bankruptcy Act as "a new opportunity in life [of debtor] and a clear field for future effort, unhampered by the pressure and discouragement of existing debt."). The goal of the revised Bankruptcy Code has remained virtually the same over the past seventy years. *See Bankruptcy Act Revision: Hearings on H.R. 31 and 32 Before the Subcomm. On Civil & Constitutional Rights of the Comm. On the Judiciary*, 94th Cong. 159-60 (1975) [hereinafter *Bankruptcy Revision Hearings*] (statement of Prof. Frank R. Kennedy, University of Michigan Law School). The federal government still believes it is necessary to provide a debtor with a "fresh start," after he or she declares bankruptcy. *See id.* Congressional hearings note that "[t]he idea is to give the bankrupt debtor a fresh start, a clean slate so that he can become an effective member of society and the economy free to work and contribute to production and to earn a livelihood for himself and for his family." *Id.* Congress has also stated that "whether the debtor uses Chapter 7, Liquidation, or Chapter 13, Adjustment of Debts of An Individual, bankruptcy relief should be effective, and should provide the debtor with a fresh start." H.R. REP. NO. 95-595, at 118 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6081.

Interestingly, neither statement addresses the fact that the "fresh start" policy does not apply to all debtors equally. *See* Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 STAN. L. REV. 725, 727 n.8 (1984) [hereinafter *Jackson Law Review*]. Corporations and other non-individuals specified in the Bankruptcy Code will only receive a discharge of their debts if they first reorganize in the way Chapter 11 requires. *See* Kathryn R. Heidt, Note, *Undermining Bankruptcy Law and Policy: Torwico Electronics, Inc. v. New Jersey Department of Environmental Protection*, 56 U. PITT. L. REV. 627, 646 n.108 (1995) (citing Bankruptcy Code § 1141(d), 11 U.S.C. § 1141(d) (1994)); *see also* DAVID BAIRD & THOMAS JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY, at 729-816 (1985) (stating automatic discharge is not applicable to corporations); THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 227 n.5 (1986) (stating "[c]orporations must reorganize before they can obtain a discharge.") [hereinafter *Jackson Law Review*]. Some commentators assert that "[t]he idea of a 'fresh start' for corporations and other non-individuals is thus more appropriately viewed as 'debtor rehabilitation,' one of the congressional goals of the Bankruptcy Code." Heidt, *supra*, at 646 (citing S. REP. NO. 95-989, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5795). Moreover, expert opinion is divided regarding where corporations actually fall within the Bankruptcy Code's "fresh start" policy. For example, some commentators assert that "[c]orporations do not need a 'fresh start' because state-law limited liability rules provide the equivalent." *Jackson Law Review, supra*, at 727 n.8 (citing Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 499 (1976)). Other commentators, however, argue that corporations should not even be granted a "fresh start." *See* Gary M. Roberts, Note, *Bankruptcy and the Union's Bargain: Equitable Treatment of Collective Bargaining Agreements*, 39 STAN. L. REV. 1015, 1028 (1987).

For bankruptcy purposes:

"Corporation" shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association,

The current Bankruptcy Code serves much the same purpose as the unrevised Bankruptcy Act did in 1915.²¹ Individuals and business entities experiencing financial hardships may file for bankruptcy, and any remaining debts or claims are subsequently settled during bankruptcy proceedings.²²

There are two distinct options available to a bankrupt entity under the Bankruptcy Code's provisions. It may either file for complete liquidation under Chapter 7 of the Bankruptcy Code or, by using a reorganization plan, regroup and "reorganize" into a new, debt-free entity.²³ In essence, Chapter 11 reorganization gives the bankrupt entity a second chance in the business world by granting it immediate debt relief.²⁴ Upon choosing this option, the debtor is granted protection from creditors and must then draft and file a

joint stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees
Bankruptcy Code § 1(8), 11 U.S.C. § 1(8) (1976). Railroad companies are included within this definition, and the Code has special provisions for the reorganization of bankrupt rail entities. *See id.* § 1164-1174, 11 U.S.C. §§ 1161-1174.

21. *See Bankruptcy Revision Hearings, supra* note 20, at 60.

22. *See Green, supra* note 9, at 174. Once a debtor files for bankruptcy, he or she receives a protective injunction which prohibits creditors from raising any future monetary claims against the debtor. *See* Richard P. Krasnow & Debra Dandeneau, *The Treatment of Environmental Matters in Bankruptcy Cases*, SB37 A.L.I.-A.B.A. 127, 132 (1997).

23. *See Ryland, supra* note 7, at 740. Liquidation is a part of Chapter 7 bankruptcy and the applicable sections of the Bankruptcy Code are sections 701-766 of title 11 of the United States Code. Section 726 is the general distribution section, specifying the particular order in which the debtor's remaining assets are liquidated. *See* Bankruptcy Code § 726, 11 U.S.C. § 726 (1994). Importantly, the discharge provisions of Chapter 7 are not available to "a railroad, insurance company, bank, savings bank, cooperative bank, savings and loan association, homestead association, or credit union." Barth, *supra* note 2, at 212 n.45 (citing Bankruptcy Code § 109(b)(1)-(3), 11 U.S.C. § 109(b)(1)-(3)). Corporations are somewhat different because although Chapter 7 is available to those entities, filing a claim under that chapter will not discharge their debts. *See* Barth, *supra* note 2, at 212 n.45 (citing Bankruptcy Code § 727(a)(1), 11 U.S.C. § 727(a)(1)(1988)). Instead, the corporation's assets are liquidated and used to pay off its creditors. *See* Barth, *supra* note 2, at 212 n.45 (citing BENJAMIN WEINTRAUB & ALAN RESNICK, BANKRUPTCY LAW MANUAL 1-2 (1980)). Therefore, some bankrupt entities must file for bankruptcy under Chapter 11. *See* Barth, *supra* note 2, at 213. Chapter 11 of title 11 addresses reorganization and its applicable provisions are described in sections 1101-1174. *See* Bankruptcy Code § 1101-1174, 11 U.S.C. §§ 1101-1174 (1994).

24. *See* Krasnow & Dandeneau, *supra* note 22, at 132. If a bankrupt business entity files for reorganization under Chapter 11, it can avoid liquidating all of its funds. *See* Cahalane, *supra* note 5, at 269. The debtor can retain its assets while its reorganization plan satisfies any liabilities. *See id.* Once the district court confirms the submitted reorganization plan, however, the debtor is bound by its terms. *See* Bankruptcy Code § 1141(a), 11 U.S.C. § 1141(a)(1994). Other bound parties include, "any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor . . ." *Id.*

plan for reorganization with the district court.²⁵ Once the plan is approved, the debtor receives an official discharge of any *pre-petition* debts not specifically covered in the plan, and may begin again with a "fresh start."²⁶

25. See Schuh, *supra* note 2, at 201 (describing procedure debtor takes after filing for bankruptcy). According to the Code's provisions,

As soon as a debtor petitions for bankruptcy, the [Bankruptcy] Code's automatic stay provision bars creditors with 'claims' that arose prior to the debtor's bankruptcy petition from seeking repayment outside the bankruptcy proceedings. The bankruptcy court, using a list of 'debts' and 'creditors' prepared by the debtor, then notifies the identified creditors of their right to assert a claim against the debtor's bankruptcy estate.

Kevin J. Saville, Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?*, 76 MINN. L. REV. 327, 333 (1991).

26. See Ryland, *supra* note 7, at 744. According to the statutory provision, a debtor desiring reorganization "may file a plan with a petition commencing a voluntary case, or at any time in a voluntary case or an involuntary case." Bankruptcy Code § 1121(a), 11 U.S.C. § 1121(a) (1994). The Bankruptcy Code provides mandatory elements of a reorganization plan. See *id.* § 1123(a), 11 U.S.C. § 1123(a). After the district court approves the plan, the debtor is granted an automatic stay, whereby any debts or liabilities, "no matter how remote or contingent," are discharged. James K. McBain, Note, *Environmental Impediments to Bankruptcy Reorganizations*, 68 IND. L.J. 233, 237 (1992) (quoting H. REP. NO. 95-595, at 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266; S. REP. NO. 95-989, at 21-22 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5807-08); see also Krasnow & Dandeneau, *supra* note 22, at 132 (describing automatic stay as essential provision in chapter 11). A contingent claim is one "which would enable a person to be a creditor in the bankruptcy action even though that person had no present cause of action against the debtor." *Reading*, 115 F.3d at 1121. In *In re Radio-Keith-Orpheum (RKO) Corp.*, the Second Circuit addressed the existence of "contingent claims" by applying section 77(b)'s broad definition of "claim." 106 F.2d 22, 26-27 (2d Cir. 1939). The *RKO* court reasoned that because its definition of claim includes "claims of whatever character[,] as long as the creditor has some interest in the debtor's assets at the time of bankruptcy, it is irrelevant when the injury accrues. *Id.* at 26. Moreover, as the Third Circuit noted in *Schweitzer v. Consolidated Rail Corp.*, "before one can have an 'interest' which is cognizable as a contingent claim under section 77, one must have a legal relationship relevant to the purported interests [to] which that interest may flow." 758 F.2d 936, 943 (3d Cir. 1985). In *RKO*, the court held that a legal relationship existed between the plaintiff landlord and the debtor tenant, allowing the plaintiff to sue for back-rent on the basis of contingent claims which were not discharged at bankruptcy. See *RKO*, 106 F.2d at 26-27. In contrast, the *Schweitzer* court held that the plaintiff did not have a contingent claim because a legal relationship does not exist "between a tortfeasor and tort victim until a tort has actually occurred." *Schweitzer*, 758 F.2d at 943 (emphasis added).

After a debtor's reorganization plan is approved, creditors are prohibited "from commencing or continuing any actions against the entity while it undergoes restructuring. This breathing spell afforded by the automatic stay enables management to concentrate on rehabilitating the business and developing a proposal for reorganization free of litigation concerns." Krasnow & Dandeneau, *supra* note 22, at 132. Therefore, the automatic stay is one of the most important provisions available to debtors under chapter 11 because it insulates debtors "from debt pressures while they negotiate a reorganization plan." *Id.* According to section 1141(c)-(d), "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors . . . [and] the confirmation of a plan dis-

C. The Conflict Between Competing Interests and Judicial Responses

CERCLA and the Bankruptcy Code frequently conflict when liable PRPs use the Bankruptcy Code's guaranteed discharge provision to seek protection from environmental obligations.²⁷ Such a conflict is inevitable because CERCLA imposes strict liability and the Bankruptcy Code grants a discharge of all financial debts and liabilities.²⁸ Nevertheless, the Bankruptcy Code only discharges pre-petition claims that are included within its statutory definition

charges the debtor from any debt that arose *before* the date of such confirmation, and any debt of a specified kind" Bankruptcy Code § 1141(c)-(d), 11 U.S.C. § 1141(c)-(d) (1994). Nevertheless, the debtor's automatic discharge is subject to a few exceptions. *See id.* § 727, 11 U.S.C. § 727.

27. *See* John R. Allison & John A. Rizzardi, *Effects of Bankruptcy on Environmental Liabilities*, 28 TORT & INS. L.J. 636, 636 (1993). The conflict arises because if a PRP is granted a discharge, CERCLA's strict liability policy is sacrificed. *See* Barth, *supra* note 2, at 203. The guilty party escapes financial liability, and EPA is left paying any response costs incurred. *See id.* Alternatively, if the discharge is refused, the debtor cannot attain "the proverbial fresh start" the Code's provisions guarantee. Ryland, *supra* note 7, at 740. In fact, some say the notion of a "fresh start" is the "driving policy" behind the Code. Cahalane, *supra* note 5, at 270 (citing S. REP. NO. 95-989, at 7 (1978), reprinted in 1978 U.S.C.C.A.N., 5787, 5793). Nevertheless, although many bankrupt entities seek shelter from environmental liabilities under the Code, bankruptcy law provides for only a limited degree of liability. *See* Ryland, *supra* note 7, at 740. For example, only those unsecured claims arising pre-petition "whether or not creditors seek payment" will be discharged. Krasnow & Dandeneau, *supra* note 22, at 133-34.

