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Superpriority Status: The Solution to the Collection of CERCLA Response Costs

Susan J. Zook

SUPERPRIORITY STATUS: THE SOLUTION TO THE COLLECTION OF CERCLA RESPONSE COSTS

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[1] authorizes the Environmental Protection Agency (EPA) to demand reimbursement from potentially responsible parties (PRPs) for the costs of hazardous waste cleanup.[2] Corporations often file bankruptcy to avoid CERCLA liability, which forces the EPA to fund the entire, exorbitant cost of cleanup.[3] The EPA recently has begun acquiring an equity stake in corporations as reimbursement for its CERCLA cleanup costs to avoid such results.[4] Such an approach, however, does not resolve the conflict between CERCLA and the Bankruptcy Code (Code).

This Note proposes to allow the EPA to collect response costs from corporations both inside and outside of bankruptcy. Part I outlines the CERCLA cleanup procedure. Part II discusses the EPA's equity stake approach to reimbursement of response costs and demonstrates why such an approach does not effectively solve the policy conflict between CERCLA and the Code. Part III analyzes the issues of whether environmental obligations constitute claims in bankruptcy, the priority of such claims, and

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1. 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992).

2. CERCLA requires that a site be included on the National Priority List (NPL) before funds from the Superfund may be used for its cleanup. 40 C.F.R. § 300.425(b)(1) (1993). However, a site need not be listed on the NPL in order for the EPA to respond under 42 U.S.C. § 9604 (1988 & Supp. IV 1992) or to compel a private party to respond under 42 U.S.C. § 9606 (1988). 40 C.F.R. § 300.400 (1993).

For a complete discussion of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, see Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 45 BUS. LAW. 923 (1990).

3. See *infra* notes 17, 37-93, and accompanying text for discussions of the costs of hazardous waste cleanup and bankruptcy measures taken to avoid CERCLA liabilities, respectively.

4. See *infra* notes 24-32 and accompanying text for a discussion of the equity stake approach.

the effect of the automatic stay on CERCLA claims. Part IV proposes a new federal statute that gives the EPA "superpriority" status in bankruptcy over all other secured and unsecured creditors and reconciles the conflict between the policies of environmental and bankruptcy laws.

I. ENVIRONMENTAL RECLAMATION UNDER CERCLA

Congress enacted CERCLA in 1980 and revised it in 1986 with the Superfund Amendments and Reauthorization Act (SARA).[5] With the passage of these Acts, Congress intended to effectuate the following objectives: to encourage maximum care and responsibility in the handling of hazardous waste; to provide rapid response to environmental emergencies; to encourage voluntary cleanup of hazardous waste spills; to encourage early reporting of violations of the statute; and to ensure that parties responsible for the release of hazardous substances bear the costs of response and damage to natural resources.[6]

Section 104 of CERCLA authorizes the EPA to take the response measures necessary to protect the public health and welfare and the environment.[7] Section 106 authorizes the EPA,

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5. CERCLA refers to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992). In this Note, both CERCLA and the amendments enacted by SARA will be referred to collectively as "CERCLA."

6. Chemical Waste Management v. Armstrong World Indus., 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987).

CERCLA imposes liability on four types of persons. These are:

> 1) the owner or operator of a vessel or facility;
> 2) the owner or operator of a facility at the time of disposal of any hazardous substance;
> 3) any person who by contract, agreement or otherwise "arranged for disposal" ("generators"); and
> 4) any person who transported hazardous substances ("transporters").

CERCLA § 107(a), 42 U.S.C. § 9607(a) (1988).

Federal courts have also generally interpreted CERCLA to permit joint and several liability regardless of fault when harm and the extent of harm are indivisible. *See, e.g.*, United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 844-45 (W.D. Mo. 1984).

7. Section 104(a)(1) of CERCLA provides in part:

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

in cases of "imminent and substantial endangerment," to order a PRP or a group of PRPs to conduct and pay for cleanup.[8] The EPA may also impose substantial penalties for noncompliance in conjunction with such orders.[9]

Alternatively, Congress provided that the EPA may undertake its own hazardous substance cleanup actions pursuant to section 104.[10] The EPA then may seek reimbursement of Superfund[11] money pursuant to section 107, as well as treble damages from PRPs.[12] A PRP may also agree to conduct the cleanup and the

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> pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action. . . .

CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1988).

8. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988). Section 106 orders have not been used widely because PRPs often negotiate consent decrees. Barr, *supra* note 2, at 935.

9. PRPs that fail to comply with § 106 orders may be subject to noncompliance penalties of $25,000 per day and an enforcement action by the United States Department of Justice (DOJ). CERCLA § 106(b)(1), 42 U.S.C. § 9606(b)(1) (1988).

10. See *supra* note 6 and accompanying text for a discussion of the objectives Congress set out.

11. Section 111 of CERCLA created the Superfund, which is a federal trust fund to which Congress initially allocated $1.6 billion. In 1986, Congress amended CERCLA to provide $8.5 billion for use over a 5-year period. CERCLA § 111, 42 U.S.C. § 9611 (1988). The money allocated to the fund comes from taxes collected on petroleum products and certain inorganic chemicals. 26 U.S.C. § 9507(b) (1988). The Superfund may be used to pay nongovernmental claims only when PRPs cannot pay for the response costs or cannot be identified. CERCLA § 111, 42 U.S.C. § 9611(a)(2) (1988). Barr, *supra* note 2, at 953.

12. CERCLA § 107(c)(3), 42 U.S.C. § 9607(c)(3) (1988). *See also* United States v. Mottolo, 695 F. Supp. 615 (D.N.H. 1988) (holding company owner and operator of site jointly and severally liable for response costs); United States v. Northernaire Plating Co., 670 F. Supp. 742 (W.D. Mich. 1987) (holding parties jointly and severally liable for response costs not inconsistent with the National Contingency Plan). Federal district courts have exclusive original jurisdiction over actions under CERCLA § 107. CERCLA § 113, 42 U.S.C. § 9613(b) (1988). *See* T & E Indus., Inc. v. Safety Light Corp., 680 F. Supp. 696, 700-703 (D.N.J. 1988) (denying defendant's contention that New Jersey's "entire controversy doctrine" precluded plaintiff from maintaining action in federal court because plaintiff's claim could not have been brought in previous state court action). Furthermore, pursuant to the 1986 SARA amendments, CERCLA § 113(e) provides for nationwide service of process "[i]n any action by the United States under" CERCLA. CERCLA § 113(e), 42 U.S.C. § 9613(e) (1988). CERCLA and SARA do not authorize

Superfund will reimburse the PRP for a portion of the response costs,[13] or use a combination of the funding mechanisms to conduct and pay for portions of the cleanup (mixed funding).[14] Congress intended that those responsible for releases of hazardous substances, not the taxpayers, shall be liable for the financial burdens of cleanup.[15] The EPA, however, has found it exceedingly difficult to collect reimbursement for response costs from corporations and other PRPs.

