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## In Re Chateaugay Corp.: An Argument for Legislative Intervention in the War between CERCLA and the Bankruptcy Code

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**IN RE CHATEAUGAY CORP.: AN ARGUMENT FOR  
LEGISLATIVE INTERVENTION IN THE WAR  
BETWEEN CERCLA AND THE  
BANKRUPTCY CODE**

**I. INTRODUCTION**

Since the passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),<sup>1</sup> there has been considerable conflict between judges, legislators, and environmental advocates regarding the treatment of environmental claims under the Bankruptcy Code (the Code).<sup>2</sup> Unfortunately, the objectives of CERCLA and the Code are not symbiotic. CERCLA was intended to provide for the public welfare by establishing procedures to facilitate environmental cleanup in addition to holding perpetrators financially accountable.<sup>3</sup> The Code was intended to provide debtors with a means to reorganize free from all debt and liability.<sup>4</sup> The primary conflict

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1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1992) (amended 1986).

2. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101-1330 (1988). In regard to the conflict between CERCLA and the Code, some commentators feel that response costs incurred by an environmental agency after the debtor has reorganized in bankruptcy are dischargeable claims within the Code's broad language. See THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 51 (1986); see also Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1204 (1984). However, other commentators argue that CERCLA provides an exception to the Code, and the Code's language should not be interpreted so broadly. See Kevin J. Saville, Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?*, 76 MINN. L. REV. 327, 349-53 (1991); Anne D. Weber, Comment, *Misery Loves Company: Spreading the Costs of CERCLA Cleanup*, 42 VAND. L. REV. 1469, 1501-06 (1989); Comment, *Ohio v. Kovacs: Conflict Between Federal Bankruptcy and Environmental Law*, 34 AM. U. L. REV. 1263, 1290-1300 (1985); cf. Audrey J. Anderson, Note, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131, 158-65 (1989) (stating that "preemptive" language of CERCLA should give it preference over state dissolution law).

3. See CERCLA §§ 106, 107, 42 U.S.C. §§ 9606, 9607; see also 126 CONG. REC. 30,940 (1980) (statement of Sen. Chafee) ("Governments must have a tool for holding liable those who are responsible for [any response] costs."); *id.* at 30,941 (statement of Sen. Mitchell) ("The guiding principle of those who wrote S.1480 was that those found responsible for harm caused by chemical contamination should pay for the costs of that harm."); Anderson, *supra* note 2, at 144 & n.83; A. F. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982). For a discussion of CERCLA's statutory provisions, see *infra* notes 25-30 and accompanying text.

4. See 11 U.S.C. § 727(b); H.R. REP. NO. 595, 95th Cong., 1st Sess. 180

between these objectives concerns the issue of whether a CERCLA "claim" may be discharged in bankruptcy if the United States Environmental Protection Agency (EPA) has not incurred response costs<sup>5</sup> or lacks knowledge of the claim.

In *In re Chateaugay Corp.*, the Second Circuit Court of Appeals addressed this issue and determined that the goals of the Code should be favored over those of CERCLA.<sup>6</sup> The court held that response costs incurred by EPA due to the pre-petition<sup>7</sup> release or threatened release of hazardous substances were dischargeable "claims" under the Code, even if the costs were incurred after the bankruptcy proceedings were finalized.<sup>8</sup> In addition, the *Chateaugay* court suggested that EPA's knowledge of a claim was irrelevant since the relationship between the agency and the debtor provides sufficient contemplation of contingent obligations.<sup>9</sup> However, other courts have been reluctant to follow *Chateaugay's* broad application of the Code.<sup>10</sup> Some of these courts have held that EPA must have knowledge of the claim before it can be discharged in bankruptcy. Furthermore, the question remains whether it is possible to strike a balance between CERCLA and the Code without emasculating their objectives.

This Note will demonstrate that it has become necessary for Congress to intervene. As a matter of policy, Congress should determine the circumstances under which CERCLA would provide an exception to the mandates of the Code. This Note will include the facts, procedure and history of *Chateaugay*, as well as a discussion of all relevant pre-*Chateaugay* legal holdings. In addition, the reasoning of *Chateaugay* will be analyzed and criticism offered. Finally, this Note will examine the impact of the *Chateau-*

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(1978), reprinted in 1978 U.S.C.C.A.N. 6141 ("The [Code] will permit a *complete settlement* of the affairs of a bankrupt debtor, and a *complete discharge* and fresh start.") (emphasis added); *id.* at 352, reprinted in 1978 U.S.C.C.A.N. 6308 ("[Even] contingent or unmatured claims are to be liquidated by the bankruptcy court in order to afford the debtor *complete bankruptcy relief.*") (emphasis added). For a discussion of the Code's provisions, see *infra* notes 31-33 and accompanying text.

5. Response costs are those expenses incurred by EPA or other agencies in cleaning up environmental contamination.

6. *In re Chateaugay Corp.*, 944 F.2d 997, 999 (2d Cir. 1991).

7. Pre-petition claims are those that arise prior to the debtor's reorganization in bankruptcy.

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

9. *Id.* at 1005.

10. For a discussion of the criticism of the *Chateaugay* decision by subsequent cases, see *infra* notes 95-130 and accompanying text.

gay holding on the decisions of subsequent courts, and demonstrate the necessity for legislative intervention.

## II. FACTS

The Chateaugay Corporation (LTV) conducted business in steel, aerospace, defense, and energy products.<sup>11</sup> These endeavors generated substantial quantities of industrial hazardous substances that required treatment prior to disposal.<sup>12</sup>

On July 16, 1986, LTV filed for bankruptcy under Chapter 11 of the Code.<sup>13</sup> The schedule of LTV's liabilities included "contingent" claims asserted by EPA.<sup>14</sup> Thereafter, EPA filed a proof of claim stating that it incurred \$32 million in pre-petition response costs at fourteen sites where it was alleged that LTV was a "potentially responsible party" (PRP) under CERCLA.<sup>15</sup> In addition, EPA stated that it anticipated incurring further response costs at thirteen of the original fourteen sites.<sup>16</sup> Thus, EPA expected that there would be future claims based on response costs not incurred in the pre-petition stage.<sup>17</sup> LTV then informed the government that it anticipated proposing a reorganization plan that would discharge all environmental liabilities caused by their pre-petition conduct.<sup>18</sup> According to LTV, this plan included response costs incurred by EPA post-confirmation.<sup>19</sup>

In reply, the federal government and the State of New York brought an action for a declaratory judgment that any post-confir-

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11. *Chateaugay*, 944 F.2d at 999. Chateaugay Corporation was one of numerous related companies that were known collectively as LTV. *Id.*

12. *In re Chateaugay Corp.*, 112 B.R. 513, 517 (Bankr. S.D.N.Y. 1990). This citation refers to the underlying decision by the district court.

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

14. *Id.* LTV's schedule of liabilities was 24 pages long. *Id.* The claims were held by EPA and the environmental enforcement officers of all 50 states, and the District of Columbia. *Id.* The "contingent" claims were those that were pending investigation by EPA or had otherwise gone undiscovered prior to the finalization of bankruptcy. *See id.* For a discussion of the dischargeability of "contingent" claims, see *infra* notes 32-33 and accompanying text.