28. *See* Kratzke, *supra* note 14, at 387. Although CERCLA's language does not specify that parties are to be held strictly liable under its provisions, courts interpreting the statute have agreed that it imposes strict liability. *See* True, *supra* note 3, at 333. *See, e.g.,* United States v. Conservation Chem. Co., 619 F. Supp. 162, 175 (W.D. Mo. 1985) (applying standard of strict liability to CERCLA, while still including certain affirmative defenses); United States v. Ward, 618 F. Supp. 884, 893 (E.D.N.C. 1985) (stating "CERCLA imposes strict liability"); *In re* T.P. Long Chem., Inc., 45 B.R. 278, 282 (N.D. Ohio 1985) (stating section 107(a) of CERCLA expresses strict liability standard); United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 843-44 (W.D. Mo. 1984) (noting although CERCLA's language does not specifically provide for strict liability, courts interpret CERCLA as strict liability statute), *aff'd* 810 F.2d 728 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); Philadelphia v. Stepan Chem. Co., 544 F. Supp. 1135, 1148 (E.D. Pa. 1982) (holding CERCLA imposes strict liability on PRPs). Courts have also construed this liability as retroactive. *See* O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989) (dismissing argument CERCLA cannot be applied retroactively), *cert. denied*, 493 U.S. 1071 (1990); Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1443 (W.D. Mich. 1989) (holding CERCLA is retroactive in nature, as Congress intended); *Northeastern Pharm.*, 810 F.2d, at 732 (affirming district court decision that CERCLA is retroactive statute); State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1300 (N.D. Ohio 1983) (stating CERCLA does not fall "within 'remedial' exception to presumption against retroactive application . . ."). For more information on CERCLA as a strict liability statute, see *supra* note 14 and accompanying text.

of "claim."²⁹ As a result, debtors and EPA disagree over two controlling issues: (1) whether environmental obligations can be discharged as "claims" under the Bankruptcy Code; and if they can, (2) when environmental claims accrue for discharge purposes.³⁰

29. See Green, *supra* note 9, at 174; TAX CONSEQUENCES 2 NORTON BANKR. L. & PRAC. 2D § 41:10 (1993) [hereinafter NORTON]. It has been noted that "[c]entral to the reorganization process, and consistent with the notion of a 'fresh start,' is the rule that liability for *all claims* against the debtor *existing on the date* a plan of reorganization is confirmed by the court . . . are discharged." Krasnow & Dandeneau, *supra* note 22, at 133-34 (citing Bankruptcy Code § 1141(d), 11 U.S.C. § 1141(d) (1994)) (emphasis added).

30. See Krasnow & Dandeneau, *supra* note 22, at 133-34 (noting "[t]he primary battleground in this apparent clash of competing policies is the scope of the discharge of claims in bankruptcy"). Debtors argue for a broad interpretation of the word "claim," asserting that any environmental liabilities arising pre-petition satisfy the definition for discharge purposes. See *id.* at 134. If courts use this broad definition, it is guaranteed that "all legal obligations of the debtor, no matter how remote or contingent, will be discharged with in [sic] the bankruptcy case." H.R. REP. NO. 95-595, at 309 (1978).

EPA, conversely, asserts a more narrow reading of "claim." It argues that environmental claims should not be discharged unless the government has actually expended funds cleaning up an environmental disaster. See Krasnow & Dandeneau, *supra* note 22, at 134. EPA elected this position because "[a] late trigger date allows the government [and EPA] to argue that the debtor's liability . . . does not arise until after the plan of reorganization has been confirmed, and thus . . . claims for reimbursement . . . pass through the bankruptcy to the reorganized entity without being discharged." *Id.* The Bankruptcy Code defines "claim" as follows:

- (A) [R]ight 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) [the] right to an equitable remedy for breach of performance of such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Bankruptcy Code § 101(5), 11 U.S.C. § 101(5) (1994). Although the Bankruptcy Code's definition is fairly broad, the obligation must fall within one of five categories listed to qualify as a "claim." See McBain, *supra* note 26, at 241. Those categories are "secured claims, administrative expenses, priority claims (such as tax claims held by government units), unsecured claims, or equity interests." *Id.* Most courts have classified "environmental obligations" as either "administrative expenses or unsecured claims." *Id.* at 242; see *In re National Gypsum Co.*, 139 B.R. 397, 413 (Bankr. N.D. Tex. 1992) (characterizing post-petition CERCLA response costs as administrative priority expenses).

In contrast, CERCLA defines a "claim" as "a demand in writing for a sum certain." CERCLA § 101(4), 42 U.S.C. § 9601(4) (1994). Although the statutes' definitions of "claim" differ, courts have looked to legislative intent and determined both statutes demand a broad interpretation of the term. See *Ohio v. Kovacs*, 469 U.S. 274, 279-83 (1985) (discussing Congress's intention that "claim" be construed broadly); Kratzke, *supra* note 14, at 388 (noting *Kovacs* court's broad interpretation of "claim" as used in Bankruptcy Code). Thus, legislative intent has served only to heighten the tension between the two provisions. The Senate noted:

These issues resulted because the Bankruptcy Code does not specify whether environmental liabilities can be characterized as "claims" under its discharge policy.³¹ As a result, courts have been forced to decide the issue on a case-by-case basis in their collective search for a practical balance between the two statutes.³²

The definition in [the Bankruptcy Code] adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters. The definition [of claim] is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. The definition also includes as a claim an equitable right to performance that does not give rise to a right to payment. By this broadest definition and by use of the term throughout title 11, especially subchapter I of chapter 5, 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. 95-989, at 22 (emphasis added), *reprinted in* 1978 U.S.C.C.A.N., at 5807-08. Consequently, by broadening the definition of "claim" in the revised version of the Bankruptcy Code, Congress effectively increased the number of debtors who could seek the safety of the "fresh start" policy. Cahalane, *supra* note 5, at 270; see S. REP. NO. 95-989, at 7, *reprinted in* 1978 U.S.C.C.A.N. at 5793 (noting Bankruptcy Code's discharge provisions are at center of fresh start policy).

Moreover, CERCLA also implies an expansive definition of "claim" because the statute's primary goal is to guarantee that PRPs address the environmental "claims" against them. See Kratzke, *supra* note 14, at 385. As Congress addressed a serious and extensive problem in enacting CERCLA, the only way to assure the statute's success was to assign the term "claim" an expansive connotation. *Id.* at 384-85.

31. See McBain, *supra* note 26, at 234. The Bankruptcy Code excluded environmental obligations from its provisions primarily because environmental concerns did not reach public awareness until years after the Bankruptcy Code was revised. See *id.* The absence of environmental claims from the Code does not necessarily mean it affords them preferential treatment or priority. See Parker, *supra* note 13, at 227. As a result, courts must decide "whether environmental obligations are 'claims' in bankruptcy, and if so, what kind of priority they should have [if any]." McBain, *supra* note 26, at 234.

32. Stanley M. Spracker & James D. Barnette, *The Treatment of Environmental Matters in Bankruptcy Cases*, 11 BANKR. DEV. J. 85, 90 (1994-95). For the most part, federal courts are divided on which of the two statutes, if either, should predominate. See Kratzke, *supra* note 14, at 387. There are numerous reasons why courts are so divided on this issue. These may include:

- (1) the difficulty of reconciling the fresh start purpose of bankruptcy with the cleanup and liability objectives of CERCLA;
- (2) the practical difficulty of pinpointing the moment potential CERCLA claims arise given the complexities, various phases, and uncertainties of environmental liability; and
- (3) a judicial concern that reorganization not be used as a tool for companies to escape legitimate environmental liabilities.

Kahn, *supra* note 2, at 2033.

Still, not all courts believe one statute should actually prevail over the other. See *National Gypsum*, 139 B.R. at 404. The *Gypsum* court stated that "it is not a question of which statute should be accorded primacy over the other, but rather what interaction between [the Bankruptcy Code and CERCLA] serves most faithfully the policy objectives embodied in the two separate enactments of Congress." *Id.* Therefore, only some courts accommodate the statutes' competing interests.

The Supreme Court first addressed the dischargeability of environmental obligations in *Ohio v. Kovacs*.³³ The Court applied the Bankruptcy Code's broad definition of "claim" and held that environmental obligations may be characterized as "claims" for bankruptcy purposes.³⁴ Federal courts have used *Kovacs* as a foundation,

For a discussion of how courts resolve this conflict, see Krasnow & Dandeneau, *supra* note 22, at 135-36.

33. 469 U.S. 274, 275 (1985). *Kovacs* has been described as "[t]he seminal case on the dischargeability of claims based on environmental damages." ENVIRONMENTAL LAWS, 6A NORTON BANKR. L. & PRAC. 2D § 149:22 (1997) [hereinafter ENVIRONMENTAL LAWS]. In *Kovacs*, the district court granted the State of Ohio an injunction against Kovacs and other entities, ordering them to clean up a waste site that was under their group control. See *Kovacs*, 469 U.S. at 275. After one defendant refused to comply with the injunction, the Court issued a lien on his personal belongings to satisfy the cost of the cleanup. See *id.* at 276. The defendant, however, declared Chapter 11 bankruptcy before the state took possession of all his assets, and was therefore granted relief from any future expenses or obligations. See *id.* & n.1.

The State of Ohio petitioned the Bankruptcy Court, arguing that the defendant's environmental obligation was not discharged at bankruptcy because it did not constitute a "claim" under the Bankruptcy Code. See *id.* at 275. Both the Bankruptcy Court and the district court held in favor of the defendant. See *id.* at 276-77. The Sixth Circuit affirmed, stating "we cannot fault the Court of Appeals for concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy." *Id.* at 283. The Supreme Court "granted certiorari to determine the dischargeability of [the defendant's] obligation under the affirmative injunction entered against him." *Id.* at 277. The Court affirmed the Sixth Circuit, stating "[a]s we understand it, the Court of Appeals held that, in the circumstances, the cleanup duty had been reduced to a monetary obligation. We do not disturb this judgment. . . ." *Id.* at 282-83.

34. See *Kovacs*, 469 U.S. at 279. The Court analyzed both the language as well as the legislative history of the Bankruptcy Code and determined that Congress intended a broad interpretation of "claim." See *id.* at 278-79. Accordingly, the Court held that because Ohio deserved "an equitable remedy" and its injunction against Kovacs was a financial obligation, it qualified as a dischargeable claim under the Bankruptcy Code. *Id.* at 278-79, 283. In essence, the Court interpreted "claim" "to include any obligation of the debtor convertible into a monetary obligation." Schuh, *supra* note 2, at 204 (citing *Kovacs*, 469 U.S. at 278-79). But see *Torwico Elec., Inc. v. New Jersey Dept. of Env'tl. Protection*, 8 F.3d 146, 150 (3d Cir. 1993) (holding exercise of regulatory law, though requiring expenditure of money, is not bankruptcy "claim"). *Kovacs* helped to reaffirm the Bankruptcy Code's "fresh start" policy by broadening its scope to cover environmental obligations. See Kratzke, *supra* note 14, at 388 (citing Ellen E. Sward, Note, *Resolving Conflicts Between Bankruptcy Law and the State Police Power*, 1987 Wis. L. Rev. 403, 428 (1987)).

Although Justice O'Connor agreed with the majority's decision in *Kovacs*, she included a separate, concurring opinion. See *Kovacs*, 469 U.S. at 285-86 (O'Connor, J., concurring). Justice O'Connor focused on the policy considerations supporting the discharge of environmental obligations, hoping to dismiss Ohio's fears that the *Kovacs* decision would prevent a state from enforcing environmental laws altogether. See *id.* at 286. Justice O'Connor declared that a state is not left without recourse, asserting that "a state may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims." *Id.*

and agree that environmental obligations under CERCLA fall within the reach of the Bankruptcy Code's discharge provisions.³⁵ Nevertheless, these courts have been forced to delve deeper into their analysis because "[a]lthough the [Supreme] Court held that liability for environmental cleanup may be discharged, it did not settle *when* liability under various environmental statutes, most importantly CERCLA, becomes a bankruptcy 'claim.'"³⁶ As a result, circuit courts are presently divided on the issue and have consequently failed to give either debtors or EPA any consistent guidance for the resolution of future claims.³⁷

Circuit courts have taken different approaches in answering this question, and as a result, four basic theories have arisen: (1) the debtor's conduct test; (2) the pro-creditor expenditure of response costs test; (3) the fair contemplation test; and (4) the legal relationship test.³⁸ The Second Circuit was the first court to ad-

35. See Cahalane, *supra* note 5, at 270-72 & n.60 (discussing how *Kovacs* authorized application of Bankruptcy Code's discharge provision to CERCLA claims); Krasnow & Dandeneau, *supra* note 22, at 138 (discussing how various courts have interpreted *Kovacs*). Since 1991, many courts have addressed the issue of discharging CERCLA liability at bankruptcy, and the trend shows courts' willingness to discharge all CERCLA liability under appropriate circumstances. See Shawn F. Sullivan, Note, *Discharge of CERCLA Liability in Bankruptcy: The Necessity for a Uniform Position*, 17 HARV. ENVTL. L. REV. 445, 467 (1993). But see *In re Allegheny Int'l Inc.*, 126 B.R. 919, 921-22 (Bankr. W.D. Pa. 1991) (holding it is difficult to discharge all potential CERCLA liability because discharge depends upon creditor's action, regardless of notice requirement), *aff'd* 950 F.2d 721 (3d Cir. 1991).