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nationwide service of process by states and private plaintiffs. *See* Violet v. Picillo, 613 F. Supp. 1563, 1569-73 (D.R.I. 1985) (relying on Rule 4(f) of the Federal Rules of Civil Procedure to find that the court lacks jurisdiction unless a federal statute or separate rule permits such nationwide service of process); Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 28 (E.D. Mo. 1985) (finding that court lacked personal jurisdiction over corporation because this lawsuit was brought under CERCLA, which does not authorize nationwide service of process for private plaintiffs).

The EPA may mail out "special notice letters" to PRPs containing a formal demand for reimbursement of past and future costs incurred at a site, trigger a 120-day period for formal settlement negotiations with EPA, and provide site-specific information to assist in negotiations, including a Statement of Work for the response actions to be taken at a site and a proposed Consent Decree. *See* CERCLA § 122(e), 42 U.S.C. § 9622(e). *See also* 56 Fed. Reg. 30,996-31,012 (1991) (introducing EPA's Model Consent Decree).

13. *See* CERCLA § 122(b)(1), 42 U.S.C. § 9622(b)(1) (1988); Ohio v. Kovacs, 469 U.S. 274 (1985). See *infra* notes 86-89 and accompanying text for a discussion of *Kovacs*.

Hanson and Krakaur compiled examples of various courts' interpretations of response costs:

> Courts have interpreted "response costs" to include not only the costs directed at the cleanup of contamination, such as investigations, monitoring, testing, and evaluation and implementation of a response action, City of New York v. Exxon, 633 F. Supp. 609, 618 (S.D.N.Y. 1986), but also to include related costs, such as enforcement and oversight costs of the EPA and Department of Justice, *see* U.S. v. NEPACCO, 579 F. Supp. at 850; administrative costs of agencies, *see* U.S. v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984, 1008 (D.S.C. 1984); attorney's fees, *see* General Electric v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1421-22 (8th Cir. 1990); *cf.* Pease & Curren Refining, Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 951 (C.D. Cal. 1990) (only U.S. may recover attorney's fees); relocation of business costs, *see* Lutz v. Cromatex, 718 F. Supp. 413, 419-20 (M.D. Pa. 1989); and site security, *see* Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989).

John N. Hanson & Peter Krakaur, *Allocation: The Engine that Drives or Derails Superfund Settlement*, 484-85 (PLI Litig. & Admin. Practice Course Handbook Course Series No. 425, 1991).

14. CERCLA § 122(b)(1), 42 U.S.C. § 9622(b)(1) (1988). *See* 53 Fed. Reg. 8279 (1988) (discussing mixed funding settlement guidance).

15. CERCLA § 107, 42 U.S.C. § 9607 (1988).

A. *Problems Inherent in Reimbursement Procedures*

Reimbursement procedures create several problems when applied to large corporations. First, there may be as many as 4000 PRPs involved in one Superfund site.[16] Second, the average cost of hazardous waste cleanup is thirty million dollars.[17] Third, many corporations seek refuge in bankruptcy to avoid exorbitant cleanup costs.[18]

B. *Bankruptcy as a Means of Avoiding Environmental Liability*

The Bankruptcy Code does not require a debtor to be insolvent before it files for bankruptcy.[19] Consequently, bankruptcy has become a haven for corporations with substantial environmental liabilities under CERCLA.[20] In 1988, almost ten percent of all environmental cases pending at the Department of Justice in-

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16. Nancy Firestone, *Government Perspectives on Bankruptcy and Environmental Law Interaction*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,358, 10,359 (1988). *See also* Lori Jonas, Note, *Dividing the Toxic Pie: Why Superfund Contingent Contribution Claims Should Not Be Barred by the Bankruptcy Code*, 66 N.Y.U. L. REV. 850, 852 n.25 (1991) (noting that the government retains discretion to hold a number of polluters liable for cleanup costs).

17. Kevin J. Saville, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?*, 76 MINN. L. REV. 327 n.5. (1991). *See also* A REPORT TO THE HOUSE COMM. ON APPROPRIATIONS, ON THE STATUS OF THE ENVTL. PROTECTION AGENCY'S SUPERFUND PROGRAM, *in* PRACTICAL APPROACHES TO REDUCE ENVTL. CLEANUP COSTS 1988, at 405, 424 (PLI Real Estate Law & Practice Course Handbook Series No. 317, 1988); William H. Rodgers, Jr., *A Superfund Trivia Test: A Comment on the Complexity of the Environmental Laws*, 22 ENVTL. L. 417, 426, 432 (1992) (stating that the average cost of cleaning up a Superfund site is $24 million) (citing OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, SUPERFUND STRATEGY: SUMMARY 21-26 (1985)). A third source stated that in October 1986, when Congress amended the Superfund law, the average cost of a single Superfund cleanup cost ranged between $30 and $40 million. Thomas J. Salerno et al., *Environmental Law and Its Impact on Bankruptcy Law — Saga of "Toxins-R' Us,"* 25 REAL PROP. PROB. & TR. J. 261, 263 (1990).

18. Jonas, *supra* note 16, at 863 n.91. See also *infra* notes 20-22 and accompanying text for a description of the number of PRPs that file or will file for bankruptcy.

19. DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 37 (rev. ed. 1993); ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS: TEXTS, CASES, AND PROBLEMS (2d ed. 1991).

20. "The existence or threat of environmental liability has been invoked successfully as a basis for seeking relief under the federal bankruptcy laws." Kevin T. Haroff, *Environmental Liabilities Under Federal Bankruptcy Laws* 1 (PLI Corp. Law and Practice Course Handbook Series No. 717, The Impact of Environmental Regulations on Business Transactions 1990). *See, e.g.*, United States v. Johns-Manville Sales Corp., 18 Env't Rep. Cas. (BNA) 1177 (D.N.H. 1982) (finding that district court lacked jurisdiction to order use of company funds for cleanup until bankruptcy resolved).

volved bankruptcy issues.[21] The EPA predicts that twenty-five to thirty percent of refuse facilities will file for bankruptcy during the next fifty years.[22] With almost one out of three corporations escaping liability through bankruptcy, average cleanup costs approaching $30 million, and almost 1200 priority sites on the National Priority List as of 1989,[23] the EPA must establish a new procedure to obtain reimbursement for CERCLA response costs.