15. *Chateaugay*, 944 F.2d at 999. *See* CERCLA §§ 106, 107(a), 42 U.S.C. §§ 9606, 9607(a) (potentially responsible party may be forced to clean up contamination or reimburse EPA for cleanup costs).

16. *Chateaugay*, 944 F.2d at 999. At the time, 11 of the LTV sites were on the National Priorities List. *Chateaugay*, 112 B.R. at 518 n.6.

17. *Chateaugay*, 944 F.2d at 999. EPA claimed that the \$32 million in costs already incurred might have been only a small portion of LTV's liability under CERCLA. *Id.*

18. *Id.* at 1000.

19. *Id.* Confirmation occurs in bankruptcy once the proceedings are finalized and the debtor has reorganized. Post-confirmation response costs are those that are incurred after the debtor's reorganization has been confirmed.

mation response costs were not dischargeable because such costs did not arise from pre-petition claims.<sup>20</sup> All parties filed summary judgment motions which were subsequently granted in part and denied in part.<sup>21</sup> Both sides appealed the district court's decision.<sup>22</sup> On appeal, the Second Circuit affirmed, holding that response costs incurred by EPA under CERCLA, relating to the pre-petition release or threatened release of hazardous substances, were "claims" dischargeable in bankruptcy even if such costs were incurred after reorganization.<sup>23</sup>

### III. CERCLA & THE CODE: COMPETING OBJECTIVES<sup>24</sup>

Under CERCLA, EPA may take any response which is neces-

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20. *Id.* According to the government, LTV did not have a "claim" as defined by the Bankruptcy Code, 11 U.S.C. § 101(4), until those costs were incurred. *Chateaugay*, 944 F.2d at 1000. For a discussion of "claims" under the Code, see *infra* note 32 and accompanying text.

21. *Chateaugay*, 944 F.2d at 1001. The opinion is unclear as to which specific parties filed summary judgment motions. The court simply stated that they were filed by both plaintiffs and defendants. *Id.* Judge Sprizzo of the district court ruled that an obligation to reimburse EPA for response costs was dischargeable when based on pre-petition release or threatened release of hazardous substances. *Id.* at 1000. The district court did not rule that all response cost claims based on pre-petition conduct were dischargeable. *Id.* Only those claims arising from pre-petition release or threatened release of hazardous substances could be discharged. *Id.* In addition, the district court held that claims for injunctive relief based on the pre-petition release or threatened release of hazardous substances were dischargeable if the injunction was an option EPA elected rather than incur response costs. *Id.* However, the claim was not dischargeable if EPA had no right to payment for response costs incurred in the cleanup. *Id.* Finally, the court granted EPA's declaratory judgment and stated that cleanup costs assessed post-petition were entitled to administrative priority under 11 U.S.C. § 503(b)(1)(A). *Id.* at 1001.

22. *Id.* EPA, New York and the Equity Holders appealed the ruling which stated that pre-petition releases and threatened releases can be discharged in bankruptcy. *Id.* LTV and the Committee of Unsecured Creditors appealed the ruling regarding the nondischargeability of injunctive relief and the entitlement of cleanup costs as an administrative priority. *Id.*

23. *Id.* at 1005. The court found these "claims" to be dischargeable even though EPA did not know the full extent of hazardous substance removal costs it might impose on LTV, or the location of all contaminated sites. *Id.* The court also affirmed the district court's ruling in regard to affording administrative priority to post-petition cleanup costs. *Id.* at 1009-10. In addition, the court held that an injunction was not dischargeable unless the creditor had the option to cleanup the site and sue for response costs. *Id.* at 1008. According to the court, both parties disagreed on how the decision should be interpreted. *Id.* at 1001. The government asserted that the decision found post-confirmation liabilities not dischargeable. *Id.* LTV claimed the decision held that injunctions were dischargeable when based on pre-petition contamination, and were nondischargeable when it required the debtor to cease polluting. *Id.*

24. For a similar discussion of the background law in this area see Saville, *supra* note 2, at 330-45.

sary to protect the public from any release or substantial threat of release of hazardous substances.<sup>25</sup> In furtherance of this authority, EPA generally has two options. First, it may issue an administrative order to compel a responsible party to implement a specific remedy.<sup>26</sup> In this regard, the Attorney General is empowered to seek a judicial injunction to force compliance.<sup>27</sup> Second, EPA may initiate the cleanup of a hazardous waste site, financed by the Superfund,<sup>28</sup> and later seek reimbursement for response

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25. CERCLA § 104(a), 42 U.S.C. § 9604(a). See *Voluntary Purchasing Groups v. Reilly*, 889 F.2d 1380 (5th Cir. 1989). EPA may conduct a Remedial Investigation and Feasibility Study to evaluate the threat posed by the hazardous substances and also possible remedies. 40 C.F.R. § 300.68(d) (1992). A wide range of remedies may be provided. See 40 C.F.R. § 300.68(a)-(j). In addition, CERCLA establishes a "floor," not a "ceiling," for environmental liability. See CERCLA § 114(a), 42 U.S.C. § 9614(a). Any state may impose additional environmental responsibilities within its borders. *Id.*

26. CERCLA § 106, 42 U.S.C. § 9606.

27. *Id.* There is almost no evidence in CERCLA's legislative history showing that the legislators were aware of the effect that this would have on the Code. However, the issue did arise in a Senate subcommittee hearing in testimony given by Peter H. Weiner, Special Assistant to the Governor of California. *Hazardous and Toxic Waste Disposal Field Hearings: Joint Hearings Before the Subcomm. on Envtl. Pollution and Resource Protection of the Senate Comm. on Env't and Pub. Works*, 96th Cong., 1st Sess., pt. 2 (1979). Mr. Weiner first testified that in order to be effective, CERCLA claims should not be dischargeable in bankruptcy. *Id.* Then, the following conversation ensued between he and Senator Chafee:

Sen. Chafee: Mr. Weiner . . . suggested that bankruptcy not be permitted as a defense.

. . . .  
Can you think of any other instances where that has been done?

. . . .  
Mr. Weiner: Senator, although I am a lawyer by training, I am not a bankruptcy expert. But if I remember correctly, persons who cause injury with malice cannot discharge their resulting obligations through bankruptcy. I would put people who operate disposal sites in the position of someone who knows the kinds of problems they may create and should be held strictly liable for anything that is caused.

If they are not adequately funded in terms of insurance or other reserves to pay for the damages they may cause, I am saying that they are causing that damage by their inability to pay with malice, so that the debt should not be discharged in bankruptcy. Sen. Chafee: [The Senator expressed concern that this would hurt those who were unable to get adequate insurance, namely small business, and thereby discourage investors from entering the field.]

Mr. Wiener: Senator, I did not mean to imply those kinds of strict provisions should be applicable to everyone . . . .

If we . . . have a compulsory insurance mechanism, then truly the person who operates without insurance or lets his insurance get canceled or expired should be held liable for that kind of activity. But I agree with you that we don't want to create a situation where no one will enter the business.