36. Saville, *supra* note 25, at 328 (emphasis added).

37. See Allison & Rizzardi, *supra* note 27, 644-45 (noting divisions between different courts over when "an environmental liability claim arises for purposes of the Bankruptcy Code"); True, *supra* note 3, at 331 (discussing "split" between courts over when environmental claim accrues for bankruptcy purposes); Schuh, *supra* note 2, at 220-21 (noting conflicting policies of different courts over when CERCLA claims arise for bankruptcy purposes). Although courts are divided, they universally agree that timing is especially crucial in bankruptcy cases. See Kratzke, *supra* note 14, at 388. Cases involving environmental debts and liabilities are no exception to this rule. See *id.* at 388-89.

38. See ENVIRONMENTAL LAWS, *supra* note 33, § 149:22. Two additional theories have been proposed. First, one author postulated his own theory of "foreseeability" as a solution to the judicial uncertainty over when CERCLA obligations accrue for discharge purposes. See Saville, *supra* note 25, at 354. According to the foreseeability theory, "courts should discharge only the CERCLA liability which is or was foreseeable at the conclusion of the debtor's bankruptcy case." *Id.* For discussion of foreseeability theory, see *id.* at 354-361. The Seventh Circuit advocated a second theory entitled "running with the land." Schuh, *supra* note 2, at 213-14 (citing *In re CMC Heartland Partners*, 966 F.2d 1143, 1146 (7th Cir. 1992)). The *CMC Heartland* court "held that liability under CERCLA, based on a debtor's current ownership of the hazardous waste site, is a claim running with the land, and therefore, survives chapter 11 reorganization." *CMC Heartland*, 966 F.2d at 1146. The *CMC Heartland* court noted that "[b]y authorizing the President to direct the current owner to cleanup a dump, CERCLA creates a claim running with the land." *Id.* at 1146.

dress the question left unanswered by the *Kovacs* decision.³⁹ In *In re Chateaugay Corp.*, the court held that EPA's pre-petition response costs constituted dischargeable "claims" under the Bankruptcy Code "regardless of when such costs were incurred, so long as such costs concerned release or threatened release of hazardous waste that occurred before debtor filed his Chapter 11 petition . . ."40 The Second Circuit agreed with the district court's approach and focused on the exact moment the hazardous release or threatened release occurred, rather than on when EPA expended its cleanup costs.⁴¹ The ap-

39. See True, *supra* note 3, at 339. The Second Circuit addressed the dischargeability of environmental obligations at bankruptcy and focused on when environmental claims accrued for bankruptcy purposes. See *In re Chateaugay Corp.*, 944 F.2d 997, 1004-05 (2d Cir. 1991). In *Chateaugay*, LTV Corporation declared Chapter 11 bankruptcy while EPA was in the process of cleaning up contaminated waste sites LTV created. See *id.* at 999. LTV acknowledged its potential liability and included the contingent claims "held by EPA and the environmental enforcement officers of all fifty states and the District of Columbia" in its plan for reorganization. *Id.* LTV was liable to EPA for approximately \$32 million of pre-petition response costs, an amount EPA believed to be only a fraction of what LTV would eventually owe. See *id.* EPA therefore argued against the discharge of any future costs which it could incur in the future on the basis that the release or threatened release occurred pre-petition. See *id.* at 1000. The district court interpreted the word "claim" broadly and ruled in favor of LTV's discharge. See *id.* The Second Circuit affirmed the district court's pro-debtor decision. See *id.* at 1010. Rather than trying to balance the competing objectives of CERCLA and the Bankruptcy Code, the court ruled in favor of the latter. See *id.* at 1002. Illustrating its pro-debtor bias, the Second Circuit stated:

Cleaning up the environment will not necessarily be aided by agreeing with the agencies that they do not yet have "claims." A determination that the CERCLA response costs ultimately to be incurred are not now claims might impair the prospects of achieving a viable reorganization, with the result that the debtor, instead of reorganizing, liquidates under Chapter 7 or dissolves . . . and the assets . . . are either unavailable for environmental cleanup costs . . . or available only to the limited extent that such costs are considered unaccrued claims

Id. at 1002.

40. *Id.* at 997-98 (emphasis added). LTV focused on its pre-petition actions and argued that the federal government's claims against it accrued for bankruptcy purposes the moment LTV violated CERCLA, not when EPA acquired response costs. See *id.* at 1000. The federal government alternatively asserted that the time of the debtor's actions is irrelevant. See *id.* at 1001. The government argued that a CERCLA claim does not accrue until after EPA expends money on cleanup costs. See Spracker & Barnette, *supra* note 32, at 95 (citing *Chateaugay*, 944 F.2d at 997). Therefore, only those EPA funds spent pre-petition are dischargeable. See *Chateaugay*, 944 F.2d at 1000. The federal government relied on the Third Circuit's decision in *Avellino & Bienes v. M. Frenville Co.*, "which held that a prepetition act by a debtor giving rise to a later liability is not enough to bring an action within the definition of a 'claim.'" Spracker & Barnette, *supra* note 32, at 95 (emphasis added) (citing *Avellino & Bienes v. Frenville Co.*, 744 F.2d 332 (3d Cir. 1984)).

41. See *Chateaugay*, 944 F.2d at 1000. The Second Circuit agreed with the district court that "an obligation to reimburse EPA for response costs is a dischargeable claim whenever based upon a pre-petition release or threatened release of hazardous substances. This ruling covers releases that have occurred pre-petition,

proach the Second Circuit adopted is called the “debtor’s-conduct test.”⁴²

The Ninth Circuit Bankruptcy Appellate Panel in *In re Jensen* followed a similar pro-debtor approach to that of *Chateaugay*.⁴³ The panel focused on a claim issue and rejected an environmental

even though they have not then been discovered by EPA [or anyone else].” *Id.* See Spracker & Barnette, *supra* note 32, at 95-96 (stating “[t]he Second Circuit held in *Chateaugay* that a CERCLA claim arises at the time of the ‘release or threatened release’ of hazardous substances”) (citing *Chateaugay*, 944 F.2d at 1002-06). According to the *Chateaugay* court, even though EPA may not learn about or expend response costs on an environmental disaster until after LTV declares bankruptcy, the claims existed pre-petition as contingent claims. See *Chateaugay*, 944 F.2d at 1005. The court stated:

True, EPA does not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon LTV, and it does not yet even know the location of all the sites at which such wastes may yet be found. But the location of these sites, the determination of their coverage by CERCLA, and the incurring of response costs by EPA are all steps that may fairly be viewed . . . as rendering EPA’s claim “contingent” rather than as placing it outside the Code’s definition of “claim.”

Id. The Second Circuit also rejected the federal government’s argument that a narrow reading of “claim” would help further the environmental interests Congress sought to protect with CERCLA. See *id.* at 1002. The court insisted that if Congress wanted an exception in the discharge provision for environmental obligations, it would have included the necessary provisions itself. See *id.* Furthermore, the *Chateaugay* court acknowledged that the judicial system does not have the authority “to restrict the meaning of across-the-board legislation like a bankruptcy law in order to promote objectives evident in [a] more focused statute[] [like CERCLA].” *Id.*

42. Kahn, *supra* note 2, at 2012. Although only a minority of courts follow the “debtor’s-conduct test,” several have followed its reasoning when confronted with similar issues. See NORTON, *supra* note 29, at § 149:22. See, e.g., *Gull Indus. v. John Mitchell, Inc.* (*In re Hanna*), 168 B.R. 386 (B.A.P. 1994); *In re Torwico*, 8 F.3d 146 (3d Cir. 1993); *CMC Heartland*, 966 F.2d at 1143; *Texaco Inc. v. Sanders* (*In re Texaco Inc.*), 182 B.R. 937 (Bankr. S.D.N.Y. 1995).

43. See *In Re Jensen*, 127 B.R. 27 (B.A.P. 9th Cir. 1991), *aff’d*, 995 F.2d 925 (9th Cir. 1993). Commentators have also referred to the *Jensen* court’s approach as the “underlying act” approach. Saville, *supra* note 25, at 341-42. In *Jensen*, the debtor’s corporation owned and operated a lumber mill in California for a brief period. See *Jensen*, 995 F.2d at 926. The mill went out of business in December 1983 and the debtor filed for Chapter 11 bankruptcy in December of that same year. See *id.* Less than two months later, the California Water Board notified the debtor that the existence of a chemical hazard on the land where the mill once operated created the possibility of an environmental catastrophe. See *id.* The debtor corporation refused to take the necessary actions to remedy the hazard, claiming a lack of financial resources, and the Board sought assistance of the California Department of Human Services (DHS) in undertaking cleanup measures. See *id.* at 927. DHS then notified the Jensens as PRPs, and assessed them ten percent of the expenses. See *id.* On April 24, 1989, the Jensens “sought a determination that their pro rata share of the cleanup expenses had been ‘discharged, by the granting of the discharge to the debtors . . . on July 23, 1984.’” *Id.* The bankruptcy court ruled in favor of the State of California and held that the claims were not discharged when the debtors filed for bankruptcy. See *id.* The bankruptcy appellate court reversed the holding, and the state appealed to the Ninth Circuit. See *id.*

agency's argument that its claim against the Jensens did not accrue until the agency expended funds on the cleanup.⁴⁴ The bankruptcy panel held instead that the claim accrued once the "liability-creating conduct" occurred.⁴⁵ Therefore, once the debtor performed the threatening conduct leading to its liability under CERCLA, a dischargeable claim existed.⁴⁶ In *Jensen*, because the contamination occurred before the Jensens filed for bankruptcy, the claims were effectively discharged at bankruptcy.⁴⁷

The court in *In re National Gypsum Co.*⁴⁸ relied upon the *Chateaugay* analysis, but took that analysis one step further.⁴⁹ The

44. See Sullivan, *supra* note 35, at 478 (citing *In re Jensen*, 127 B.R. at 30-31). According to the Bankruptcy Appellate Panel of the Ninth Circuit, "a determination that a claim under environmental laws arises when funds are expended contravenes the overriding goal of the Bankruptcy Code to provide a fresh start for the debtor." ENVIRONMENTAL LAWS, *supra* note 33, at § 149:22.

45. Sullivan, *supra* note 35, at 478 (citing *Jensen*, 127 B.R. at 30-31, and determining when claim accrued for bankruptcy purposes).

46. See *Jensen*, 127 B.R. at 32 (stating "[t]he final theory, that the bankruptcy claim arises based upon the debtor's conduct, we believe most closely reflects legislative intent and finds the most support in the case law"); see also Kratzke, *supra* note 14, at 399 (discussing when dischargeable claim arises).

47. See *Jensen*, 127 B.R. at 33. In essence, the Appellate Panel only required that the release, or threatened release, occurred pre-petition for it to be discharged at bankruptcy. See *id.* The Panel adopted the rationale the *Chateaugay* court used, and stated that "so long as a prepetition triggering event has occurred, i.e. the release or threatened release of hazardous waste, the claim is dischargeable, regardless of when the claim for relief may be in all respects ripe for adjudication." *Id.* at 32 (citing *Chateaugay*, 112 B.R. at 522). Other courts' holdings are consistent with *Jensen*, and the Bankruptcy Appellate Panel stated that "[t]hese cases have generally held the bankruptcy claim arises upon conduct by the debtor which would give rise to a cause of action, if other elements may later be satisfied." *Id.* See, e.g., *In re Johns-Manville Corp.*, 57 B.R. 680, 684 (B.A.P. S.D.N.Y. 1986) (holding "damages arising because of pre-petition events" create claims for bankruptcy purposes); *In re A.H. Robins Co.*, 63 B.R. 986, 994 (Bankr. E.D. Va. 1986) (stating "right to payment arises when the acts giving rise to the alleged liability were performed"), *aff'd*, *Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir. 1988); *In re Edge*, 60 B.R. 690, 705 (Bankr. M.D. Tenn. 1986) (stating plaintiff has "right to payment and thus a claim arose at the time of the debtor's pre-petition misconduct").

48. 139 B.R. 397 (Bankr. N.D. Tex. 1992).