II. EPA'S RECENT APPROACH: CORPORATIONS MAY REIMBURSE EPA WITH STOCK

To reimburse the Superfund for response costs, the EPA has begun taking an equity stake in several corporations liable for environmental cleanup.[24] *In re U.E. Systems, Inc.*[25] is one case in which such an approach was attempted.[26] The United States Bankruptcy Court for the Northern District of Indiana approved a settlement as part of a Chapter 11 bankruptcy reorganization

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21. Firestone, *supra* note 16, at 10,358.

22. Jill T. Losch, *Bankruptcy v. Environmental Obligations: Clash of the Titans*, 52 LA. L. REV. 137, 138 n.1 (citing U.S. General Accounting Office, Hazardous Waste, Environmental Safeguards Jeopardized When Facilities Cease Operating 18 (1986)).

23. Barr, *supra* note 2, at 935. *See also* 11 ENVTL. PROTECTION AGENCY, A MANAGEMENT REVIEW OF THE SUPERFUND PROGRAM (1989) (identifying nearly 30,000 sites tainted with hazardous waste).

According to current estimates, it will cost approximately $30 billion to clean up the 1250 NPL sites. Rodgers, *supra* note 17, at 421. Lost recovery actions initiated by the United States recovered only 9% of the $2.6 billion spent on Superfund. *Id.* at 430.

24. *See Consent Decree Covers 20 Sites*, SUPERFUND WEEK, Sept. 4, 1992; *Environmental Claims*, 61 U.S.L.W. 2266, 2267 (Nov. 3, 1992); *EPA Gets Claim in Bankruptcy Company's Reorganization*, PESTICIDE & TOXIC CHEMICAL NEWS, Oct. 7, 1992; *EPA Gets Equity Stake in Firm; Company Relieved of Liability*, HAZARDOUS WASTE NEWS, Oct. 13, 1992; *EPA Makes "Unusual" Settlement With Uniroyal*, GREENWITE, Oct. 2, 1992, at Marketplace; Elisabeth Kirschner, *EPA Gets Uniroyal Technology Stock*, CHEMICAL WEEK, Oct. 14, 1992, at 12; Jonathan M. Moses, *EPA Gets Stake in Firm to Settle Cleanup Claims*, WALL ST. J., Oct. 2, 1992, at B1.

25. United States v. U.E. Sys., Inc. (*In re* U.E. Sys., Inc.), No. 01-32791-HCD (N.D. Ind. filed Sept. 28, 1992). This case is still pending in the United States Bankruptcy Court for the Northern District of Indiana. However, the court ordered that the Settlement Agreement motion be granted on September 28, 1992.

26. The use of the word "attempted" was intentional because at the time of this Note, a Settlement Agreement had been approved by the Bankruptcy Court for the Northern District of Indiana, but the EPA had yet to receive the stock. See Lodging of Consent Decree, 57 Fed. Reg. 37,839 (1992), for the proposed Settlement Agreement that was accepted by the Bankruptcy Court in the Order granted on September 28, 1992.

plan whereby the EPA, the Department of the Interior, and Indiana and Wisconsin state environmental agencies took a major stake in the Uniroyal Technology Corporation in order to free the company of liabilities at twenty environmental cleanup sites around the United States.[27] Caroline DiBonita, attorney for the EPA, claims that the arrangement was "precedent setting because of its size."[28]

A. *Why The EPA Should Not Accept Stock In Corporations*

The government, specifically the EPA and the Department of the Interior, should be prevented from taking equity stakes in corporations. First, the government theoretically remains uninvolved in private business. There is no compelling reason for governmental agencies to deviate from that norm in this context by acquiring substantial equity stakes in large corporations.

Second, there is potential for abuse when the government involves itself in management.[29] A conflict of interest arises when the EPA serves as both shareholder and regulator. The EPA becomes involved in decision-making from the inside of the corporation as a significant shareholder, and from the outside as a regulatory agency. The EPA cannot hold these two positions simultaneously without losing its objectivity. A shareholder's objective is to increase the financial success of the corporation while encouraging economic growth. Conversely, the EPA's regulatory objective is to protect the public's health and welfare as well as the environment.

Third, the EPA currently does not have a structure established to manage these shares of stock. To continue the practice of taking equity stakes, the EPA would have to create a separate division of the Enforcement Section to be responsible for its investment stock. This section would decide whether to hold the stock, and accordingly, when to sell the shares. Currently, if the EPA decides to retain the stock as an investment, Superfund is not reimbursed immediately, and may never be if the corporation is unsuccessful after reorganization. If the EPA decides to sell the shares immediately, it acts inappropriately because the EPA is not in the business of selling corporate stock.[30]

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27. *In re* U.E. Sys., Inc., No. 01-32791-HCD. The EPA received a 12% equity stake in Uniroyal Technology Corp., while the Department of the Interior and the states of Wisconsin and Indiana each received 1.9 million shares of stock. Moses, *supra* note 24, at B1.

28. Moses, *supra* note 24, at B1.

29. *Id.* at B7. (citing Chris Buckley, an environmental lawyer in the Washington D.C. office of Gibson, Dunn & Crutcher).

30. Moses, *supra* note 24, at B7.

Finally, the EPA is only willing to take stock as a last resort from corporations that are insolvent or in bankruptcy. Solvent corporations, on the other hand, are capable of reimbursing the Superfund, or quickly and efficiently conducting the cleanup themselves, which are the ideal results under CERCLA.[31] Consequently, the stock that the EPA receives under this approach is generally worthless. Even if a bankrupt corporation survives Chapter 11,[32] it will be several years before its stock has any significant value. To avoid the EPA's use of the equity stake and similar approaches, Congress should give the EPA a superpriority status over secured and unsecured creditors. Such a statute would allow the EPA to exert all of its energy on environmental cleanup rather than negotiating with corporations for reimbursement of response costs.