*Id.*

28. CERCLA § 111, 42 U.S.C. § 9611; see also Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613

costs.<sup>29</sup> If EPA chooses the second option, all parties responsible for the environmental contamination are required to pay the cleanup costs.<sup>30</sup>

Under the Code, a debtor may discharge all debts arising prior to bankruptcy in the bankruptcy proceedings.<sup>31</sup> According to § 101(4) of the Code, these debts are “claims” defined as a:

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

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.<sup>32</sup>

Congressional intent in this definition of “claim” is indisputably clear: “By this broadest possible definition . . . the bill contemplates that *all legal obligations* of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy

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(amending various provisions of 42 U.S.C. §§ 9601-9675 (Supp. IV 1986)). When the liable party is bankrupt, the Superfund will reimburse governments, including federal, state, and local, and all other persons for response costs incurred in the environmental cleanup. CERCLA § 111(a)(1)-(2), 42 U.S.C. § 9611(a)(1)-(2). SARA also provides for a right of contribution for property owners who were only partially liable. CERCLA § 113(f), 42 U.S.C. § 9613(f). Moreover, SARA appropriated \$8.5 billion to the Superfund for five years, and no more than \$5.1 billion for a four year period that began in October 1991. CERCLA § 111(a), 42 U.S.C. § 9611(a). Before a party can submit a claim to the Superfund, they must first assert it against the owner of the facility from which the contamination originated. CERCLA § 112(a), 42 U.S.C. § 9612(a). If within 60 days the claim is not paid, the claim may be submitted to the Superfund for payment. *Id.*

29. CERCLA § 107(a), 42 U.S.C. § 9607(a). See *Walls v. Waste Resource Corp.*, 823 F.2d 977, 980-81 (6th Cir. 1987); *In re National Gypsum Co.*, 139 B.R. 397, 404 (N.D. Tex. 1992); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982). In addition, a liable party may seek contribution for response costs from any potentially liable parties, and the courts may allocate costs among the parties based on equitable factors. CERCLA § 113(f), 42 U.S.C. § 9613(f).

30. See *supra* note 3 for a discussion of the intent behind CERCLA to hold responsible parties financially accountable.

31. 11 U.S.C. § 727(b). See *Ohio v. Kovacs*, 469 U.S. 274, 278 (1985); *Beard v. A.H. Robbins Co.*, 828 F.2d 1029, 1031 (4th Cir. 1987) (stating that confirmation of reorganization plan discharges debtor from pre-petition claims).

32. 11 U.S.C. § 101(4). The issue of whether environmental obligations fall within the definition of “claim” is a question of law. *Chateaugay*, 112 B.R. at 520 n.10.

case.”<sup>33</sup>

Under certain circumstances, CERCLA and the Code have disparate objectives. For example, under CERCLA, if EPA is not cognizant of a hazardous waste claim prior to its discharge in bankruptcy, that claim should be assertable against the debtor even after reorganization. This is consistent with CERCLA’s objective to hold all responsible parties financially accountable. However, this result is inconsistent with the objectives of the Code. According to the Code, the claim in the above example should be discharged in bankruptcy under the principle that pre-petition claims cannot be asserted against the reorganized debtor. In light of this disparity, courts have had difficulty determining the proper application of both CERCLA and the Code under these circumstances.<sup>34</sup>

#### IV. PRE-CHATEAUGAY LEGAL HOLDINGS

The first opportunity for a court to address the issue of the dischargeability of environmental claims in the context of bankruptcy arose in *Ohio v. Kovacs*.<sup>35</sup> In *Kovacs*, the United States Supreme Court held that an injunction ordering a debtor to remedy a contaminated site, which had been converted into a monetary obligation for payment of cleanup costs, was a dischargeable claim in bankruptcy.<sup>36</sup> Initially, the State of Ohio brought an action against the debtor for polluting public waters in violation of

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33. H.R. REP. NO. 595, 95th Cong., 2d Sess. 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6266 (emphasis added); see also *Johnson v. Home State Bank*, 111 S. Ct. 2150, 2154 (1991); *Pennsylvania Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1990); *Kovacs*, 469 U.S. at 279; *Chateaugay*, 944 F.2d at 1003; *AM Int’l, Inc. v. Data Card Corp.*, No. 87-C3408, 1992 U.S. Dist. LEXIS 9372, at \*30 (stating that Congress intended definition of “claim” to be interpreted broadly).

34. The courts have also refused to hear some cases brought under the Code. See *In re Combustion Equip. Assocs.*, 838 F.2d 35 (2d Cir. 1988). In *Combustion*, the Second Circuit found a suit seeking declaratory judgment to be unripe for adjudication because litigation would inhibit cleanup efforts. *Id.* at 41. In that case, the suit was brought in advance of a claim made by EPA. *Id.* at 36. The court issued its decision but held open the question of whether it would be appropriate to bring a declaratory judgment action during bankruptcy proceedings. *Id.* at 40.

35. *Kovacs*, 469 U.S. at 274.

36. *Id.* at 283; see also *id.* at 285-86 (O’Connor, J., concurring) (discharging claim in bankruptcy “does not wholly excuse the obligation” or leave state without recourse in its attempt to enforce its environmental laws); *Midlantic Nat’l Bank v. New Jersey Dep’t of Envtl. Protection*, 474 U.S. 494 (1986) (stating that Code does not allow debtor to abandon property when there are ongoing environmental hazards); *Baird & Jackson*, *supra* note 2, at 1199.



state environmental laws.<sup>37</sup> In connection with this suit, an injunction was issued that prohibited further pollution, and required the removal of hazardous substances.<sup>38</sup> When the debtor failed to comply with the injunction and sought refuge in bankruptcy, Ohio motioned for a declaratory judgment that the cleanup was not dischargeable.<sup>39</sup> Since Ohio only sought reimbursement for cleanup costs, the Court held that the injunction was converted into a monetary obligation.<sup>40</sup> Accordingly, the debt was dischargeable as a "claim" under § 101(4)(B) of the Code.<sup>41</sup>

After *Kovacs*, courts focused their analysis on when the "right to payment" arose in order to determine when a "claim" was discharged in bankruptcy.<sup>42</sup> In *United States v. Union Scrap Iron & Metal*, the District Court of Minnesota held that no "right to payment" could be discharged in bankruptcy until response costs were incurred.<sup>43</sup> In *Union Scrap*, the deadline for filing a claim in bankruptcy had expired before the Minnesota Pollution Control Agency discovered the environmental damage.<sup>44</sup> The court reasoned that, under CERCLA, EPA had no authority to act until there was a release or threatened release of hazardous waste.<sup>45</sup> Additionally, the court stated that no legal obligation could arise absent an EPA response.<sup>46</sup> Thus, EPA could not have a claim in

37. *Kovacs*, 469 U.S. at 276. *Kovacs* was the CEO of Chem-Dyne Corporation, an operator of an industrial waste disposal site. *Id.* *Kovacs* was also sued for maintaining a nuisance, and causing fish kills. *Id.* When the suit was originally brought, *Kovacs* entered into a settlement where he agreed to stop polluting, remove contamination from the property, and pay \$75,000 compensation to the state for injury to wildlife. *Id.* When *Kovacs* refused to comply, Ohio appointed a receiver to seize his assets. *Id.*

38. *Id.* at 276.