49. See Sullivan, *supra* note 35, at 482. The National Gypsum Co. declared Chapter 11 bankruptcy on October 28, 1990. See *Gypsum*, 139 B.R. at 399. Upon declaring bankruptcy, Gypsum alerted the United States that they may be liable for environmental hazards at multiple Superfund sites. See *id.* at 401. Almost one year later, on May 29, 1991, the United States filed a CERCLA claim against the debtor corporation, alleging that Gypsum was responsible for generating and dumping hazardous waste in seven different Superfund locations. See *id.* at 401. In the claim, the United States also reserved the right to file additional CERCLA claims against Gypsum for pre-petition disposals at thirteen unlisted sites. See *id.* The United States was also aware of other Superfund sites Gypsum was partly responsible for creating. See *id.* at 403.

The United States made several arguments in its claim. First, it argued that any future response costs EPA incurred were not subject to the Code's guaranteed

Gypsum court refused to favor one statute over the other, and attempted to strike a balance between the Bankruptcy Code and CERCLA.⁵⁰ Similar to the Second Circuit's decision in *Chateaugay*, the *Gypsum* court agreed that for discharge purposes, a CERCLA claim accrues at the point of release or threatened release of the hazardous material because of pre-petition conduct.⁵¹ Thus, in ad-

discharge of claims. *See id.* at 401. Second, the United States argued that any costs associated with the thirteen unlisted sites were not dischargeable bankruptcy claims. *See id.* The United States also claimed that any future response costs EPA incurred should be awarded administrative priority. *See id.* Lastly, the United States wanted to hold *Gypsum* and its parent corporation jointly and severally liable for the CERCLA claims. *See id.*

In response, *Gypsum* filed a motion for summary judgment, arguing that the "potential liability for any future response costs or future natural resource damages at the seven Listed Sites constitute pre-petition claims subject to discharge. . . ." *Id.* The debtor corporations also argued that any environmental obligations "pre-petition conduct" caused were claims subject to the Code's discharge provision and any EPA costs incurred were unsecured claims not provided for in *Gypsum*'s reorganization plan. *See id.* Lastly, *Gypsum* opposed joint and several liability, and argued that its obligation should be assessed according to its actual participation in creating the waste site. *See id.*

The bankruptcy court addressed four issues at trial. The first was "whether future response costs . . . at the Listed Sites are 'claims' within the meaning of the Code, and subject to discharge." *Id.* at 403. The second was "whether Debtors' environmental liabilities for the Unlisted Sites arising from pre-petition conduct are 'claims' within the meaning of the Bankruptcy Code, subject to discharge." *Id.* at 409. The third was whether EPA's response costs "are entitled to administrative expense priority." *Id.* at 412. Lastly, the fourth issue was whether *Gypsum* and its parent corporation were jointly and severally liable. *See id.* at 413. For purposes of this Note, only the first two of the four issues stated are significant.

50. *See Gypsum*, 139 B.R. at 404. The *Gypsum* court stated:

Once a potentially responsible party is in bankruptcy, the provisions of CERCLA cannot stand as the sole relevant statutory guide, and must be reconciled with the provisions of the Code. Contrary to the . . . party's respective arguments, it is not a question of which statute should be accorded primacy over the other, but rather what interaction between the two statutes serves most faithfully the policy objectives embodied in the two separate enactments of Congress.

Id. (emphasis added). *See also In re Cottonwood Canyon Land Co.*, 146 B.R. 992, 997 (Bankr. D. Colo. 1992) (rejecting petitioner's argument environmental claims deserved special treatment under Code). *But see United States v. Whizco*, 841 F.2d 147, 150 (6th Cir. 1988) (reflecting inability to reconcile competing interests of both statutes and ultimately favoring environmental obligations over "fresh start").

51. *See Gypsum*, 139 B.R. at 407. The *Gypsum* court agreed with *Chateaugay* that "conduct giving rise to release or threatened release of hazardous substances pre-petition should be the relevant inquiry in determining the existence of a claim in bankruptcy . . ." *Id.* The *Gypsum* court's analysis did not stop there in that it refused to favor the Bankruptcy Code's policies over those of CERCLA. *See id.* This approach is consistent with Congress's primary goal that all creditors are assured "equal and identical treatment . . . , thus preventing any creditor from receiving preferential treatment." Parker, *supra* note 13, at 227. The court failed to see any "meaningful distinction" between the time of release or the time of the debtor's conduct. *Gypsum*, 139 B.R. at 407. Rather, the *Gypsum* court held:

[T]he only meaningful distinction that can be made regarding CERCLA claims in bankruptcy is one that distinguishes between costs associated

dition to essentially adopting the debtor's conduct test, the *Gypsum* court articulated the idea of "fair contemplation."⁵² According to the fair contemplation analysis, the discharge of an environmental obligation at bankruptcy requires that two elements are first satisfied. First, the release or threatened release must have occurred based upon pre-petition conduct. Second, future response costs must have been within the "fair contemplation" of the government or EPA at the time of bankruptcy.⁵³ Therefore, according to the *Gypsum* court, "[i]t is immaterial for the purposes of bankruptcy, whether EPA's claims against the Debtors are ripe for adjudication under CERCLA, as long as all the elements that can give rise to liability under CERCLA have occurred pre-petition."⁵⁴

In contrast, *United States v. Union Scrap Iron & Metal*⁵⁵ is a primary example of a case in which a court followed a more pro-creditor approach to the discharge of environmental obligations by focusing on the legal relationship between the parties.⁵⁶ The *Union*

with pre-petition conduct resulting in a release or threat of release that could have been "fairly" contemplated by the parties; and those that could not have been "fairly" contemplated by the parties.

Id. at 407-08 (emphasis added).

52. *Id.* at 408-09.

53. *See id.* To determine whether the fair contemplation of future response costs was present, the *Gypsum* court listed several relevant factors to identify. *See id.* at 408. Those factors include "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." *Id.* In *Gypsum*, the court applied the fair contemplation standard to the listed claims, and held that at least one, if not all, of the enumerated factors existed at bankruptcy. *See id.* Therefore, all of the claims against *Gypsum* existed and were effectively discharged at bankruptcy. *See id.* at 415. The court held that "[a]ll liability at the Unlisted Sites arising from pre-petition conduct resulting in release or threatened release, fairly within contemplation of the parties, are dischargeable claims." *Id.* at 412.

54. *Id.* at 405. Other courts have adopted similar approaches to the one the *Gypsum* court used. *See, e.g., In re Reading Co.*, 900 F. Supp. 738, 745 (E.D. Pa. 1995) (noting bankruptcy discharge depends on presence of all CERCLA elements pre-petition), *aff'd* 115 F.3d 1111 (3d Cir. 1997); *In re Texaco*, 182 B.R. 937, 949 (Bankr. S.D.N.Y. 1995) (asserting Code only requires that claims arise before reorganization plan is confirmed to be discharged at bankruptcy).

55. 123 B.R. 831 (Bankr. D. Minn. 1990).

56. *See ENVIRONMENTAL LAWS*, *supra* note 33, § 149:22. In *Union Scrap*, the debtor corporation Taracorp was involved in the contamination of several Superfund sites, and it notified EPA of its involvement upon filing Chapter 11 bankruptcy on October 1, 1982. *See Union Scrap*, 123 B.R. at 833. Five years after Taracorp successfully emerged from bankruptcy, EPA brought a CERCLA claim against it. *See id.* at 833-34. Taracorp sought protection from the Code's discharge provision, arguing that any CERCLA liability was discharged because the hazardous release occurred pre-petition. *See id.* at 834. EPA conversely argued that Taracorp's CERCLA liabilities did not accrue for discharge purposes until "after its reorganization had been confirmed by the bankruptcy court." *Id.* Accordingly,

Scrap court refused to broadly define “claim” and instead stated that “nonbankruptcy substantive law defines when a particular relationship between a debtor and a third party amounts to a legal obligation reflecting a claim for bankruptcy purposes.”⁵⁷ The *Union Scrap* court therefore used CERCLA instead of the Bankruptcy Code to determine when a legal obligation was established between the debtor and EPA.⁵⁸ The court relied on the government’s argument that EPA’s potential to imagine the existence of environmental hazards at the debtor’s facilities did “not give rise to a presumption of knowledge of the hazards”⁵⁹ Accordingly, the court held that a legal obligation under CERCLA is not established until after EPA incurs cleanup costs because it is only then that EPA knows about the hazard.⁶⁰ The fact that the debtor in *Union Scrap* performed the liable conduct pre-petition was not enough.⁶¹ Therefore, *Union Scrap* defined a “claim” for bankruptcy purposes on the basis of the existence of a legal relationship between the parties.⁶²

the *Union Scrap* court considered the following question: “Should a party’s liabilities for environmental damage be discharged in bankruptcy when the harm was done pre-petition, but it was not known at the time to the EPA that the party was potentially responsible, and when CERCLA liability could not be incurred until after bankruptcy reorganization was complete?” *Id.* at 835.

57. *Id.*

58. *See id.* For a listing of the elements necessary to impose CERCLA liability, see *supra* note 16 and accompanying text.

59. *Id.* at 836.

60. *See id.* at 835-36. Taracorp urged the *Union Scrap* court to follow the *Chateaugay* precedent and “hold that the mere release or threatened release of hazardous substances, without actual or presumed knowledge resulting in discovery, investigation, response or the incurring of costs [on the part of EPA], should be considered a contingent claim dischargeable in bankruptcy.” *Id.* at 836-37. The court rejected Taracorp’s argument, stating that “[a]dopting Taracorp’s position would effectively require pre-enforcement CERCLA litigation by forcing the EPA to investigate and assess its potential CERCLA claims every time a conceivable potentially responsible party filed for bankruptcy. This would reverse the CERCLA scheme and threaten the effectiveness of EPA action.” *Id.* at 837. *See also, In re Combustion Equipment Ass’n., Inc.*, 838 F.2d 35, 40 (2d Cir. 1988) (stating “[i]f the EPA is forced to expend its resources on preserving its rights to eventual recovery against any PRP . . . the EPA will have less ability to pursue its primary mission”). The *Union Scrap* court instead chose to follow a more “sensible approach” which balanced the interests of both statutes. *Union Scrap*, 123 B.R. at 838. Following the precedent established in *Jensen*, the *Union Scrap* court held that a legal relationship is not established between the parties until EPA incurs expenses. *See id.* at 837-38.

61. *See id.*

62. *See* Robin E. Phelan, et al., *Contamination of the “Fresh Start”: When the Costs of Environmental Cleanup Are Not Dischargeable Claims*, (28-June) BULL. BUS. L. SEC. ST. B. TEX. 52, 60 (1991); *see also* ENVIRONMENTAL LAWS, *supra* note 33, § 149:22 (referring to *Union Scrap*’s approach as “response costs” view which applied *Jensen* reasoning). The *Union Scrap* court based its holding on the principle that “[a] claim exists only when the pre-bankruptcy relationship between the debtor and

The Third Circuit adheres to the legal relationship approach defined in *Union Scrap*.⁶³ The first significant Third Circuit case addressing the conflict between CERCLA and the Bankruptcy Code was *Schweitzer v. Consolidated Rail Corp.*⁶⁴ In *Schweitzer*, the Reading Company invoked the Bankruptcy Code's discharge provision against company employees who sued the railroad for asbestos-related injuries after it had already reorganized.⁶⁵ Reading argued that the claims were discharged at bankruptcy because the employees' exposure occurred before the railroad reorganized.⁶⁶ The

third party contained all the elements necessary to give rise to a legal obligation under the relevant substantive non-bankruptcy law." *Union Scrap*, 123 B.R. at 835. Accordingly, because EPA had not yet incurred any cleanup expenses, no legal relationship was established between the parties pre-petition. See Phelan, et al., *supra*, at 60. The court denied Taracorp's motion for summary judgment because it failed to establish that EPA had a contingent claim at bankruptcy. See *Union Scrap*, 123 B.R. at 839. See generally *In re Beeter*, 173 B.R. 108 (W.D. Tex. 1994); *In re Petibone Corp.*, 90 B.R. 918 (Bankr. N.D. Ill. 1988).

63. See Parker, *supra* note 13, at 231-32.

64. 758 F.2d 936 (3d Cir. 1985). The primary issue before the Third Circuit on appeal was "whether a plaintiff in an asbestos-related personal injury action who had no manifest injury prior to the consummation date of his employer's reorganization in bankruptcy had a dischargeable 'claim' within the meaning of [the Code]." *Id.* at 939.

65. See *Reading*, 115 F.3d at 1121. Reading invoked section 77(f) of the Bankruptcy Act for its defense. See *id.* According to Bankruptcy Code section 205, which replaced Bankruptcy Act section 77, all creditors are bound by the reorganization plan, regardless of whether they file any claims against the bankrupt company pre-petition. See Bankruptcy Code § 205(f), 11 U.S.C. § 205(f) (1976) (repealed 1978). The Bankruptcy Code specifically provides:

[U]pon confirmation by the judge, the provisions of the plan and of the order of confirmation shall . . . be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed, whether or not approved, including creditors who have not, as well as those who have, accepted it.