III. Bankruptcy Claims and Priority

The reimbursement of response costs by corporations that file bankruptcy is difficult due to the inherent conflict between CERCLA and the Bankruptcy Code. CERCLA focuses on speed and efficiency in the cleanup of environmental sites. Consequently, the government does not instigate litigation until after the cleanup has begun.[33] Conversely, the Code accelerates claims and litigation to allow the debtor to begin its "fresh start" as soon as possible.[34] These conflicting policies concerning the

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31. See generally Barr, *supra* note 2, for a discussion of the ability of solvent corporations to reimburse the Superfund.

32. Many corporations that file Chapter 11 bankruptcy fail before they ever create and submit a plan of reorganization to the Creditors' Committee and other creditors. Warren & Westbrook, *supra* note 19, at 432. Because a debtor has the absolute right to convert a Chapter 11 case to a Chapter 7 case pursuant to 11 U.S.C. § 1112 (a) (1988), many projected liquidations are filed in Chapter 11. Warren & Westbrook, *supra* note 19, at 433. Consequently, it is impossible to get accurate data concerning the number of genuine Chapter 11 reorganizations that succeed. *Id.* Creditors and the trustee may also convert a Chapter 11 case to a Chapter 7 case pursuant to 11 U.S.C. § 1112(b), if it is in the best interests of the estate and there is cause. *Id.* Conversion is required if a majority of the creditors do not approve the plan of reorganization as specified in 11 U.S.C. § 1126(c) (1988).

33. Robin E. Phelan et al., *Dancing the Toxic Two-Step: Environmental Problems in Bankruptcy Cases*, 445,616 (PLI Commercial Law and Practice Course Handbook Series No. 601, Advanced Bankruptcy Workshop 1992).

34. *Id.* Ironically, one commentator proposed that the "fresh start" policy does not apply to corporate debtors because the 1978 Act does not contain a provision for the discharge of the debts of "non-individuals." *See* Douglas C. Ballentine, Note, *Recovering Costs for Cleaning Up Hazardous Waste Sites: An Examination of State Superlien Statutes*, 63 Ind. L.J. 571, 572 n.9 (1988). *See also* 11 U.S.C. § 727(a)(1) (1988).

Such an approach seems to conflict with the notion of the Chapter 11

timing of claims and litigation become complex and confusing.[35] In fact, the timing of environmental issues delays a bankruptcy court's determination of the validity, amount, and priority of a claim.[36]

Further, neither the Code nor CERCLA make any provision for the priority of environmental obligations in bankruptcy. Therefore, courts have been left to decide whether environmental obligations constitute claims in bankruptcy, and if so, whether these claims have priority over other claims in bankruptcy.

A. *Environmental Claims In Bankruptcy*

Because it is not expressly indicated in the Bankruptcy Code, there has been much debate over whether CERCLA's environmental obligations constitute claims in bankruptcy. The Code defines "claim" as "a right to payment" or "a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment."[37] Congress intended to define "claim" broadly, as indicated in the legislative history, which includes all of the debtor's legal obligations in the definition of "claim."[38]

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reorganization in which corporations are discharged from liabilities and emerge from bankruptcy with a clean slate. However, some claims are not dischargeable in bankruptcy.

See *infra* notes 37-55 and accompanying text for a discussion of the dischargeability of bankruptcy claims. *See generally* 3A COLLIER ON BANKRUPTCY (Lawrence P. King ed., 15th ed. 1979) (providing an in-depth discussion of the Bankruptcy Code).

35. Phelan, *supra* note 33, at 616.

36. *Id.* Section 502 of the Bankruptcy Code concerns the allowance of claims in bankruptcy cases. 11 U.S.C. § 502 (1988). Section 502(a) deems claims "allowable" unless a party-in-interest objects. *Id.* at § 502(a). See *infra* notes 39-55 for a discussion of different approaches to the timing issue.

37. Under the Bankruptcy Code, "claim" is defined as:

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

11 U.S.C. § 101(5)(A), (B) (Supp. IV 1992).

38. "[T]he [Code] contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." H.R. REP. No. 595, 95th Cong., 2d Sess. 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266; S. REP. No. 989, 95th Cong., 2d Sess. 21-22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5807-08.

Courts have been inconsistent in deciding whether environmental obligations constitute claims in bankruptcy. In *In re Chateaugay Corp.*,[39] the Second Circuit held that CERCLA response costs incurred by the EPA are pre-petition claims, which are potentially dischargeable in bankruptcy, even if such costs actually are incurred after the petition is filed.[40] The court required, however, that the response costs result from a release or threatened release of hazardous waste that occurs before the debtor files its petition.[41] The Second Circuit focused on the effect of the injunction rather than the timing of the release. According to the court, an order containing an injunction that "ends or ameliorates continued pollution" is not a dischargeable claim.[42] The court reasoned that the EPA may not accept monetary payment in lieu of preventing future pollution.[43]

The court found that a dischargeable claim does arise, however, when an order requires the PRP to clean up a site. The injunction to clean up a site is in effect a monetary obligation because the EPA has the option to perform the cleanup itself and sue for reimbursement.[44] Finally, orders which combine an order to clean up a site with an order to "end[] or ameliorate[]

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39. 944 F.2d 997 (2d Cir. 1991). In *Chateaugay*, the LTV Corporation filed a bankruptcy petition under Chapter 11 listing 24 pages of "contingent" claims held by the federal EPA and all 50 state EPA branches in its schedule of liabilities. *Id.* at 999. LTV is a diversified steel, aerospace, and energy corporation. *Id.* The suit concerned two issues: (1) whether CERCLA response costs incurred by the EPA are pre-petition claims dischargeable in bankruptcy; and (2) whether response costs incurred during the bankruptcy at sites owned or operated by the debtor constitute administrative expenses entitled to priority under the Code. See *infra* notes 60-70 and accompanying text for a discussion of administrative expense priority.

40. 944 F.2d at 1006. *See* Douglas G. Baird & Thomas H. Jackson, Comment, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1119, 1204 (1984) [hereinafter *Toxic Wastes in Bankruptcy*].