39. *Id.*

40. *Id.* at 283. At oral argument, counsel for Ohio conceded that the only performance they sought from *Kovacs* was payment for cleanup costs. *Id.* The court did not speculate on the outcome had *Kovacs* filed for bankruptcy before a "receiver" could be appointed. *Id.* at 284.

41. *Id.* at 283.

42. See generally Saville, *supra* note 2, at 337-41.

43. 123 B.R. 831, 838 (Bankr. D. Minn. 1990). *Union Scrap* conducted business in scrap metal recovery. *Id.* at 832. Often, the company would process dilapidated batteries to extract lead. *Id.* at 832-33. Environmental contamination occurred at one of their battery storage sites. *Id.* at 833. *Union Scrap* frequently processed and stored batteries under a contract with Taracorp. *Id.* at 834.

44. *Id.* at 833. EPA did not file a claim in Taracorp's bankruptcy proceedings regarding the contamination of *Union Scrap's* battery storage site. *Id.* at 834.

45. *Id.* at 835-36. See CERCLA §§ 104, 106, 42 U.S.C. §§ 9604, 9606.

46. *Union Scrap*, 123 B.R. at 836. EPA did incur response costs with regard

bankruptcy until it incurred response costs.<sup>47</sup>

In contrast, the Ninth Circuit Court of Appeals in *In re Jensen* emphasized the debtor's conduct as the determining factor in the origination of a "claim."<sup>48</sup> In that case, the court held that the claim arose when the conduct of the debtor led to the release or threatened release of hazardous substances.<sup>49</sup> Moreover, the court stated that the claim arose pre-petition, and therefore was discharged in bankruptcy.<sup>50</sup> In *Jensen*, a lumber company filed for bankruptcy and was later notified by the California Department of Health Services (DHS) that a hazardous waste problem existed on its property.<sup>51</sup> As owners, the debtors filed jointly in bankruptcy.<sup>52</sup> After the bankruptcy proceedings were finalized, DHS informed the debtors that they would be held personally responsible for the cleanup of contamination at the site.<sup>53</sup> Subsequently, the debtors sought a declaratory judgment that all environmental claims were discharged in bankruptcy.<sup>54</sup> The court reasoned that in order to determine when a claim arose, a court must examine when the debtor's conduct created the liability.<sup>55</sup> When the debtor's conduct gave rise to the cause of action pre-petition, a dischargeable claim was created.<sup>56</sup>

The *Union Scrap* and *Jensen* decisions illustrate the early stages of two fundamentally different methods for assessing environ-

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to two of Taracorp's facilities. *Id.* at 834. However, in regard to the Union Scrap Washington Avenue site, no potential liability was acknowledged in bankruptcy. *Id.*

47. *Id.* at 836. The court distinguished *In re Chateaugay Corp.*, 112 B.R. 513 (Bankr. S.D.N.Y. 1990), by stating that in *Chateaugay*, EPA had the opportunity to file their claim prior to confirmation. *Union Scrap*, 123 B.R. at 836.

48. 127 B.R. 27, 32-33 (Bankr. 9th Cir. 1991).

49. *Id.* at 33. The court based its holding on the district court's decision in *Chateaugay* emphasizing the extensive relationship between the parties prior to confirmation. *Id.* at 32-33.

50. *Id.* at 33. Whether there has been a pre-petition release or threatened release of hazardous substances is a question of fact to be determined in the bankruptcy proceedings. *Chateaugay*, 112 B.R. at 521 n.12.

51. *Jensen*, 127 B.R. at 28. The Jensens' business involved the dipping of lumber into fungicide tanks. *Id.*

52. *Id.*

53. *Id.* Apparently, DHS had taken steps to remedy the contamination using money from the Superfund. *Id.*

54. *Id.*

55. *Id.* at 32; *see also In re Clement*, 136 B.R. 557, 560 (Bankr. C.D. Cal. 1992) (applying "conduct of the debtor" standard to determine when claim arose); *In re Johns-Mansville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986); *In re A.H. Robins Co.*, 63 B.R. 986, 993 (Bankr. E.D. Va. 1986).

56. *Jensen*, 127 B.R. at 32; *cf. In re Penn Cent. Transp. Co.*, 771 F.2d 762 (3d Cir. 1985) (holding that anti-trust claims arising prior to bankruptcy but discovered by claimant after reorganization were dischargeable claims).

mental claims in bankruptcy prior to *Chateaugay*. The court in *Union Scrap* held that a "right to payment" or "claim" does not arise if EPA has not incurred response costs.<sup>57</sup> The analysis in *Union Scrap* relies exclusively on the conduct of EPA. Conversely, the court in *Jensen* held that a claim arises when the conduct of the debtor leads to the release or threatened release of hazardous substances.<sup>58</sup> The focus in *Jensen* is therefore entirely on the conduct of the debtor. Ultimately, the Second Circuit in *Chateaugay* found the reasoning in *Jensen* most persuasive.

## V. NARRATIVE ANALYSIS OF CHATEAUGAY

The court in *Chateaugay* began its analysis by acknowledging that CERCLA and the Code have competing objectives.<sup>59</sup> The court stated that while the Code seeks to allow reorganized debtors a "fresh start," CERCLA seeks to facilitate environmental cleanup and provide for reimbursement regardless of the financial status of the responsible party.<sup>60</sup> However, the *Chateaugay* court recognized that the Code's broad sweeping language was intended to override many laws enacted in favor of creditors.<sup>61</sup> Thus, the court concluded:

If the Code, fairly construed, creates limits on the extent of environmental cleanup efforts, the remedy is for Congress to make exceptions to the Code to achieve other objectives that Congress chooses to reach, rather than for courts to restrict the meaning of across-the-board legislation like bankruptcy law in order to promote objectives evident in more focused statutes.<sup>62</sup>

Subsequently, the court analyzed the problems associated

57. *Union Scrap*, 123 B.R. at 838.

58. *Jensen*, 127 B.R. at 33.

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

60. *Id.*

61. *Id.* The court later stated its concern that if unincurred response costs were not dischargeable, some corporations would be unable to reorganize under the Code. *Id.* at 1005; see also *In re Waterson Steamship Corp.*, 141 B.R. 552, 554 n.2 (Bankr. S.D.N.Y. 1992) (citing *Chateaugay* for proposition that allowing unmanifested tort claims to avoid discharge would "impair the prospects of achieving a viable reorganization").