Id. The statute further provides:

[T]he property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities

Id. This language illustrates congressional intent to grant bankrupt companies a fresh start, free of any prior debts or claims against them. See *id.* Still, the *Schweitzer* court recognized that the "plaintiffs' rights could only have been affected by the discharge of all 'claims' against their employer if they had 'claims' within the meaning of § 77 prior to the consummation date of their employer's reorganization." *Schweitzer*, 758 F.2d at 941. Section 77 defines "claims" as interests including "debts, whether liquidated or unliquidated, securities (other than stock and option warrants to subscribe to stock), liens, or other interests of whatever character." Bankruptcy Code § 205(b), 11 U.S.C. § 205(b) (1976) (repealed 1978).

66. See *Schweitzer*, 758 F.3d at 941-42. The employees based their argument on traditional tort theory which states that there is generally no cause of action until

Third Circuit rejected this argument, asserting that mere exposure to asbestos was not enough to establish a claim.⁶⁷ The court stated that no dischargeable claim existed prior to injury because “there was no legal relationship between the parties” until after an actual injury occurred.⁶⁸ Relying on federal tort law, the *Schweitzer* court determined that because the employees suffered no compensable injury prior to Reading’s reorganization, no claim existed at that point either.⁶⁹ Therefore, because no legal relationship existed between the parties until after Reading reorganized, such claims did not accrue until post-petition.⁷⁰ Thus, the employees’ claims were not discharged at bankruptcy.⁷¹ As such, under the *Schweitzer* exception to bankruptcy discharges, a claim not existing prior to reorganization cannot be discharged by section 77 of the Bankruptcy Act.⁷²

the plaintiff suffers some compensable injury. *See id.* at 942. The court referenced a treatise on tort law that explains:

Actual loss or damage resulting to the interests of another [is a necessary element of a negligence cause of action] The threat of future harm, not yet realized, is not enough. Negligent conduct in itself is not such an interference . . . except in the case of some individual whose interests have suffered.

W. PROSSER & P. KEETON, PROSSER & KEETON ON TORTS 165 (5th ed. 1984).

67. *See Schweitzer*, 758 F.2d at 942. The court feared that “[i]f mere exposure to asbestos were sufficient to give rise to a . . . cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims” *Id.* As a result, the court held that the claim required some manifest injury. *See id.*

68. *Schweitzer*, 758 F.2d at 167-68.

69. *See id.* at 943.

70. *See id.* (stating “before one can have an ‘interest’ which is cognizable as a contingent claim under section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow”); *see also* Danzig Claimants v. Grynberg (*In re Grynberg*), 113 B.R. 709, 713 (Bankr. D. Colo. 1990) (holding “some direct prepetition privity” between parties is necessary for contingent claim); *In re Pettibone Corp.*, 90 B.R. 918, 933-34 (Bankr. N.D. Ill. 1988) (necessitating pre-petition relationship between parties for discharge purposes); *cf. Frenville*, 744 F.2d at 336-37 (holding contingent claim does not exist unless there is right to payment).

71. *See Frenville*, 744 F.2d at 336-37; *see also In re Central R.R. Co. of New Jersey*, 950 F.2d 887, 892 (3d Cir. 1991) (holding manifest injury is necessary requirement of claim and therefore, “a claim is not manifest until the claimant discovers, or a reasonable person would have discovered, his injury and knows or has reason to know, the cause thereof”); *Zulkowski v. Consol. Rail Corp.*, 852 F.2d 73, 75 (3d Cir. 1988) (holding tort action constitutes claim under Bankruptcy Act, but does not accrue until “a party suffers an identifiable, compensable injury”); *cf. Frenville*, 744 F.2d at 335 (applying rule established in *Schweitzer* and holding “[o]nly proceedings that could have been commenced or claims that arose before filing of the bankruptcy petitions are automatically stayed”).

72. *See Schweitzer*, 758 F.2d at 943.

The Third Circuit has followed *Schweitzer* in a number of bankruptcy cases. In *In re Penn Central Transp. Co. (Pinney Dock)*,⁷³ the Third Circuit discharged the plaintiff's anti-trust claim against the reorganized Penn Central Corporation (PCC) because every essential element of an anti-trust claim was present before Penn Central Transportation Company (PCTC) reorganized.⁷⁴ Therefore, a

73. 771 F.2d 762 (3d Cir. 1985). In *Pinney Dock*, Penn Central Transportation Company (PCTC) sought reorganization under section 77. *See id.* at 763. The district court ordered that any of PCTC's creditors wanting to protect their claims from automatic discharge had to come forward and produce definitive evidence of any existing claims "against PCTC arising prior to the date of the reorganization process . . ." *Id.* (emphasis added). The creditor corporations received written notice from the district court and filed timely claims against the bankrupt railroad. *See id.* The creditors filed claims, however, not "based upon alleged antitrust violations." *Id.* at 764. The district court approved the plan, and ordered its consummation date for October 24, 1978. *See id.*

The Consummation Order finalized the reorganization process, ordering a discharge of any claims not already raised. *See id.* "Notwithstanding the discharge and injunctive provisions of Section 77(f) and the Consummation Order, . . . [the creditors later] filed actions . . . alleging violations of antitrust laws by PCC [Penn Central Corporation], its predecessor railroad companies, and five other railroads." *Id.* at 765. The defendants moved for summary judgment and the district court partially granted their request. *See id.* at 766. The court granted summary judgment concerning the anti-competitive claims predating the consummation order, but "[a]s to those allegations based upon the actions of PCTC or its predecessors . . . the court found that . . . [the creditors] would have to obtain the permission of the reorganization court prior to any further prosecution of their antitrust claims against PCC." *Id.* The district court ultimately ruled against the creditors' claims, "permanently enjoin[ing] them from prosecuting . . . any . . . action for damages or other relief based upon bankruptcy claims which arose prior to the 1978 Consummation Order." *Id.* (emphasis added).

The Third Circuit affirmed the district court's ruling on appeal. *See id.* at 763. The circuit court agreed that the creditors had sufficient notice of the possible discharge of their anti-trust claims and that in failing to assert them prior to the finalization of PCTC's reorganization plan, the claims were effectively discharged by section 77 at bankruptcy. *See id.* at 768-69. The court recognized that because the creditors' claims accrued pre-petition, they had to either assert the claims or lose any right to them. *See id.* The court stated:

We are in complete agreement with . . . the district court in its opinion dismissing appellant's action to the effect that the purpose of the bankruptcy law and the provisions for reorganization could not be realized if the discharge of debtors were not complete and absolute; that if courts should relax the provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated; . . . and that it would be unjust and unfair to those who had accepted and acted upon the reorganization plan if the court were thereafter to reopen the plan and change the conditions which constituted the basis of its earlier acceptance.

Id. at 767.

74. *See id.* at 765-67. According to the *Pinney Dock* court, an anti-trust claim "accrues when a defendant commits an act in furtherance of the conspiracy that injures the plaintiff and results in ascertainable damages." *Id.* When PCTC reorganized, the acts had already been committed, damages had manifested and the amount of damages was known. *See id.* at 766-67. Therefore, because a legal rela-

legal relationship existed between the parties pre-petition and was effectively discharged because of PCC's bankruptcy proceedings.⁷⁵ Later, in *In re Penn Central Transp. Co. (Paoli Yard)*,⁷⁶ seeking to avoid contribution expenses, PCC argued that its reorganization discharged any previous environmental liability accrued by its predecessor, PCTC.⁷⁷ The *Paoli Yard* court applied the *Schweitzer* exception and held that PCC's claims were not discharged when PCTC reorganized because as Congress had not yet created CERCLA, there existed no basis for liability at that time.⁷⁸

Most recently, the Third Circuit applied the *Schweitzer* rule in *In re Penn Central Transportation Co. (Bessemer)*.⁷⁹ Once again, PCTC asserted a section 77 reorganization defense against a poten-

tionship existed between the parties prior to bankruptcy, the claims were discharged under the Bankruptcy Code. *See id.* at 766-69.

75. *See id.* at 765-66. The court stated that "such actions constitute bankruptcy 'claims' within the meaning of § 77 since they are based upon federal statutes that create substantive obligations wholly separate from bankruptcy law." *Id.* at 766.

76. 944 F.2d 164 (3d Cir. 1991).

77. *See id.* at 168.

78. *See id.*; *see also Reading*, 115 F.3d at 1122. In *Paoli Yard*, the Third Circuit followed the exception to the bankruptcy discharge rule it created in *Schweitzer* by analogizing the facts of this case to those present in the *Schweitzer* case. *See Paoli Yard*, 944 F.2d at 166-68. The appellate court focused on the importance of timing and the existence of a legal relationship between the parties, noting:

[T]hat at the moment of the bankruptcy discharge and the inception of the injunction, CERCLA had not yet been passed by Congress. . . . Consequently, at the time of the Consummation Order, there was no statutory basis for liability to be asserted against PCTC by the petitioners. Just as the employees in *Schweitzer* had no recognizable tort causes of action under the FELA prior to the employer railroad's relevant consummation dates, the petitioners here could not have brought claims under CERCLA prior to the Consummation Date. . . . Under the facts now before us in this appeal, it was not until the passage of CERCLA that a legal relationship was created between the petitioners and PCC relevant to the petitioners' potential causes of action such that an interest could flow. Because this legal relationship did not evolve until after the Consummation Date, the petitioners did not have contingent claims against PCTC. Accordingly, our decision in *Schweitzer* leads us to the conclusion that the petitioners' asserted claims under CERCLA did not constitute dischargeable claims within the meaning of section 77 and thus survive the discharge of the debtor.

Id. at 167-68.

79. 71 F.3d 1113 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1851 (1996). In *Bessemer*, the appellant filed a claim for indemnity and contribution against the reorganized Penn Central Transportation Company and other railroads for their individual "participation in antitrust conspiracy." *Id.* at 1113-14. Prior to the suit, Penn Central reorganized under section 77 of the Bankruptcy Code, and upon its official consummation, Penn Central was released "from any further claims predicated upon its pre-consummation acts or conduct." *Id.* at 1114. Nonetheless, the appellants sought "indemnity and contribution from Penn Central, as the instigator, enforcer and primary beneficiary of the conspiracy[.]" for a judgment which cost Bessemer \$592 million dollars. *Id.*

tial creditor, and the court applied the *Schweitzer-Paoli Yard* analysis.⁸⁰ The Third Circuit examined when, exactly, the creditors' anti-trust conspiracy claim accrued and determined that the necessary elements of the claim were not all present until after PCTC reorganized.⁸¹ Therefore, the creditors' claim against Penn Central was not discharged at bankruptcy because a legal relationship was not yet established between the parties pre-petition.⁸² From these cases, it is evident that the Third Circuit is convinced "that a legal relationship is a prerequisite for the existence of a claim."⁸³

80. *See id.* at 1114, 1118. The Third Circuit drew an analogy to *Schweitzer* in determining whether the creditors' post-consummation claims were discharged when Penn Central reorganized. *See id.* at 1115. The *Bessemer* court stated that "[l]ike the subclinical injuries there [meaning in *Schweitzer*], appellants here had no cause of action against Penn Central pre-consummation. Because they could not have filed this action during the Penn Central bankruptcy, *Schweitzer's* lesson is that their claims could not have been discharged." *Id.*

In response, Penn Central argued its creditors had contingent claims that would have been discharged at bankruptcy, but the Court rejected this argument. *See id.* at 1115-16. The Third Circuit applied the analysis used in *Schweitzer* and *Paoli Yard* to determine whether Bessemer had contingent claims for discharge purposes. *See id.* at 1115-17. The court held:

[W]e do not believe the plaintiffs had 'interests' of any character before injury manifested itself. In our view, before one can have an 'interest' which is cognizable as a contingent claim under section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow.

Id. at 1116 (quoting *Schweitzer*, 758 F.2d at 943). *Paoli Yard* further supported this decision. The *Bessemer* court stated:

In *Paoli Yard*, we made explicit what was implicit in *Schweitzer*: it is not sufficient for dischargeability purposes that there was *some* pre-consummation legal relationship between the debtor and the party later seeking now to assert a claim; rather, *that relationship must be relevant to the claimant's cause of action*. When CERCLA was enacted, two fundamental changes occurred in that relationship: first, Conrail became primarily liable for the toxic waste cleanup. Second, and more importantly for our purposes, CERCLA made Penn Central potentially liable to Conrail for contribution and indemnity. Only then did a legal relationship relevant to the cause of action arise.