41. The EPA (referred to as Government in this case) argued that it did not have a claim for reimbursement of CERCLA response costs until those costs were incurred. 944 F.2d at 1000. The EPA argued that a narrow reading of claim would better serve CERCLA's objectives because response costs resulting from pre-petition release or threatened release of hazardous substances would not be considered claims. *Id.* at 1002. Thus, the EPA could later assert its right to reimbursement against the reorganized debtor to receive the full value of its claim. *Id.* However, the court noted that such a narrow reading of claim may deny the EPA its right to reimbursement when the debtor converts its Chapter 11 reorganization into a Chapter 7 liquidation. When such a conversion occurs, the EPA cannot collect because its claim has not yet matured. *Id.* at 1005, 1008.

42. *Id.* at 1008.

43. *Id.*

44. *Id.* at 1009. CERCLA § 104, 42 U.S.C. § 9604 (1988 & Supp. IV 1992).

continued pollution" are not dischargeable claims.[45] The court recognized that "most environmental injunctions will fall on the non-'claim' side of the line."[46] Such a finding follows previous Supreme Court decisions including *Ohio v. Kovacs*,[47] which held that if the environmental obligation could be satisfied only by the payment of money, the obligation was a claim.

The Ninth Circuit advocated a different approach for determining whether an environmental obligation constitutes a claim. In *In re Dant & Russell*,[48] the court upheld the district court's allowance of a claim for expenses already incurred in CERCLA cleanup, but reversed the lower court's allowance of response costs not yet incurred.[49] The court reasoned that the PRPs would no longer have an incentive to complete the cleanup if they were awarded future costs before completing the work.[50]

The Bankruptcy Court of the Northern District of Texas advocated a third approach in *In re National Gypsum Co.*[51] The court held that CERCLA liabilities were dischargeable claims to the extent that the parties could fairly contemplate liabilities at the commencement of the case.[52] The court based its holding

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45. 944 F.2d at 1008. The Second Circuit refused to bifurcate the order into that which is ordinarily considered a dischargeable claim and that which is nondischargeable. *Id.* at 997. *But cf. In re National Gypsum*, 139 B.R. 397 (N.D. Tex. 1992) (bifurcating claim according to traditional notions of dischargeability). For a discussion of *In re National Gypsum*, see *infra* notes 51-55 and accompanying text.

46. 944 F.2d at 1008.

47. 469 U.S. 274 (1985).

48. Dant & Russell, Inc. v. Burlington N.R.R. (*In re* Dant & Russell, Inc.), 951 F.2d 246 (9th Cir. 1991).

49. *Id.* at 250. The debtor dumped toxic wastes on the property that it leased from Burlington Northern Railroad (BN) to operate a wood treatment plant. The Railroad cleaned up the property and subsequently filed a claim against the debtor in the debtor's bankruptcy case for both previous costs incurred and future response costs in connection with the leased property. The lower court allowed all costs to constitute a claim in bankruptcy. *Id.*

The Ninth Circuit reversed the lower court as to the future claims based upon the CERCLA provision requiring that costs must be incurred before they may be recovered. *Id.* In this manner, the Ninth Circuit made its determination of claims based upon its interpretation of the term "incurred." *Id.*

Such a holding does not prevent BN from recovering these costs in the future under the Bankruptcy Code, 11 U.S.C. § 502(j) (1988), by means of a motion for reconsideration. Additionally, BN may file subsequent suits against the reorganized corporation for costs incurred post-petition. Furthermore, BN could obtain a declaratory decree from the bankruptcy court that would apportion liability for costs if and when incurred. 951 F.2d at 250.

50. *Id.* at 250. See generally Barr, *supra* note 2, for a discussion of the reimbursement procedures associated with CERCLA response costs.

51. 139 B.R. 397 (Bankr. N.D. Tex. 1992).

52. *Id.* at 409.

on a "fair contemplation theory"[53] rather than the "contingent claim" theory articulated by the *Chateaugay* court.[54] The court refuted this distinction because it was meaningless and held that the only distinction that should be drawn is between whether the parties fairly contemplated response costs.[55]

B. *Estimating Amount of Claim*

Debtors often argue that the EPA does not have a claim because its claim is contingent at the time the debtor files its petition in bankruptcy.[56] However, section 502(c) of the Code

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53. The court insisted that "the only meaningful distinction . . . is one that distinguishes between costs associated 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 (footnotes omitted).

The district court in United States v. Union Scrap Iron & Metal, 123 B.R. 831 (Bankr. D. Minn. 1990), also relied on the fair contemplation of the parties prior to bankruptcy. *Id.* at 834-37. The court refused to discharge post-bankruptcy claims that resulted from pre-petition conduct because the EPA was not aware that the debtor owned the property at the time of the filing. *Id.*

54. In *Chateaugay*, the court refused to recognize a claim based solely upon the debtor's pre-petition conduct. Instead, the court focused on the debtor's pre-petition conduct resulting in release or threatened release of hazardous substance. 944 F.2d at 1000, 1005. The *Chateaugay* court speculated that it would not allow a dischargeable claim for response costs incurred as a result of a debtor improperly sealing barrels containing hazardous waste. *Id.* at 1002. Although the court may well have been aware that the debtor's pre-petition conduct would result in future response costs, there was no pre-petition release or threatened release at the time of filing. Thus, the resulting response costs did not constitute a dischargeable claim.

The *National Gypsum* court disagreed and noted that the Fifth Circuit held that the disposal of the hazardous substance itself constitutes a "release or threat of release." 139 B.R. at 408 n.25 (citing Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989)). In addition, CERCLA defines "release" to include ". . . 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) (1988). Therefore, the *Chateaugay* court incorrectly hypothesized that response costs resulting from a debtor's sealing of barrels containing hazardous waste does not constitute a dischargeable claim.

55. 139 B.R. at 407-08 (footnotes omitted). The court enunciated five factors to determine whether "fair contemplation" existed: 1) knowledge by the parties of a site in which a PRP may be liable; 2) NPL listing; 3) notification by EPA of PRP liability; 4) commencement of investigation and cleanup activities; and 5) incurrence of response costs. *Id.* at 408 (footnote omitted).