62. *Chateaugay*, 944 F.2d at 1002. At least superficially, this quote appears to give preference to the Code. However, some commentators have suggested that in spite of this position, the *Chateaugay* court later favored the enforcement of environmental laws over the Code. See Carolyn J. Buller & Geoffrey K. Barnes, *Paying for Cleanup*, NAT'L L.J., Oct. 21, 1991, at 1.

with determining when the right to payment arises.<sup>63</sup> In its discussion, the court distinguished between the treatment given to tort and contract claims.<sup>64</sup> The court noted that there were some tort cases where a victim had no cognizable claim prior to a manifestation of injury.<sup>65</sup> Yet, as the *Chateaugay* bench recognized, other courts have found a claim to be discharged in these instances.<sup>66</sup>

Comparing bankruptcy to contractual claims, the court stated that the Code's mention of "unmature" or "contingent" claims referred to obligations due upon the happening of some future event within the contemplation of the parties.<sup>67</sup> Though the court admitted that the instant case was not entirely similar to those involving contract claims, it concluded that "[t]he relationship between environmental regulating agencies and those subject to regulation provides sufficient 'contemplation' of contingencies to bring . . . obligations based on pre-petition conduct within the definition of 'claims.'"<sup>68</sup> In spite of the fact that EPA neither knew the location of all contaminated sites nor the full extent of the response costs, the claims were found "contingent" within the meaning of the Code.<sup>69</sup>

The court in *Chateaugay* intimated that the district court deci-

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63. *Chateaugay*, 944 F.2d at 1003. The court stated that defining claims to include all that arise due to the pre-petition conduct of the debtor complies with the theory of the Code, but "yields questionable results." *Id.* As an example, the court asked if a builder constructs 10,000 bridges and knows one will fail in the future killing 10 people, would these claims be discharged in bankruptcy? *Id.* The court suggested that in such a case the practical problems in recognizing these claims would be astronomical. *Id.*

64. *Id.* at 1003-05.

65. *Id.* at 1004. See *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 943 (3d Cir.) (stating that it would be "absurd" to expect tort claims to be filed in bankruptcy proceedings when there was yet no manifestation of injury), *cert. denied*, 474 U.S. 864 (1985); see also *In re Penn Cent. Transp. Co.*, 944 F.2d 164, 167-68 (3d Cir. 1991) (comparing tort claims where there was no manifestation of injury during bankruptcy to environmental claims where bankruptcy preceded enactment of CERCLA), *cert. denied*, 112 S. Ct. 1262 (1992).

66. *Chateaugay*, 944 F.2d at 1004. See *Johns-Mansville*, 57 B.R. at 690-92 (holding asbestos claim to be dischargeable absent manifestation of injury during bankruptcy).

67. *Chateaugay*, 944 F.2d at 1004. See *In re All Media Properties, Inc.*, 5 B.R. 126 (Bankr. S.D. Tex. 1980) (holding that "unmatured" or "contingent" claims within Code refer to obligations arising on happening of some future event which was in contemplation of parties at time of their original relationship), *aff'd*, 646 F.2d 193 (5th Cir. 1981).

68. *Chateaugay*, 944 F.2d at 1005. The court seems to suggest that the mere relationship between the parties was sufficient to put EPA on notice that "contingent" claims existed. *Id.*

69. *Id.*

sion reversed by *Jensen* was the only holding that disagreed with its position.<sup>70</sup> In *Jensen*, the Ninth Circuit agreed entirely with the district court in *Chateaugay* by holding that claims based on the pre-petition release or threatened release of hazardous substances were dischargeable.<sup>71</sup> Furthermore, in a footnote, the court of appeals in *Chateaugay* stated that *Union Scrap* was distinguishable.<sup>72</sup> In *Union Scrap*, the environmental claims arose years after the debtor's reorganization in bankruptcy, whereas, in *Chateaugay*, EPA had the opportunity to file its claims prior to confirmation.<sup>73</sup>

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70. *Id.* Of questionable authority since *Jensen* is a footnote in *Waterville Indus. v. First Hartford Corp.*, 124 B.R. 411, 413 n.2 (Bankr. D. Me. 1991). The case was brought under RCRA for damages, and an order for the debtor to close polluted lagoons. *Id.* at 412. In that footnote, the court concluded that if the claims did not accrue until response costs were incurred, they arose post-confirmation and were not discharged in bankruptcy. *Id.* at 413 n.2 (citing district court reversed in *Jensen*).

71. *Id.*; see also *Jensen*, 127 B.R. at 33. In *Jensen*, the court stated that *Chateaugay* was directly analogous and that their "conclusion [gave] effect to the important bankruptcy goal of providing a fresh start to the debtor and discourag[ed] manipulation of the bankruptcy process." *Id.*

72. *Chateaugay*, 944 F.2d at 1005 n.2.

73. *Id.* The court also examined whether an injunction was a claim for purposes of discharge. *Id.* at 1006. The court, referring to the law review article by Baird & Jackson, *supra* note 2, stated that some commentators have suggested that there are two categories of injunctions. *Chateaugay*, 944 F.2d at 1007. First, there are "negative," nondischargeable injunctions that order the debtor to "cease polluting." *Id.* Second, there are "affirmative," dischargeable injunctions that order the debtor to "clean up toxic wastes." *Id.* The court concluded, however, that it would interpret the Code as written, and not endeavor to rewrite it. *Id.*

The *Chateaugay* court stated that the problem with environmental cases was that the injunctions often join obligations where in one the right to payment exists, and in the other there was no right to payment. *Id.* at 1008. Moreover, the court stated that where an injunction imposes an obligation as an alternative to a right to payment, the claim was dischargeable. *Id.* However, a regulatory agency has no right to payment when the alternative is continued pollution. *Id.* Therefore, an injunction which seeks to remove accumulating waste, or to stop or ameliorate ongoing pollution, is not dischargeable. *Id.*

On this issue, the *Chateaugay* court distinguished itself from *Kovacs*. *Id.* The court noted that this case involved a corporate debtor, whereas *Kovacs* involved an individual debtor. *Id.* The court stated that the decisive factor, however, was that Ohio only sought the payment of money. *Id.* at 1008-09. According to *Chateaugay*, *Kovacs* stands for the proposition that an order that affords EPA the right to payment is a "claim." *Id.* at 1009. Further, the court stated that there was nothing in *Kovacs* that allowed an order that seeks only to ameliorate ongoing pollution to be discharged. *Id.* Thus, "placing on the non-'claim' side all injunctions that seek to remedy on-going pollution is more faithful to . . . *Kovacs* . . ." *Id.*

VI. CRITICAL ANALYSIS OF *CHATEAUGAY*

Soon after the ruling in *Chateaugay*, the Third Circuit Court of Appeals examined the issue of the origination of a "claim" in *In re Penn Central Transportation Co.*<sup>74</sup> Though the rulings appear to conflict, the reasoning in *Penn Central* can be reconciled with *Chateaugay*. In *Penn Central*, the court of appeals analyzed the legal relationship between the parties.<sup>75</sup> The court held that since the legal relationship arose after the bankruptcy was finalized, the CERCLA claims were not dischargeable.<sup>76</sup>

In *Penn Central*, EPA discovered PCB leakage at the Paoli railroad yard.<sup>77</sup> Soon thereafter, EPA sought mandatory injunctive relief for the cleanup of PCB leakage and reimbursement for response costs from Conrail, Southeastern Pennsylvania Transit Authority, and Amtrak, the present and subsequent owners of the yard.<sup>78</sup> These owners sought contribution from the original owner, Penn Central Transportation Company (PCTC), which filed for bankruptcy and discharged all pre-petition liability.<sup>79</sup> However, at the time of PCTC's reorganization, CERCLA had not been enacted.<sup>80</sup> Reasoning by analogy to tort claims, the court stated that there is no legal relationship between the parties until there is some manifestation of injury.<sup>81</sup> Here, the court stated that the legal relationship arose after CERCLA was enacted, and therefore originated after PCTC's confirmation in bankruptcy.<sup>82</sup>

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74. 944 F.2d 164 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992).