Bessemer, 71 F.3d at 1117 (emphasis added).

81. *See Bessemer*, 71 F.3d at 1115. According to the precedent established in *Frenville*, "[f]or both separate actions and third-party complaints, a claim for contribution or indemnification *does not* accrue at the time of the commission of the underlying act, but rather at the time of the payment of the judgment flowing from that act." *Id.* (quoting *Frenville*, 744 F.2d at 337) (emphasis added).

82. *See Bessemer*, 71 F.3d at 1113, 1117-18. The Third Circuit compared the facts of *Bessemer* to those of *Schweitzer*, stating that "[t]he event triggering contribution occurred *after* the date of PCTC's 1973 Consummation Order. As in *Schweitzer*, the claim did not yet exist at the time of reorganization and thus was *not* barred." *Reading*, 115 F.3d at 1122. (emphasis added).

83. Kratzke, *supra* note 14, at 403.

III. FACTS

On April 1, 1976, the Reading Railroad (Reading) officially ceased operating as a rail entity, five years after it had filed for reorganization under section 77 of the Bankruptcy Act of 1898.⁸⁴ Reading complied with the Regional Rail Reorganization Act's guidelines and transferred all remaining assets to the Conrail Corporation to begin the reorganization process.⁸⁵ By this point, the Reading Trustees had already filed an Amended Plan with the United States District Court for the Eastern District of Pennsylvania, outlining its intentions for reorganization.⁸⁶ The court notified both the United States and Conrail, which were potential creditors of the dissolving Reading.⁸⁷ Neither party objected to the proposed plan, even after attending hearings discussing the "plan's confirmation and proposed consummation."⁸⁸ The court approved Reading's plan and set December 31, 1980 as the official date for Reading's consummation.⁸⁹

The "most significant feature" within Reading's consummation plan was an injunction insulating the newly organized Reading Company "from all liability based on the obligations of its predeces-

84. See *Reading*, 115 F.3d at 1114 (stating "[f]or all practical purposes, Reading ceased to be a railroad on April 1, 1976"). Seven railroads followed Reading's lead, and filed for bankruptcy in 1973. See *id.* Congress recognized "[t]he seemingly intractable nature of these bankruptcies, combined with the obvious public need for continuing rail services" and responded legislatively. *Id.* Congress passed the Regional Rail Reorganization Act of 1973 (RRRA) with the stated purpose of facilitating "the reorganization of railroads . . . into an economically viable system capable of providing adequate and efficient rail service . . ." Regional Rail Reorganization Act of 1973, 42 U.S.C. § 701(b)(2) (Supp. IV 1974). RRRA created a plan to convey the remaining assets of bankrupt railroads to a new entity, Consolidated Rail Corporation (Conrail). See *Reading*, 115 F.3d at 1114. Bankrupt companies received Conrail securities in exchange for those assets, and then had the opportunity to reorganize as "new, non-rail entities." *Id.*

85. See *Reading*, 115 F.3d at 1114 (explaining on April 1, 1976, all Reading's rail assets were transferred to Conrail and former Reading rail employees became eligible for employment with Conrail).

86. See *id.* at 1114-15 (highlighting consummation did not occur until 1980 because Reading's reorganization plan lasted for several years).

87. See *id.* at 1115.

88. *Id.* The Bankruptcy Code provides that "[a]fter notice, the court shall hold a hearing on confirmation of a plan. A party in interest may object to confirmation of the plan." Bankruptcy Code § 1128(a)-(b), 11 U.S.C. § 1128(a)-(b) (1994). The District Court for the Eastern District of Pennsylvania followed this procedure, yet neither Conrail nor the United States, as parties with interests, objected to the discharge provisions of Reading's proposed plan. See *Reading*, 115 F.3d at 1114-15.

89. See *Reading*, 115 F.3d at 1115 (noting while consummation date was December 31, 1980, Congress enacted CERCLA just three weeks earlier on December 11, 1980, with CERCLA being effective immediately).

sor," namely, Reading Railroad.⁹⁰ The injunction prohibited any individual, corporation and government entity from filing suit against the newly organized non-rail entity if its primary intention was to satisfy debts previously incurred by Reading Railroad.⁹¹ The provision guaranteed that any past debts or liabilities would be discharged upon Reading's official consummation.⁹² Under the security of the foregoing provision, the Reading Company emerged on January 1, 1981, to begin a "fresh start" in the business world.⁹³

During this process, on October 31, 1980, EPA notified Reading that it would treat a hazardous waste site owned by Reading as a CERCLA site.⁹⁴ Although Reading was notified before the consummation order officially discharged the bankrupt company from its debts and liabilities, neither EPA nor the United States filed claims against the railroad to ensure payment of the costs incurred by the environmental cleanup of Reading's property.⁹⁵ Furthermore, neither party mentioned other hazardous waste sites nor "the po-

90. *Id.* The injunction within Reading's consummation plan read as follows: All persons, firms, governmental entities and corporations . . . are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suits or proceedings, at law or in equity or otherwise against the Reorganized Company or its successors or assigns or against any of the assets or property of the Reorganized Company . . . directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any such person, firm, governmental entity or corporation may have in, to or against the Debtor, the Reading Trustees, or any of their assets or properties . . . by reason or on account of any obligation or obligations incurred by the Debtor or any of its Trustees in these proceedings"

Id. (quoting *In re Reading Co.*, Bankr. No. 71-823 (E.D. Pa. 1980) (Memorandum and Order 2004)).

91. *See Reading*, 115 F.3d at 1115.

92. *See id.*

93. *See id.* The *Reading* court noted that Congress enacted CERCLA while Reading's consummation plan was in its final stages. *See id.* Moreover, it stated that the new authority CERCLA promulgated had a significant impact upon reorganizing railroad entities. *See id.* Congress, EPA and the railroads themselves recognized this impact. *See id.* In *Reading*, the court emphasized that the railroads considered CERCLA a threat because it specifically targeted the normal practices of their industry. *See id.*; *see also* 126 CONG. REC. 26,061-62 (1980) (letter to Sen. Howard H. Cannon from Richard Briggs, Association of American Railroads) (addressing railroad industry's concerns regarding both legislative provisions increasing its liability as well as governmental involvement in its affairs); *Superfund Hearings*, *supra* note 3, at 225 (singling out railroads as source of "hazardous substance spills" which amendments to CERCLA target with stiffer legislation).

94. *See Reading*, 115 F.3d at 1115 (commenting "EPA would treat a hazardous waste site in McAdoo, Pennsylvania, as a CERCLA site").

95. *See id.*

tential for additional hazardous waste liability” during any of Reading’s bankruptcy proceedings.⁹⁶

The conflict between Conrail and the Reading Company focused on a fifty-acre plot of land (the Douglassville site) situated along the Schuylkill River in Pennsylvania.⁹⁷ EPA officially declared the Douglassville site “a potentially hazardous site” on October 31, 1980.⁹⁸ On June 12, 1986, EPA asked Reading for information regarding the Douglassville site, and later determined on June 29, 1988, that Reading was a PRP.⁹⁹ On July 31, 1991, the United States ordered thirty-six PRPs, including Conrail but not Reading, to initiate cleanup measures on the Douglassville site.¹⁰⁰ The United States filed another claim against this group of PRPs seeking reimbursement for all present and future costs associated with its cleanup; a group from which Reading was once again absent.¹⁰¹

Conrail and the other PRPs filed an action against the Reading Company seeking contribution for all costs accrued under CERCLA section 107 during the Douglassville cleanup.¹⁰² In response, Reading filed a motion for injunctive relief in the United States District Court for the Eastern District of Pennsylvania, claiming all of its liability was discharged when it reorganized under the Bankruptcy Act.¹⁰³ The court granted the injunction Reading requested¹⁰⁴,

96. *See id.*

97. *See id.* (claiming appeal resulted from differences concerning responsibility for site’s environmental problems and “the clash of CERCLA liability with the discharge granted Reading as a result of its bankruptcy”). Since 1941, Douglassville had been the site of “a solvent recovery and oil recycling business.” *Id.*

98. *Id.* at 1115-16. Even before EPA designated the Douglassville site as a potentially hazardous site, it was familiar with the site’s forthcoming environmental problems. *See id.* at 1116. For example, in November of 1970, “heavy rains caused storage lagoons . . . to fail[, releasing t]wo to three million gallons of waste sludge . . . into the Schuylkill River.” *Id.* Then, in 1972, more sludge flooded the Schuylkill River after Hurricane Agnes struck the East Coast. *See id.* EPA responded to the environmental disaster pursuant to the Clean Water Act’s oil spill provisions. *See id.* During the cleanup process, EPA used the Reading Railroad to transport sludge away from the Schuylkill River. *See id.*

99. *See Reading*, 115 F.3d at 1116 (explaining EPA alleged “between July 6, 1965, and March 12, 1976, Reading had either generated or transported shipments of waste oil to Douglassville” and thus qualified as potentially responsible party).

100. *See id.* at 1116 n.101 (citing *United States v. Berks Assoc., Inc.*, CIV.A.91 - 4868, 1992 WL 68346 (E.D. Pa. Apr. 1, 1992)).

101. *See Reading*, 115 F.3d at 1116.

102. *See id.* (noting in this third-party action, six hundred other parties in addition to Reading Company were named as defendants).

103. *See id.* For the language used in the injunction as part of original order of Bankruptcy for Reading, see *supra* note 90.

104. *See Reading*, 115 F.3d at 1116 (citing *In re Reading Co.*, 900 F. Supp. 738, 741 (E.D. Pa. 1995)).

and in doing so, it held that because Conrail was a PRP, it could only sue another PRP, namely Reading, under CERCLA section 113(f).¹⁰⁵ Reading's liability under this provision depended upon whether Reading was also liable to an additional third party; specifically, the United States.¹⁰⁶ The district court held that "[a]ny such liability had been discharged by the bankruptcy consummation order because all the necessary elements of a CERCLA claim existed when the plan was consummated and the United States had constructive knowledge that the claim existed at the time."¹⁰⁷ Consequently, Reading was found not liable and therefore did not owe Conrail contribution costs.¹⁰⁸ Both Conrail and the United States appealed, and the United States Court of Appeals for the Third Circuit affirmed the district court's judgment.¹⁰⁹

IV. NARRATIVE ANALYSIS

Conrail raised four issues in its appeal to the Third Circuit. It sought contribution under section 113(f), indemnity for the cleanup costs incurred at the Douglassville site pursuant to section 107(a)(4)(B), and common law contribution and restitution.¹¹⁰ On appeal, the Third Circuit addressed whether Conrail could make a valid claim against Reading for the costs accrued during the Douglassville clean-ups.¹¹¹ The *Reading* court divided its analysis into two sections. The first section addressed the nature of Conrail's claim against Reading for contribution, and the second focused on the effect that Reading's Bankruptcy proceedings had upon that claim.¹¹²

A. The Nature of Conrail's Claim

The court characterized Conrail's claim against Reading as a claim for contribution that had to be brought under CERCLA sec-

105. *See Reading*, 115 F.3d at 1116, 1120 (citing CERCLA § 113(f), 42 U.S.C. § 9613(f) (1994)).

106. *See Reading*, 115 F.3d at 1116.

107. *Id.*

108. *See id.*

109. *See id.* at 1111.

110. *See id.* at 1117.

111. *See Reading*, 115 F.3d at 1117 (noting to determine validity of Conrail's claim, "we [the court] must determine the nature of the cause of action that Conrail possesses and whether that cause of action is dependent on Reading's liability to the United States for costs of the Douglassville clean-up").

112. *See id.* at 1117, 1121.

tion 113(f).¹¹³ The claim could not be brought under the common law principles of restitution or contribution, the court asserted, because "CERCLA preempts Conrail's common law theories."¹¹⁴ The court found that although Congress did not draft CERCLA to expressly preempt state common law, the passage of CERCLA caused this result because the remedies available under the statute directly conflict with those available under the common law theories of restitution and contribution.¹¹⁵ Therefore, the remaining question for the court was under which specific CERCLA provision Conrail had to bring its contribution claim. Conrail argued that it had two separate claims against Reading, one pursuant to section 107(a)(4)(B) and the other pursuant to section 113(f).¹¹⁶ Reading challenged Conrail, arguing that the express contribution provision section 113(f) prevails over the "judicially created right" for contri-

113. *See id.* at 1121 (emphasizing CERCLA section 113(f), not CERCLA section 107(a), is proper provision to use in pursuing this type of claim).