56. *See, e.g., In re* Dant & Russell, Inc., 951 F.2d 246 (9th Cir. 1991) (disallowing claim status for contingent claims resulting from costs not yet incurred).

allows courts to estimate contingent or unliquidated claims.[57] The Bankruptcy Court for the Northern District of Texas recently became the first court to apply "claim estimation" to environmental claims in the *National Gypsum* bankruptcy proceeding.[58] One commentator objected to an estimate of all liabilities associated with pre-petition activities based solely upon a pre-petition release because it "represents a formidable if not insurmountable task."[59]

C. *Priority of Environmental Claims*

The Code provides the following priorities for bankruptcy claims: secured claims, administrative expenses, priority claims (such as tax claims held by governmental units), unsecured claims, and equity interests.[60] All claims held by a specific class, such as secured creditors, must be satisfied before the next class receives anything.[61] If the assets fail to satisfy the claims of a class, the creditors in that particular class share pro rata in the

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57. Section 502(c) of the Bankruptcy Code provides:

> (c) There shall be estimated for purposes of allowance under this section —
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> (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
>
> (2) any right to payment arising from a right to an equitable remedy for breach of performance.

11 U.S.C. § 502(c) (1988).

58. James K. McBain, Note, *Environmental Impediments to Bankruptcy Reorganizations*, 68 IND. L.J. 233, 241 n.53 (1992) (citing *Court in Texas Produces First Estimation of U.S. CERCLA Costs, Resource Damages*, Bankr. L. Daily (BNA) (July 9, 1992) (discussing *In re* National Gypsum (*In re National Gypsum II*), No. 390-37213-SAF-11 (Bankr. N.D. Tex. June 24, 1992)).

59. Saville, *supra* note 17, at 352. Estimation puts a tremendous burden upon the courts:

> The problem of contingent claims in bankruptcy is . . . the question whether or not the bankruptcy court will deem liquidation or estimation of the claim reasonably feasible, a question . . . whose solution will ultimately rest upon the exercise of judicial discretion in light of the circumstances of the case, particularly the probable duration of the process of liquidation as compared with the period of future uncertainty due to the contingency in question.

Id. at 352 n.199 (citing 3A COLLIER ON BANKRUPTCY para. 63.30 at 1912 (James W. Moore ed., 14th ed. 1975)).

60. 11 U.S.C. § 507 (1988 & Supp. IV 1992). McBain, *supra* note 58, at 242 (citing Torwico Electronics, Inc. v. New Jersey Dep't of Envtl. Protection, 131 B.R. 561, 565 (Bankr. D.N.J. 1991) (viewing "priority claim" as a reference to claims under CERCLA § 507(a)(2)-(8))). Administrative expenses may also be considered a type of priority claim instead of their own category. *Id.* at 242 n.57.

61. WARREN & WESTBROOK, *supra* note 19, at 225-26.

remaining available assets.[62] Courts typically treat environmental obligations as administrative expenses or unsecured claims.[63]

Administrative expenses are the "actual, necessary costs and expenses of preserving the estate . . . ,"[64] and holders of such claims are paid immediately after the secured creditors.[65] All administrative expenses must be paid in full before the reorganization plan is approved.[66]

Several courts, to the delight of the EPA, have found that section 107 CERCLA response costs are administrative expenses of the estate.[67] Such a finding requires the debtor to pay the EPA these response costs in cash before the plan may be confirmed. Because such costs are exorbitant, most debtors will not be able to pay, and Chapter 11 reorganization will fail.[68]

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62. For example, if the secured creditors' claims are satisfied and the creditors with priority claims are owed $400,000 in the aggregate, but the debtor has only $100,000 in assets remaining, the priority claim creditors will each receive $0.25 on the dollar and the remaining creditors will receive nothing.

63. Section 106(a) orders are almost uniformly accepted as administrative expenses because they involve pre-petition government actions attempted "to abate . . . an 'imminent and identifiable threat.'" *In re National Gypsum II*, *supra* note 58.

The distinction often rests upon whether the obligation is a § 106 or a § 107 response cost. *See supra* notes 8-12 and accompanying text.

64. 11 U.S.C. § 503(b)(1)(A) (1988).

65. 11 U.S.C. § 507(a)(1) (1988 & Supp. IV 1992).

66. 11 U.S.C. § 1129(a)(9)(A) (1988).

67. The principal case allowing administrative expense treatment for § 107 response costs is *In re* Wall Tube & Metal Products Co., 831 F.2d 118 (6th Cir. 1987). The court allowed a finding of administrative expense to deny businesses in bankruptcy an advantage over businesses suffering from the same type of liability outside of bankruptcy. *Id.* at 124. The court relied on the test for determining priority status articulated in Reading Co. v. Brown, 391 U.S. 471 (1968). *In re Wall Tube*, 831 F.2d at 123. The *Reading* court refused to allow relief to debtors in bankruptcy, even when the debtor was not responsible for the release of hazardous waste, while imposing such liability on similar parties outside of bankruptcy. *Id.* (quoting *Reading*, 391 U.S. at 482-83). As a result of the *Reading* approach, the general unsecured creditors pay for the cleanup costs and the EPA has a higher priority status than other government entities. McBain, *supra* note 58, at 243.

Other courts also have allowed the EPA an administrative expense priority status. *See In re* Stevens, 68 B.R. 774 (D. Me. 1987); *In re* T.P. Long Chem., 45 B.R. 278 (Bankr. N.D. Ohio 1985).

Some courts allow administrative expense priority only upon a finding of "imminent and identifiable harm" to the public health and safety. Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 507 n.9 (1986); *see also In re* National Gypsum Co., 139 B.R. 397, 413 (Bankr. N.D. Tex. 1992) (permitting priority for pre-petition costs if "necessitated by conditions that posed an imminent and identifiable harm to the environment and public health").

68. McBain, *supra* note 58, at 242. See *supra* note 32 and accompanying text for a discussion of the likelihood of a successful Chapter 11 reorganization.

Some courts, however, have found that environmental obligations are unsecured claims.[69] This classification encourages reorganization because debtors are only required to pay a small percentage of their outstanding liability to the EPA to discharge cleanup claims. However, this classification also encourages debtors to enter bankruptcy as a means of discharging environmental liabilities because there will be few assets remaining for the EPA to collect as an unsecured creditor.[70]

D. *Automatic Stay*

Another provision of the Code, the automatic stay, also conflicts with CERCLA. The automatic stay, section 362, is one of the fundamental protections the Bankruptcy Code provides

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69. Burlington N.R.R. v. Dant & Russell, Inc. (*In re Dant & Russell, Inc.*), 853 F.2d 700, 708-09 (9th Cir. 1988) [hereinafter *Dant & Russell I*] (holding that absent explicit legislative direction, claims for cleanup costs arising pre-petition should not receive administrative expense priority); Walsh v. West Virginia (*In re* Security Gas & Oil, Inc.), 70 B.R. 786, 795 (Bankr. N.D. Cal. 1987) (same). *But see In re* Peerless Plating Co., 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987) (granting EPA's response costs administrative expense priority).