75. *Id.* at 167-68. The litigation of this case and underlying cases involving the Penn Central bankruptcy was "complicated and protracted." *Id.* at 165. The bankruptcy proceedings alone lasted eight years. *Id.*

76. *Id.* at 168. The court's decision seems to rest entirely on the fact that CERCLA was not enacted prior to the confirmation in bankruptcy. *Id.* The court in *Penn Central* cited no cases relating to the discharge of CERCLA claims in bankruptcy. *See id.* at 166-68. The court simply found that no claim existed to be discharged in bankruptcy. *Id.* at 168.

77. *Id.* at 166. EPA determined that the PCBs at the yard presented a substantial danger to the public health and/or environment. *Id.* at 166 n.2.

78. *Id.* at 166.

79. *Penn Central*, 944 F.2d at 166. At the time of PCTC's reorganization, PCBs had been in use at the yard for over 30 years. *Id.* at 165.

80. *Id.* at 166. CERCLA was originally enacted in 1980 and the bankruptcy was finalized by a Consummation Order and Final Decree on October 24, 1978. *Id.* at 165.

81. *Id.* at 167. Herein lies the only relevant conflict between *Penn Central* and *Chateaugay*. The court in *Chateaugay* found contract law to be the best analogy. *Chateaugay*, 944 F.2d at 1005. However, the cases remain distinguishable since the *Penn Central* court never had to determine when a claim was dischargeable. *Penn Central*, 944 F.2d at 167-68.

82. *Penn Central*, 944 F.2d at 168; *cf.* *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 943 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). The court also

Thus, during the bankruptcy proceedings, EPA did not have a "claim" to be discharged.<sup>83</sup>

While neither court in *Penn Central* or *Chateaugay* cited the other, both focused on the genesis of the legal relationship between the parties.<sup>84</sup> *Penn Central* concluded that there was no cause of action between the debtor and EPA prior to the enactment of CERCLA.<sup>85</sup> The *Chateaugay* bench concluded that the legal relationship between EPA and those subject to regulation brought potential obligations based on pre-petition conduct within the contemplation of the parties and, therefore, within the definition of "claim."<sup>86</sup> Although these courts were confronted with similar issues, their facts were incongruent. Applying the *Penn Central* rationale to *Chateaugay*, there would have been no legal relationship to "contemplate," and no "claim" to discharge if CERCLA had not been enacted prior to LTV's bankruptcy proceedings.<sup>87</sup> However, in contrast to *Penn Central*, CERCLA was enacted prior to the LTV bankruptcy.<sup>88</sup> Therefore, the *Penn Central* and *Chateaugay* decisions are distinguishable on their facts.

The *Chateaugay* court's distinction of *Union Scrap*, however, is not persuasive. *Union Scrap*'s decision adopted the reasoning of the district court case that was reversed by the Ninth Circuit in *Jensen*.<sup>89</sup> On that basis, *Union Scrap* found that no claim arose until response costs were incurred.<sup>90</sup> According to *Chateaugay*, the district court in *Jensen* was the only one to "reach[] a contrary conclu-

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concluded that PCTC's claim that the reorganization was actually a liquidation was without merit. *Penn Central*, 944 F.2d at 169.

83. *Penn Central*, 944 F.2d at 168. In a case decided after *Penn Central*, the Southern District of New York addressed the issue of the ripeness of a claim for adjudication. *Manville Corp. v. United States*, 139 B.R. 97 (Bankr. S.D.N.Y. 1992). In *Manville*, the government claimed the dispute unripe since EPA had yet to initiate judicial enforcement proceedings. *Id.* at 103. The court, citing *Chateaugay* and *In re Combustion Equip. Assocs.*, 838 F.2d 35 (2d Cir. 1988), found the claims ripe for adjudication. *Manville*, 139 B.R. at 103.

84. See *Chateaugay*, 944 F.2d at 1005; *Penn Central*, 944 F.2d at 167-68. The Seventh Circuit in *In re CMC Heartland Partners*, 974 F.2d 775 (7th Cir. 1992), agreed with this assessment. In *CMC*, the court found *Penn Central* distinguishable since it relied so heavily on the fact that the bankruptcy occurred before CERCLA's enactment. *Id.*

85. *Penn Central*, 944 F.2d at 168.

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

87. *Id.*

88. This explains why *Penn Central* did not include *Chateaugay* in its analysis, as well as why subsequent courts, though engaging in this analysis, did not cite *Penn Central*.

89. *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 838 (Bankr. D. Minn. 1990).

90. *Id.*

sion” in its attempt to define “claim.”<sup>91</sup> Even though all response costs had yet to be incurred by EPA, as in *Union Scrap*, the *Chateaugay* court ruled that those future claims were discharged since the costs were based on the pre-petition release or threatened release of hazardous substances.<sup>92</sup> Moreover, *Union Scrap* effectively eliminated the possibility of “contingent” CERCLA claims by determining that future response costs incurred by EPA were not dischargeable.<sup>93</sup> *Chateaugay* defined “contingent” CERCLA claims and ruled that they were discharged in bankruptcy in accordance with the Code.<sup>94</sup> Therefore, the holding in *Union Scrap* is antithetical to the holding in *Chateaugay*.

## VII. IMPACT

### A. Introduction

The court in *Chateaugay* appeared to provide a definitive solution for analyzing CERCLA claims under the Code. A claim arising from pre-petition release or threatened release of hazardous substances is dischargeable under the Code notwithstanding EPA’s lack of knowledge or failure to incur response costs. However, several cases have questioned the rationale in *Chateaugay*. The district and appellate court responses criticize the preference that *Chateaugay* gave to the Code’s language, emphasizing that EPA must have knowledge of or must fairly contemplate the CERCLA claim before it can be discharged. This reasoning is incompatible with *Chateaugay* and it firmly establishes a second approach to the issue. Ultimately, both approaches prove unsatisfactory, illustrating the necessity for a legislative solution.

### B. Post-*Chateaugay* District Court Cases

The first test for the *Chateaugay* decision came in *Sylvester Brothers Development Co. (SBDC) v. Burlington Northern Railroad*.<sup>95</sup> Relying heavily on the *Union Scrap* decision, the District Court of Minnesota held that where a debtor did not disclose its CERCLA liabilities in bankruptcy, and the government did not have knowl-

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91. *Chateaugay*, 944 F.2d at 1005 (emphasis added). However, the court appeared to be hesitant to criticize *Union Scrap* since the claim in that case arose many years after confirmation. See *id.* at 1005 n.2.

92. *Id.* at 1005.

93. *Union Scrap*, 123 B.R. at 838-39.