114. *See id.* at 1117 (referring to district court's decision and how this decision and district court's decision mirror one another).

115. *See id.* The *Reading* court addressed the issue of preemption to define the true nature of Conrail's claim. *See id.* The court highlighted three specific ways a federal statute can preempt state common law. First, a statute can expressly preempt the state law. *See id.* Second, the statute can preempt state law implicitly, "by so occupying the field with comprehensive federal regulation that it leaves no room for state law." *Id.* And third, the federal statute can create a conflict between it and the state law, and implicitly preempt the latter. *See id.* In this situation, a conflict arises because either complying with both the state and federal law is impossible, or, because the state law impedes achievement of the federal statute's objectives. *See id.* *See generally* California Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272, 280-292 (1987) (focusing on implicit way federal laws preempt state statutes by creating conflict between them).

The *Reading* court noted that the Third Circuit had addressed the issue of "preemption by conflict" in the past, but it was not until this particular case that the Third Circuit specifically recognized that a conflict existed "between . . . common law claims for contribution and restitution and the remedies expressly provided" by CERCLA. *Reading*, 115 F.3d at 1117. For example, the *Reading* court highlighted *Manor Care, Inc., v. Yaskin*, a previous Third Circuit case addressing CERCLA and issues of preemption. *See id.* (citing 950 F.2d 122, 125-26 (3d Cir. 1991)). In *Manor Care*, the Third Circuit considered whether Congress intended to preempt state common law principles with the passage of CERCLA. *See Manor Care*, 950 F.2d at 125-26. The *Manor Care* court held that Congress neither expressly preempted state law with CERCLA nor created a statute that implicitly preempted state law by making it impossible to simultaneously comply with state law and federal laws. *See id.* Therefore, the *Manor Care* court concluded that in evaluating CERCLA claims and issues of preemption, courts must address the conflict between CERCLA and state law, and determine how that conflict effectively prioritized CERCLA. *See id.* at 125-26, 128. *See also* Witco Corp. v. Beekhuis, 38 F.3d 682, 688 (3d Cir. 1994) (holding appellant could comply with both statute law and CERCLA provision because two were not "mutually exclusive").

116. *See Reading*, 115 F.3d at 1117.

bution pursuant to section 107(a)(4)(B).¹¹⁷ The court agreed with Reading and held that only section 113(f) was available to Conrail as a PRP for the contamination of Douglassville.¹¹⁸

In determining which CERCLA provision Conrail could use against Reading to collect contribution costs, the Third Circuit examined the specific language as well as the congressional intent of both CERCLA provisions.¹¹⁹ The court held that the language of section 107 is actually narrower than courts have previously interpreted it, and therefore only empowered an innocent party to file suit against one or more responsible parties for its recovery costs.¹²⁰ Alternatively, section 113(f) expressly permits one PRP to file a claim against another PRP for contribution of the costs it has incurred during an environmental cleanup.¹²¹ Accordingly, section 113(f) was the only viable option for Conrail because it was not an innocent party, but instead was as responsible for Douglassville's contamination as Reading. Furthermore, the court stated that "Congress intended to replace § 107(a)(4)(B)'s implied contribution remedy when it enacted § 113(f)."¹²²

Conrail advanced two final arguments in favor of its independent section 107 claim for contribution. First, Conrail indicated the actual language of section 113, which specifically refers to the permissibility of "a civil action" under section 107.¹²³ The court easily dismissed this argument by stating:

The fact [that] . . . § 113(f) mentions the availability of a civil action under § 107(a) does not *a fortiori* indicate that Congress intended to permit an action for contribution to be brought either under § 107(a) or under § 113(f), at

117. *Id.* The *Reading* court accepted Reading's position and stated that in an action which presents a claim for apportionment of clean-up costs, "section 113(f) trumps [section] 107(a)(4)(B)." *Id.*

118. *See id.* at 1119-20. The *Reading* court noted that Congress intended the remedy provided by section 113(f) to be an "efficient resolution of environmental disputes." *Id.* at 1117. The court feared that "[p]ermitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress." *Id.* It accordingly held that CERCLA's provision for contribution preempted Conrail's common law claims for contribution and restitution, making the latter two unavailable to Conrail. *Id.*

119. *See id.* at 1117-20 (explaining congressional intent is focus of preemption analysis and examining language assists in identifying that intent).

120. *See id.* at 1119-120 (commenting until SARA, section 107 served as gap-filler, and once Congress enacted SARA, section 113 became appropriate section to rely on in seeking contribution).

121. *See Reading*, 115 F.3d at 1120.

122. *Id.* at 1119.

123. *See id.*

the discretion of the litigant. After all, a “civil action” can be initiated for direct costs, as well as for contribution.¹²⁴

Conrail next argued that it could bring a claim for contribution under section 107, based on the Supreme Court’s decision in *Key Tronic Corp. v. United States*.¹²⁵ In *Key Tronic*, the Supreme Court addressed whether sections 107 and 113 permitted contribution, and held that the “overlap” between the two statutory provisions did not confer a discretionary right upon a PRP to choose under which provision to file suit.¹²⁶ Instead, the Supreme Court in *Key Tronic* illustrated how various courts have interpreted the private rights of action authorized by section 107(a)(4)(B) differently.¹²⁷ The Third Circuit, however, relied on the statute’s plain meaning and held that section 113(f), not section 107(a)(4)(A), was the appropriate provision for Conrail to use in seeking its remedy of contribution.¹²⁸

B. Conrail’s Claim in Light of Reading’s Bankruptcy

The *Reading* court began its evaluation of the effect Reading’s bankruptcy proceedings had on Conrail’s claim by reviewing the precedent previous Third Circuit cases had established when addressing “the discharge of claims [at] bankruptcy.”¹²⁹ Those cases structured the Third Circuit’s application of section 77 discharges to environmental claims, and the *Reading* court accordingly structured its analysis and began by determining whether Conrail’s CER-

124. *Id.* at 1119-20.

125. *See id.* at 1120 (citing *Key Tronic*, 511 U.S. 809 (1994)). Conrail based its argument on a statement within the Supreme Court’s decision in *Key Tronic*. *See Reading*, 115 F.3d at 1120. The controversial comment in the *Key Tronic* decision reads: “[T]he statute [CERCLA] now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.” *Id.* (quoting *Key Tronic*, 511 U.S. at 816).

126. *See Reading*, 115 F.3d at 1120 (explaining overlap exists because some courts have permitted direct actions by landowners under section 107 to recover costs from responsible parties).

127. *See id.* According to the *Reading* court,

The fact [that] . . . a direct action might be brought under § 107(a) does not open the door for a PRP to bring an action for contribution under that same section. Indeed, the fact that § 113(f)(1) specifically permits an action for contribution to be brought “in the absence of a civil action under . . . [section 9607]” reenforces our conclusion that Congress intended § 113 to be the *sole means* for seeking contribution

Id. (emphasis added).

128. *See id.*

129. *Id.* at 1121. The *Reading* court primarily relied upon four previous Third Circuit decisions: *Schweitzer*, *Paoli Yard*, *Pinney Dock*, and *Bessemer*. *See id.* at 1121-26. For a discussion of these cases, see *supra* notes 64-83 and accompanying text.

CLA claim existed at the time of Reading's bankruptcy.¹³⁰ The court stated that unless the interest could be characterized as a contingent claim where no legal relationship existed between the parties at the time of bankruptcy, if the claim existed prior to reorganization, it was discharged.¹³¹ The Third Circuit, relying on *Paoli Yard*, accepted Conrail's section 113(f) claim for contribution.¹³² The court held that Conrail's claim was not discharged when Reading filed for bankruptcy because Congress had not yet enacted the Superfund Amendments and Reauthorization Act of 1986 (SARA).¹³³ Thus, without either a statutory basis for liability or a legal relationship between the parties, the court reaffirmed that a claim did not yet exist for discharge purposes.¹³⁴

Although the court found that Conrail's claim was not discharged at bankruptcy, the Third Circuit held that the claim failed

130. *See id.* at 1123. In describing the analytical framework for section 77 discharges, the *Reading* court stated:

[W]e must determine whether the CERCLA claim had accrued at the time of the reorganization. If so, then it was discharged. To determine whether a claim existed, we look to the substantive area of law governing the underlying claim. If a claim had not accrued, then we must determine whether the claimant possessed an interest rising to the level of a contingent claim that would be discharged.

Id. (citations omitted).

131. *See Reading*, 115 F.3d at 1123-25 (analyzing relevant case law as applicable to *Reading*). For a discussion of contingent claims, see *supra* note 26 and accompanying text.

132. *See id.* at 1123.

133. *See id.* (comparing non-existence of CERCLA at time of bankruptcy in *Paoli Yard* with non-existence of SARA at time of bankruptcy in *Reading*).

134. *See id.* Congress did not enact SARA and its particular contribution provision until 1986, whereas Reading's official consummation occurred six years earlier, in 1980. *See id.* at 1115, 1123. Reading argued that section 113(f) "permits a contribution action based on perspective liability." *Id.* at 1123. In support of its proposition, Reading used the plain language of section 9163(f), which states, "any person may seek contribution from any other person who is liable or potentially liable under § 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 civil action" *Id.* (quoting CERCLA § 113(f), 42 U.S.C. § 9613(f)). Reading also asserted that legal precedent demonstrates that the Third Circuit has found "an implied right of action under [CERCLA] § 107(a)(4)(B)." *Id.*

The *Reading* court rejected this argument because the result would be unfair to Conrail. *See id.* The *Reading* court refused to punish Conrail for failing to assert a claim which had no legal basis until years later. *See id.* First, because SARA section 113(f) did not exist in 1980, Conrail did not, at that time, have an express claim for contribution against Reading when it reorganized. *See id.* Furthermore, the *Reading* court stated that even if it accepted section 107(a)(4)(B)'s implied contribution provision, courts did not legally recognize this implied right of action until after Reading reorganized. *See id.* The *Reading* court applied *Paoli Yard*, holding that because Conrail's claim did not exist at the time of bankruptcy, it was therefore not discharged at bankruptcy. *See id.*

as a matter of law.¹³⁵ The court stated that for Conrail to have a legitimate claim for contribution under CERCLA section 113(f), Conrail and Reading must have shared joint liability to a common third party, which was in this case the United States.¹³⁶ The court held that neither Conrail nor Reading were liable to the United States, because all claims it had against Reading were discharged at bankruptcy.¹³⁷ Therefore, Conrail's section 113(f) claim could not proceed because joint liability, an essential element of its contribution claim, was missing.¹³⁸

The joint liability element was described in *Reading* by the Third Circuit's use of the traditional common law meaning of contribution in its interpretation of section 113(f).¹³⁹ This definition requires "some form of joint liability" between the plaintiff and the defendant to the same third party.¹⁴⁰ Conrail argued that the definition of contribution in section 113(f) moved beyond the joint liability requirement, but the *Reading* court disagreed.¹⁴¹ The court feared that if contribution was not limited to its traditional common law meaning, "contribution could become an endless circle of

135. *See id.*

136. *See Reading*, 115 F.3d at 1123 (establishing that while right to bring claim for contribution existed, mere existence of this right did not suffice to obtain favorable judgment).

137. *See id.* at 1123.

138. *See id.* at 1123-24. The United States asked the Third Circuit to remand the case so that the District Court for the Eastern District of Pennsylvania could determine "the derivative nature of the contribution claim and [resolve] its potential failure" *Id.* The court denied this request, asserting that remanding the case would be a waste of judicial time because the district court had already decided the issue. *See id.* Instead, the Third Circuit exercised plenary review and reexamined the district court's decision. *See id.* at 1124. Second, the *Reading* court explained, "although an absence of joint liability may be a defense, when there is no question that joint liability is lacking, a necessary element to establish contribution cannot be proven." *Id.*

139. *See id.*

140. *Id.* The *Reading* court used the specific language of section 113(f) to support its common law approach to defining "contribution." *See id.* The *Reading* court stated that "CERCLA § 113(f) captures the requirements of joint liability in its statutory language: 'Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title'" *Id.* (quoting CERCLA § 113(f), 42 U.S.C. § 9613(f) (1994)).