70. The minority view denies administrative priority and holds that cleanup obligations are based upon pre-petition conduct, are compensatory in nature, and do not benefit the estate. *See, e.g.,* Dant & Russell I, 853 F.2d 700, 706-07 (9th Cir. 1988) (denying administrative expense priority for cleanup costs); Southern Ry. v. Johnson Bronze Co., 758 F.2d 137, 141-42 (3d Cir. 1985) (denying administrative priority to railroad's contractual indemnification claim against debtor-in-possession for cost of cleaning up hazardous waste disposed of by debtor on railroad's right of way).

The majority approach grants administrative expense priority based upon the rationale that the costs expended in achieving compliance and ultimately in assuring the public health are a necessary cost of preserving the estate. *See, e.g.*, Lancaster v. Tennessee (*In re* Wall Tube & Metal Prod. Co.), 831 F.2d 118, 123-24 (6th Cir. 1987) (holding that response costs are actual and necessary administrative expenses to preserve the estate and protect the public health); *In re* Peerless Plating Co., 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987) (granting EPA administrative priority for response costs over trustee's allegations of EPA's bad faith); *In re* Stevens, 68 B.R. 774, 782-84 (Bankr. D. Me. 1987) (holding that administration costs included those incurred in protecting the public from hazardous waste); *In re* Pierce Coal & Constr., Inc., 65 B.R. 521, 531 (N.D. W. Va. 1986) (holding that reclamation costs have administrative priority pursuant to 11 U.S.C. § 503(b)(1)); *In re* T.P. Long Chem., Inc., 45 B.R. 278, 286 (N.D. Ohio 1985) (holding that EPA's costs of responding to a release of hazardous substance were administrative expenses because the "estate cannot avoid the liability imposed by CERCLA [so] it follows that the cost incurred . . . in discharging this liability is an actual necessary cost of preserving the estate entitled to administrative expense priority").

to debtors. Section 362(a)(1)[71] stays any judicial, administrative, or other actions or proceedings against the debtor, including the enforcement of any judgment obtained before the petition.[72] The automatic stay grants immediate, although temporary, relief to the debtor and allows an orderly distribution of the debtor's assets.[73]

Section 362, the automatic stay provision, contains two exceptions applicable to governmental authorities such as the EPA. First, the "police power exception" exempts commencement of actions within the police power of a governmental unit[74] from the automatic stay.[75] This exception allows the government to

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71. Section 362 provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of —
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . . .

11 U.S.C. § 362(a)(1) (1988).

72. An automatic stay provides relief to debtors from creditors constantly harassing them to pay pre-petition debts. DAVID G. EPSTEIN ET AL., BANKRUPTCY 59 (1993). Automatic stays apply only during the pendency of the case. *Id.* at 62. Once the case is completed and the dischargeable debts are discharged, the automatic stay no longer applies. *Id.* It is important to note, however, that some debts are not dischargeable and therefore the debtor remains liable for such debts after bankruptcy. See *supra* notes 37-55 and accompanying text for a discussion of the dischargeability of claims in bankruptcy.

73. WARREN & WESTBROOK, *supra* note 19, at 212.

74. Section 101(27) of the Bankruptcy Code defines "governmental unit" to include federal, state, and municipal governments and their instrumentalities. 11 U.S.C. § 101(27) (Supp. IV 1992).

75. Section 362(b)(4) provides:

> The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay —
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. § 362(b)(4) (1988).

The legislative history of § 362 indicates that Congress intended environmental laws to be considered police and regulatory powers. *See* H.R. REP. No. 595, 95th Cong., 2d Sess. 343, *reprinted in* 1978 U.S.C.C.A.N. 5787, 6299 ("[W]here a governmental unit is suing a debtor to prevent or stop violation of . . . environmental protection . . . safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.").

obtain an injunction to protect public health and safety, and has also been applied to the prevention of environmental law violations.[76] However, the legislative history prohibits applying the police power exception to actions protecting monetary interest in the debtor's property or estate.[77] The distinction between monetary interests and public health and safety objectives often prevents governmental units from obtaining priority over other creditors.[78] Courts have held that the exception applies to non-monetary judgments but does not allow for recovery of monetary awards.[79]

The second exception to the automatic stay is found in section 362(b)(5), which exempts non-monetary judgments[80] obtained to enforce a governmental unit's police or regulatory power.[81]

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76. *See, e.g.*, Walsh v. West Virginia (*In re* Security Gas & Oil, Inc.), 70 B.R. 786, 795 (Bankr. N.D. Cal. 1987) (holding that order to cease activities violating state law fell within § 362(b)(4)).

77. 124 CONG. REC. S17,409 (daily ed. Oct. 6, 1978); 124 CONG. REC. H11,092 (daily ed. Sept. 28, 1978).

78. McBain, *supra* note 58, at 245. *See also* Jonas, *supra* note 16, at 865-66.

79. Phelan, *supra* note 33, at 635. One unsettled issue is whether governmental injunctions and cleanup orders relating to third persons are exempt from the statute because they are deemed equal to monetary judgments. *Id.* *See* United States v. Price, 688 F.2d 204, 212 (3d Cir. 1982) (requiring a landfill owner to perform a study of toxic hazards at his site in part because such relief was preventive, not compensatory, even though it required monetary payments). *See also* Penn Terra, Ltd. v. Department of Envtl. Resources, 733 F.2d 267, 274-78 (3d Cir. 1984) (holding that a state's injunction is exempt from the automatic stay and requiring a Chapter 7 debtor to take cleanup actions, even though these actions required a substantial expenditure that would deplete the estate's assets). The court in *Penn Terra* indicated that the automatic stay would apply to actions to clean up past harm but not to orders to prevent future harm. *Id.* at 278. *Penn Terra* leaves to the bankruptcy court the authority to issue a discretionary stay under § 105 if "necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." *Id.* at 273.