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

95. 133 B.R. 648 (Bankr. D. Minn. 1991).



edge of the potential claims, those claims were not discharged.<sup>96</sup> In *Sylvester*, SBDC brought an action for contribution or indemnity against numerous defendants for cleanup costs.<sup>97</sup> One of the parties filed a summary judgment motion arguing that all its liability was discharged in bankruptcy.<sup>98</sup> The court reasoned that where the government was not afforded the opportunity to assert its CERCLA claim, the “problems posed for CERCLA enforcement by dismissing the debtor outweigh the debtor’s hope for discharge.”<sup>99</sup> Therefore, under those circumstances, preference was given to CERCLA.<sup>100</sup>

The *Sylvester* court noted that the decisions in *Chateaugay* and *Jensen* were distinguishable.<sup>101</sup> In those cases, the environmental claims arose during the bankruptcy proceedings.<sup>102</sup> In *Sylvester*, the claims arose four years after reorganization.<sup>103</sup>

In *In re National Gypsum Co.*, the District Court for the Northern District of Texas was given the opportunity to address the *Chateaugay* decision.<sup>104</sup> The court held that future response costs based on pre-petition conduct were discharged when they were “fairly” contemplated by the parties at the time of the bankruptcy.<sup>105</sup> In *National Gypsum*, the debtor filed for bankruptcy, and EPA filed a proof of claim based on environmental contamination at several sites.<sup>106</sup> EPA also reserved the right to recover for

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96. *Id.* at 653. Although the creditor had notice that it was a creditor in the bankruptcy proceedings, it did not know that the debtor was a PRP under CERCLA until after confirmation. *Id.* at 652.

97. *Id.* at 650. Numerous defendants in this action impleaded third-party defendants and ultimately there were over 100 parties to this action. *Id.* at 650-51.

98. *Id.* at 651.

99. *Id.* at 654. Here, the court seemed to be very concerned about the fact that EPA could be prevented from receiving reimbursement for any CERCLA claim. *Id.* at 652-54. However, the court was not concerned about the possibility of deceit or fraud if EPA, in spite of their knowledge of potential liability, claimed ignorance to such claims simply to prevent their discharge in bankruptcy.

100. *Sylvester*, 133 B.R. at 653.

101. *Id.* at 653 n.2.

102. *Id.* The court found this especially important since, in this case, the government agency did not have actual knowledge of the liability in time to assert its claim. *Id.* at 653.

103. *Id.* at 653 n.2.

104. 139 B.R. 397 (Bankr. N.D. Tex. 1992).

105. *Id.* at 406-09. The court listed several factors of importance in this determination: knowledge by the parties of a site at which PRP may be liable, NPL listing, notification by EPA of PRP liability, commencement of investigation and cleanup, and incurred response costs. *Id.* at 408.

106. *Id.* at 399-400.

damage discovered after reorganization.<sup>107</sup> The debtor moved for summary judgment arguing that future claims would be discharged in bankruptcy.<sup>108</sup>

In its reasoning, the court departed from *Chateaugay's* preference for the Code.<sup>109</sup> The court stated that it was not willing to favor the Code's objective of a "fresh start" over CERCLA's goal of holding the responsible parties financially accountable.<sup>110</sup> Further, the court stated that there was no meaningful distinction between the debtor's conduct and the release or threatened release of waste as a result of that conduct.<sup>111</sup> The salient issue was whether the release or threatened release of hazardous substances was fairly contemplated by the parties.<sup>112</sup> Accordingly, *National Gypsum* de-emphasized the importance of the debtor's conduct in favor of the subjective perceptions of each party.<sup>113</sup>

In an opinion given as a "Report and Recommendation" on the merits of a summary judgment motion, the District Court for the Northern District of Illinois in *AM International, Inc. (AMI) v. Data Card Corp.*,<sup>114</sup> again addressed the issues presented in *Chateaugay*. In *AMI*, the magistrate recommended that the summary judgment motion be denied because there was a genuine issue of fact concerning whether the parties "fairly" contemplated that a post-confirmation claim could arise.<sup>115</sup> In that case, the

107. *Id.* at 401. The United States argued that future response costs and future natural resource damage costs were not subject to discharge. *Id.*

108. *Id.* at 407.

109. *National Gypsum*, 139 B.R. at 407. However, the court stated that the inquiry into whether the conduct arose from pre-petition release or threatened releases of hazardous substances was relevant. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 407-08. The court derived the term "fairly" from the *Chateaugay* opinion itself. *Id.* at 407 n.22. The court found the term "significant and apt," and adopted it as consistent with the notice requirement in the Code. *Id.* at 407-08 & nn.24-26.

113. *Id.* at 407. In a recent case, *NCL Corp. v. Lone Star Bldg. Ctrs., Inc.*, No. 89-6822-Civ.-Nesbitt, 1992 U.S. Dist. LEXIS 13,553 (S.D. Fla. July 30, 1992), the Southern District of Florida examined environmental liability between lessor and lessee. *Id.* at \*1. The court concluded that a lessor's claims were discharged in bankruptcy even under the more rigorous standard set by *National Gypsum*. *Id.* at \*18-19. However, the court found that the lessee may be liable for any post-petition discharges for which they were responsible. *Id.* at \*20.

114. No. 87-C3408, 1992 U.S. Dist. LEXIS 9372 (N.D. Ill. June 25, 1992).

115. *Id.* at \*50. Some of the factors to be included in this analysis were: Data Card's awareness of hazardous substances at the site before purchasing stock; the environmental risks of which they were aware; the effect that the parties contemplated the settlement agreement would have. *Id.* at \*50-51.

debtor sought injunctive and declaratory relief that its environmental liability was discharged in bankruptcy.<sup>116</sup> Data Card, a subsequent owner of the site, incurred \$150,000 for the cleanup of contamination and was without notice of the debtor's bankruptcy.<sup>117</sup> In the "Report and Recommendation," the magistrate accepted the limitation imposed on *Chateaugay* by *National Gypsum* in order to "eliminate the possibility of a broad-brush application of *Chateaugay*."<sup>118</sup>

These decisions demonstrate that the *Chateaugay* opinion has not been welcomed by those courts still trying to seek a balance between the interests of CERCLA and the Code. It is equally apparent that given the precedential weight of a court of appeals decision over one from the district court, *Chateaugay*'s reasoning, though scathed, is still good law.<sup>119</sup> However, the district court's departure from the *Chateaugay* ruling regarding the primacy to be given the Code shakes the foundational principle on which the ruling is based. This divergence by the district courts is most evident in their determination to avoid a "broad-brush" application of *Chateaugay*. Consequently, these critiques indicate that the courts are not resolving these issues on uniform legal principles.<sup>120</sup>

### C. *In re CMC Heartland Partners*-An Appellate Response to *Chateaugay*

Since *Chateaugay*, the consummate case regarding these issues was delivered by the Seventh Circuit Court of Appeals in *In re CMC Heartland Partners*.<sup>121</sup> In *CMC*, the court held that if a claimant had knowledge of both the potential CERCLA liability and the

116. *Id.* at \*1.

117. *Id.* at \*9-12. After Data Card became the owner of the site, it discovered contamination in the soil and groundwater and reported the problem to the Ohio Environmental Protection Agency. *Id.* at \*9-11.

118. *Id.* at \*22. The court was concerned that claims would be discharged even if they were not in the contemplation of the parties. *Id.*

119. The Southern District of New York has upheld the reasoning in *Chateaugay* in regard to pre-petition claims. See *City of New York v. Exxon Corp.*, 112 B.R. 540, 553 n.17 (Bankr. S.D.N.Y. 1990). In *Exxon*, New York brought an action for declaratory judgment on the debtor's present and future liability for response costs. *Id.* at 553. On a motion for summary judgment, granted partially on other grounds, the court stated that New York's claims based on the pre-petition release of hazardous substances were discharged. *Id.* at 553 n.17. The court did not decide whether post-confirmation claims would be discharged. *Id.*

120. See *Sylvester*, 133 B.R. at 653 n.2; *National Gypsum*, 139 B.R. at 407-09; *AMI*, 1992 LEXIS at \*19-22.

121. 974 F.2d 775 (7th Cir. 1992).