141. *See Reading*, 115 F.3d at 1124 (stating "Conrail argues that common liability by two or more defendants to one common government agency is not necessary under § 113(f)"). The *Reading* court adopted the same traditional common law definition for contribution that the Uniform Contribution Among Tortfeasors Act (UCAT) expresses. *See id.* The UCAT provides "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." *Id.* (quoting UNIF. CONTRIBUTION AMONG TORTFEASORS ACT § 1, 12 U.L.A. 1955).

attempts to seek reimbursement from unrelated parties.”¹⁴² Therefore, because section 113(f) uses the common law definition of contribution, the success of Conrail’s claim for contribution depended on whether Reading was also liable to the United States under section 107(a).¹⁴³

Conrail also argued that liability existed under section 107(a)(4)(A), but the *Reading* court discounted this assertion.¹⁴⁴ The court ruled that section 107(a) was only available to an innocent party who sued the responsible party for total indemnification of the environmental cleanup costs it incurred.¹⁴⁵ The *Reading* court stated that Conrail was not an innocent party, and therefore, recovery under this section was unavailable.¹⁴⁶ It characterized Conrail as a PRP, and held that only section 113(f) allows one PRP to recover contribution expenses from another PRP.¹⁴⁷ Still, without common liability to a third party, the section 113(f) claim failed.¹⁴⁸

After deciding that common liability was essential to the success of Conrail’s section 113(f) claim, the court addressed how Reading’s reorganization affected its relationship with the United States.¹⁴⁹ The court applied the *Schweitzer-Paoli Yard* analysis and held that all four requirements for a CERCLA claim existed before Reading reorganized.¹⁵⁰ Therefore, because the United States incurred its environmental cleanup costs prior to Reading’s reorgani-

142. *Reading*, 115 F.3d at 1124.

143. *See id.*

144. *See id.* at 1124-25. Conrail claimed that according to the statutory language of CERCLA, it was entitled to contribution costs under section 107(a). *See id.* Section 107(a)(4)(A) makes PRPs liable for “costs of removal or remedial action incurred by the United States Government” *Id.* at 1125 (quoting CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A)). In addition, CERCLA makes PRPs liable for “any other necessary costs of response incurred by any other person” *Id.* § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B). Conrail used CERCLA’s language to assert that common liability to the United States is not necessary under section 107(a)(4)(A). *See Reading*, 115 F.3d at 1125. The court rejected this argument because as a PRP itself, Conrail could only seek contribution, not total indemnification. *See id.* The court therefore held that “Reading’s § 113(f) liability depends on its liability to the United States.” *Id.*

145. *See Reading*, 115 F.3d at 1120-21 (explaining case facts clearly show Conrail was seeking contribution and therefore had to file under section 113).

146. *See id.* at 1120, 1124-25.

147. *See id.* at 1116, 1120-21.

148. *See id.* at 1126 (highlighting since Reading did not qualify as either liable or potentially liable under section 107(a)(4)(A), it could not be liable to Conrail).

149. *See id.*

150. *See Reading*, 115 F.3d at 1125. For a discussion of the necessary CERCLA elements, see *supra* note 16 and accompanying text.

zation, any liability Reading had to the United States was effectively discharged at bankruptcy.¹⁵¹

The United States argued that its claims against Reading were not discharged because it did not have sufficient knowledge of the claim when it accepted Reading's reorganization plan.¹⁵² The court dismissed this argument because it found ample support for the district court's finding that the United States was, or should have been, fully aware of the nature of its claim against Reading before it filed for bankruptcy.¹⁵³ Consequently, the United States' CERCLA claim was discharged at bankruptcy, and Reading was thereby released from any liability.¹⁵⁴ Reading was neither liable,

151. See *Reading*, 115 F.3d at 1126. Reading easily satisfied the first three CERCLA elements in that it was one of the responsible parties, hazardous substances were dumped at the Douglassville site and a "release" according to CERCLA had occurred. See *id.* This reality left only the question of when exactly the United States incurred clean-up costs; before or after Reading's consummation. See *id.* CERCLA defines "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 substance or pollutant or contaminant). . . ." CERCLA § 101(22), 42 U.S.C. § 9601(22) (1994). The remaining element would only be satisfied if the United States assumed the cleanup costs for Douglassville before Reading reorganized. See *Reading*, 115 F.3d at 1125. The *Reading* court affirmed that Reading satisfied all four CERCLA elements stating:

In both 1970 and 1972, federal environmental agencies, acting pursuant to the Clean Water Act, 33 U.S.C. § 1321, undertook cleanups of massive releases from the Douglassville site. These cleanups meet the definition of a "removal action." The United States never recovered its "response costs" for these efforts. Consequently, on the date of Reading's § 77 reorganization, all four CERCLA elements were met. The United States possessed an actual claim against Reading.

Id.

152. See *Reading*, 115 F. 3d at 1126.

153. See *id.* Any questions regarding a party's knowledge are questions of fact the court reviews for the presence of clear error. See *id.* The Third Circuit deferred to the district court's findings that the United States had considerable evidence of its claim against Reading at the time of bankruptcy. See *id.* In support of its decision, the circuit court noted the following facts the district court had found:

[T]he United States knew the Douglassville site was an environmental trouble spot and Reading Railroad was connected to it; by October 31, 1980, the EPA had identified the site as potential hazardous waste site; federal officials had twice responded to cleanup needs at the site; EPA knew Reading Railroad had operated a rail line to the site; in 1972 EPA had ordered Reading Railroad to haul waste from the site; and ICC tariffs, available as part of bankruptcy proceedings, showed that Reading transported hazardous materials to the site.

Id. (citing *In re Reading Co.*, 900 F. Supp. at 745-46). The district court also relied on "the length of the Reading Railroad's bankruptcy [and] the government's substantial participation in it." *Id.*

154. See *id.* The *Reading* court stated that "under our decisions in *Schweitzer* and *Paoli Yard*, the United States' CERCLA claim against Reading for environmental clean-up at the Douglassville site was discharged in the § 77 reorganization." *Id.*

nor potentially liable, under section 107(a)(4)(A) and was therefore not liable to Conrail for any contribution.¹⁵⁵ Thus, the court held that Conrail's claim under section 113(f) failed as a matter of law.¹⁵⁶

V. CRITICAL ANALYSIS

The *Reading* court's decision is consistent with previous Third Circuit decisions addressing the conflict between CERCLA's strict liability provisions and the Bankruptcy Code's all-encompassing discharge provision.¹⁵⁷ Similar to the decisions in *Union Scrap* and *Schweitzer*, the Third Circuit adopted the legal relationship test in *Reading*.¹⁵⁸ The Third Circuit applied the *Schweitzer-Paoli Yard* test to the facts of the *Reading* case and determined that without a legal basis of liability between the parties, Conrail had no cause of action against Reading for contribution.¹⁵⁹

At the outset of its analysis, the *Reading* court properly applied both the broad definition of "claim" Congress has advanced as well as the opinions set forth in *Kovacs*, *Schweitzer* and other similar cases.¹⁶⁰ The court was also correct in determining that Reading's CERCLA obligations qualified as "claims" under the Bankruptcy Code and would be discharged as long as they accrued pre-petition.¹⁶¹ The court also recognized that for Conrail to have a legitimate claim against Reading for contribution, the parties were required to share liability to a common third party, like that ex-

155. *See id.*

156. *See id.* In its conclusion, the court acknowledged the continual conflict between CERCLA and the Bankruptcy Act. *See id.* It stated that "[i]n reaching this conclusion, we have not elevated bankruptcy law over CERCLA, nor do we perceive a clash between the two systems. Each performs its respective function. Our opinion merely demonstrates that CERCLA claims are treated like any other claim in bankruptcy." *Id.*

157. For a discussion of the other Third Circuit cases addressing the conflict between CERCLA and the Bankruptcy Code, see *supra* notes 64-83 and accompanying text.

158. *See Reading*, 115 F.3d at 1120-25. For a discussion of the legal relationship test applied in *Union Scrap*, *Schweitzer* and *Paoli Yard*, see *supra* notes 55-83 and accompanying text. For a discussion of the alternative approaches courts have taken, see *supra* notes 33-54 and accompanying text.

159. *See Reading*, 115 F.3d at 1123-26. For further discussion of the *Reading* court's application and analysis, see *supra* notes 113-55 and accompanying text.

160. *See Reading*, 115 F.3d at 1121. For a discussion of the authorities the court relied on for its broad definition of "claim," see *supra* notes 29-31, 33-83 and accompanying text.

161. *See Reading*, 115 F.3d at 1123. For a discussion of why the Bankruptcy Code discharges only pre-petition debts, see *supra* notes 25-26 and accompanying text.

isting between the debtor and creditor in *Union Scrap*.¹⁶² Because common liability to a third party was absent between Reading and Conrail when Conrail's claim accrued, so too, was the legal relationship needed to base Conrail's contribution claim upon.¹⁶³

In addition to correctly applying the legal relationship test defined by the Third Circuit, the *Reading* court accurately interpreted the conditions under which sections 107(a) and 113(f) are available to either the federal government or private plaintiffs.¹⁶⁴ The court recognized that the judicially-created right to contribution under section 107(a) became ineffective once Congress passed the SARA amendments, and more particularly, with the creation of section 113.¹⁶⁵ According to the express language of that provision, as well as the congressional intent behind it, the *Reading* court properly concluded that section 107 was only available to an innocent party. Therefore, a PRP seeking contribution instead of total indemnification, would have to seek action pursuant to section 113(f).¹⁶⁶ This statutory interpretation parallels those of other courts.

The *Reading* court made another important decision when it chose to balance the objectives and legal principles of both CERCLA and the Bankruptcy Code in achieving the most equitable solution.¹⁶⁷ Unlike other courts which have favored the public policy considerations of one statute at the expense of the other, the *Reading* court followed the approach the *In re National Gypsum* court chose.¹⁶⁸ In deciding whether Conrail had a valid claim for contribution against Reading, the court refused to elevate one statute over the other and assigned both statutes the same priority.¹⁶⁹

162. See *Reading*, 115 F.3d at 1124. For a discussion of *Union Scrap's* analysis of the legal relationship test, see *supra* notes 55-62 and accompanying text. For information on other Third Circuit cases adopting the legal relationship approach, see *supra* notes 63-155 and accompanying text.

163. See *Reading*, 115 F.3d at 1124-26. For more information on the *Reading* court's holding and reasoning, see *supra* notes 113-55 and accompanying text.

164. For a discussion of the conditions necessary for sections 107(a) and 113(f) claims, see *supra* note 16-17 and accompanying text.

165. See *Reading*, 115 F.3d at 1118-20. For more information on the replacement of section 107's implicit contribution provision with section 113's express provision, see *supra* notes 2,16 and accompanying text.

166. See *Reading*, 115 F.3d at 1118-20.

167. See *id.* at 1126. For a discussion of how the *Reading* court reached its decision, see *supra* notes 113-55 and accompanying text. For an example of approaches similar to that used in the *Reading* court, see *supra* notes 50-54 and accompanying text.

168. See *Reading*, 115 F.3d at 1126. For a discussion of other courts which have not used a balancing approach and which have instead favored one statute over the other, see *supra* notes 39-49 and accompanying text.

169. See *Reading*, 115 F.3d at 1126.

VI. IMPACT

In re Reading can have a positive effect on the Third Circuit as well as other circuit courts confronted with the conflict between CERCLA's strict liability provisions and the Bankruptcy Code's automatic discharge policy. First, the *Reading* court strengthened the precedent under which courts had applied the legal relationship test to these cases. Second, the Third Circuit will continue to reject assigning one statute's goals priority over the other's. Hopefully, by continuing to support a more equitable and balanced approach to the traditional conflict between the two statutes, other courts will follow the Third Circuit's lead and adopt a uniform and fair position within their own jurisdictions. Moreover, Congress may realize the need to address the conflict between CERCLA and the Bankruptcy Code and "knock out" this conflict by amending either the Bankruptcy Code or CERCLA.

Although this case is consistent with prior Third Circuit decisions, it nevertheless illustrates that courts remain divided and unable to resolve the conflict between CERCLA and the Bankruptcy Code without some legislative guidance.¹⁷⁰ Congress must revise the Bankruptcy Code and address how courts should deal with environmental obligations, past, present and future, when they are confronted with the Bankruptcy Code's discharge provisions. Absent Congressional action, either bankruptcy law or environmental law will continue to suffer.¹⁷¹ Therefore, "[t]he interests of debtors and environmental authorities would be better served by predictable treatment of environmental claims than by the current inconsistencies."¹⁷²

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170. See Kratzke, *supra* note 14, at 409 (explaining lack of solid guidelines leads to confusion in this area and prolongs "existing legal dilemma"). Kratzke notes that because it falls outside the scope of the judiciary's power to rewrite the Bankruptcy Code, "Congress should seriously consider amendment to alleviate the growing problem . . ." *Id.* at 416.

171. See McBain, *supra* note 26, at 263 (explaining following one bankruptcy court's holding does not suffice and "the appropriate means of directing courts is through amendment to the Code or Rules") .

172. *Id.* at 260.