PRP prior to confirmation in bankruptcy, the claim was discharged.<sup>122</sup> The debtor, a railroad company, petitioned for reorganization and the bankruptcy court issued a deadline for the assertion of all claims against the debtor.<sup>123</sup> Prior to bankruptcy, a contaminating spill occurred at the railroad yard, but no creditor or agency asserted a claim prior to the deadline.<sup>124</sup> The court reasoned that since the State of Washington had knowledge of the spill before confirmation, the claims were discharged in bankruptcy.<sup>125</sup>

The court in *CMC* attempted to reconcile its reasoning with *Chateaugay*.<sup>126</sup> It stated that the claimants in *Chateaugay* had actual knowledge of the CERCLA liability prior to confirmation in bankruptcy.<sup>127</sup> However, it is inferable from *Chateaugay* that actual knowledge of a claim was immaterial.<sup>128</sup> In fact, the court in *Chateaugay* suggested that the mere relationship between environmental agencies and those subject to their regulation gave rise to such contingencies.<sup>129</sup> Consequently, most obligations based on pre-petition conduct would be discharged as "claims."<sup>130</sup>

#### VIII. CRITICISM OF *CHATEAUGAY/CMC HEARTLAND* & THE NEED FOR LEGISLATIVE GUIDANCE

The *Chateaugay* and *CMC* decisions seem to establish two

122. *Id.* The court focused on knowledge of the claim by the claimant as the determinative factor in the analysis of the dischargeability of a claim. *Id.* The court stated that it found "no reason . . . to adopt a standard which has the potential of cutting future creditors' claims even though these creditors had no reason to know about the release or threatened release of a hazardous substance." *Id.*

123. *Id.* at 777. The bankruptcy court issued a deadline of December 26, 1985, for the filing of claims against the debtor. *Id.* The order barred all future and untimely claims filed after that date. *Id.* at 778. The Washington State Department of Ecology knew of the contamination by June 11, 1985 and did not file a timely claim. *Id.*

124. *Id.* at 778.

125. *Id.* The court criticized *Union Scrap* for undermining CERCLA's goal of speedy cleanup of environmental contamination. *Id.* at 786.

126. *CMC*, 974 F.2d at 784. The court also found *Jensen* to be distinguishable. *Id.* The court stated that the *Jensen* creditors had some knowledge of the claims against the debtor. *Id.*

127. *Id.* The court also cited to Saville, *supra* note 2, at 349, and stated that it supports the idea that courts are more willing to find that a claim arises early in bankruptcy when knowledge is not at issue. *CMC*, 974 F.2d at 784 n.4.

128. See *Chateaugay*, 944 F.2d at 1005.

129. *Id.* This position is even more convincing given that, in *Chateaugay*, EPA neither knew the full extent of the damage nor the location of all sites at which contamination was found. *Id.*

130. *Id.*

lines of cases. The former would discharge some CERCLA response costs as “contingent” claims even though incurred by EPA after the bankruptcy proceedings.<sup>131</sup> The latter would not discharge those liabilities unless the claimants had knowledge of the environmental damage.<sup>132</sup> Neither of these results are satisfactory.

The *Chateaugay* ruling could lead to abuse by debtors and unsecured creditors, whereas the *CMC* ruling could lead to abuse by EPA and other agencies. Since unsecured creditors cannot recover from the debtor until all other debts are satisfied — which often means that they are denied recovery — they may pressure the debtor to avoid full disclosure of their environmental problems.<sup>133</sup> Thus, the unsecured creditor recovers on its claims and the debtor still has the undisclosed environmental claims discharged in bankruptcy. Similarly, under *CMC*, EPA may avoid the risk of recovering only a partial share of its response costs by waiting until after bankruptcy proceedings are finalized.<sup>134</sup>

Furthermore, both approaches emasculate the objectives of CERCLA and the Code. Where a debtor creates environmental waste and escapes liability through the Code, the purpose of CERCLA in holding all responsible parties financially accountable is frustrated. This was most clearly exemplified in *Chateaugay* where the court found that some environmental claims may be discharged even if EPA was unaware that they existed. Likewise, where a pre-petition CERCLA claim is asserted against the reorganized debtor, the Code’s aim to allow debtors a “fresh start” is thwarted.

It is apparent that according primacy to either environmental or bankruptcy law leads to anomalous results.<sup>135</sup> Yet, it remains uncertain whether it is possible to strike a balance between CERCLA and the Code without frustrating the purpose of either. The court’s decision in favor of one or the other is clearly one of policy. Often, Congress drafts statutes that are intentionally vague, and allows bureaucrats and judges to determine their application.

131. *Id.*

132. See *CMC*, 974 F.2d at 787; *Sylvester*, 133 B.R. at 653; *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 838 (Bankr. D. Minn. 1990) (requiring actual knowledge of debtor’s liability).

133. See *Saville*, *supra* note 2; *Buller & Barnes*, *supra* note 62.

134. This is true even though the court recognized this as a potential problem with the *Union Scrap* ruling. *CMC*, 974 F.2d at 787. EPA may claim that they had no actual knowledge of the CERCLA liability and thereby avoid its discharge in bankruptcy.

135. See *Chateaugay*, 944 F.2d at 1005; *Sylvester*, 133 B.R. at 654.

However, for both CERCLA and the Code, clarity of purpose and uniformity of application are essential for the achievement of their ultimate objectives. The only satisfactory solution is one that was ironically suggested by the *Chateaugay* court.<sup>136</sup> Congress should determine, as a matter of policy, the circumstances under which CERCLA creates exceptions to the mandates of the Code.<sup>137</sup> At this time, only Congressional guidance can provide a conclusive yet satisfactory resolution of this issue. Until then, disparate results will persist to the detriment of the objectives of both statutes.

### IX. CONCLUSION

It is clear from subsequent cases that the opinion in *Chateaugay* did not have its desired effect: to provide a definitive solution to the conflict between CERCLA and the Code. It is also apparent that the post-*Chateaugay* cases do not offer any satisfactory solutions. Thus, the battle between CERCLA and the Code will continue so long as Congress fails to intervene. In short, Congress should determine the circumstances under which CERCLA claims are not dischargeable in bankruptcy. Until that time, the true objectives of CERCLA and the Code will suffer.

*Arnold E. Capriotti, Jr.*

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

137. See *In re Paepflow*, 974 F.2d 775 (7th Cir. 1992) (stating that courts should be hesitant to carve judicial exceptions to Code's discharge provisions); *In re Eagle-Picher Indus.*, No. 1-91-00100, 1992 U.S. Bankr. LEXIS 1448, at \*16-17 (S.D. Ohio Sept. 16, 1992) (stating that even if interpretation of Code leads to harsh results, exceptions are for Congress to make) (citing *Chateaugay*); *Chateaugay*, 112 B.R. at 524 (stating that courts should not subvert policy by judicially created exceptions not clearly supported by bankruptcy statute).