80. *See* Laurel E. Lockett, *Environmental Liability Enforcement and the Bankruptcy Act of 1978: A Study of H.R. 2767, The "Superlien" Provision*, 19 REAL PROP. PROB. & TR. J. 859, 870-71 (1984). A "money judgment" has been defined as "one which adjudges the payment of a sum of money, as distinguished from one directing an act to be done or property to be transferred or restored." United States Fidelity & Guar. Co. v. Fort Misery Highway Dist., 22 F.2d 369, 372 (9th Cir. 1927) (citation omitted). In Ohio v. Kovacs, 469 U.S. 274 (1985), the Supreme Court held that an individual debtor's obligation to clean up a hazardous waste site amounted to a money judgment and was dischargeable under the Code. See *infra* notes 86-89 and accompanying text for a discussion of *Ohio v. Kovacs*.

81. Section 362(b)(5) provides:

> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not

Courts differ over whether this exception permits enforcement of cleanup orders, or whether enforcement would be barred as an attempt to enforce a monetary judgment against the debtor, which the automatic stay provision prohibits.[82]

The Third Circuit dealt with both of these exceptions in *Penn Terra v. Department of Environmental Resources*.[83] The court interpreted the police power exception broadly, while it narrowly construed the "enforcement of a monetary judgment."[84] Commentators fear that a broad interpretation of the police power exception would cause reorganizations to fail because the environmental liabilities will have priority status over all other unsecured claims, leaving few assets available for use in the debtor's reorganization.[85]

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operate as a stay —

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."

11 U.S.C. § 362(b)(5) (1988).

82. Section 362(a)(2) provides:

(a) Except as provided . . . a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of —

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title."

11 U.S.C. § 362(a)(2) (1988).

83. 733 F.2d 267 (3d Cir. 1984).

84. *Id.* at 273. Because the remedy protected against "potential future harm" rather than compensating for "past wrongful acts," the police power exception applied. *Id.* The court looked to the harm that the action intended to address rather than its form. The court also found that the remedy could not consist of money alone, and therefore it did not consist of an attempt to enforce a monetary judgment. *Id.* at 275.

85. McBain, *supra* note 58, at 246. But see *supra* note 32 discussing the likelihood of debtors surviving Chapter 11.

Another bankruptcy issue in conflict with existing environmental law is "adequate protection." Congress included the adequate protection clause to "insure that the secured creditor receives the value for which he bargained." H.R. REP. No. 595, 95th Cong., 2d Sess. 339 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6295. *See generally* Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97 (1984) [hereinafter *Corporate Reorganizations*] (discussing protection of secured creditors in corporate Chapter 11 reorganizations).

Section 362(d) provides that a secured creditor may petition to lift the stay "for cause, including the lack of adequate protection. . . ." 11 U.S.C. § 362(d)(1) (1988). However, the trustee in bankruptcy must bear the burden of the proof on the lack of adequate protection. 11 U.S.C. § 363(o)(1) (1988).

Bankruptcy Rule 4001 provides the procedures for obtaining adequate

In *Ohio v. Kovacs*,[86] the Supreme Court held that the automatic stay applies only to the enforcement of monetary environmental judgments, but does not apply to suits to enforce the state's regulatory statutes.[87] The court further held that Ohio's environmental injunction against Kovacs was dischargeable in bankruptcy as a debt converted into a monetary obligation.[88] Ohio was assigned a receiver who was performing the cleanup and only wanted monetary reimbursement from Kovacs to defray the cleanup costs.[89]

However, in *In re Chateaugay Corp.*,[90] the bankruptcy court refused to lift the automatic stay. The court invoked its equitable powers under section 105[91] of the Bankruptcy Code to enjoin a citizens' group from initiating a lawsuit to monitor post-petition cleanup activities and to diminish ongoing violations of the Clean Water Act at a mining site in Minnesota.[92] The court held

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protection. FED. R. BANKR. P. 4001. Methods of adequate protection include periodic cash payments, additional or replacement liens, or the "indubitable equivalent." 11 U.S.C. § 361 (1988). *In re* Environmental Waste Control, Inc., 125 B.R. 546 (N.D. Ind. 1991), is an example of a case in which the court relaxed the enforcement of the adequate protection provisions in favor of environmental cleanup. The district court ordered a debtor to use estate property for environmental cleanup. *Id.* at 546-47. A secured creditor objected on the basis of adequate protection. *Id.* at 552. The court held that "[the secured creditor's] position regarding its priority over the estate's assets must yield in light of the competing environmental harms." *Id.*

86. 469 U.S. 274 (1985). The State of Ohio obtained an injunction ordering Kovacs, on behalf of Chem-Dyne Co. and in his individual capacity as its CEO, to clean up certain industrial and hazardous waste disposal sites and to pay $75,000 to the state for injury to wildlife and other violations. *Id.* at 275-76. Kovacs failed to comply with the injunction and the state appointed a receiver to take possession of all of Kovacs' property and other assets in order to begin cleanup of the sites. Kovacs filed for Chapter 7 bankruptcy before the cleanup was completed. *Id.*

The Supreme Court granted certiorari to determine the dischargeability of Kovacs' obligation under the injunction and affirmed the holding of the Sixth Circuit Court of Appeals against the state. *Id.* at 285.

87. *Id.* at 284-85.

88. 469 U.S. at 283.

89. *Id.* at 276, 282.

90. 118 B.R. 19 (Bankr. S.D.N.Y. 1990).

91. Section 105(a) provides:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (1988).

92. 118 B.R. at 23.

that such proposed litigation would be an unnecessary expense of the debtor's estate since the State of Minnesota and the debtor were cooperating to effectuate cleanup.[93]

The trend favoring environmental cleanup indicates that the EPA's Superfund claims will survive the automatic stay provisions of the Code.[94] Private party claims and actions generally are stayed under the Code because the police power exception to the automatic stay does not apply.[95]

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93. *Id.* The legislative history of § 362(a)(1) suggests that environmental litigation falls within the exception for governmental actions (*i.e.*, the police power exception), but only as to non-monetary judgments. This restrictive application of the exception to non-monetary judgments would only avoid giving the governmental unit preferential treatment concerning money judgments to the detriment of all other creditors. Therefore, claims brought by the government for reimbursement of environmental response costs should not be exempt from the automatic stay unless the governmental unit is suing a debtor for future costs of "environmental protection." S. REP. No. 989, 95th Cong., 2d Sess. 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838.

94. Phelan, *supra* note 33, at 636. The majority of courts do not apply the automatic stay to environmental claims based on two different lines of reasoning. One line of reasoning suggests that the EPA's efforts to recover response costs are pecuniary in nature and therefore cannot be collected in bankruptcy. *See* United States v. Nicolet, 857 F.2d 202, 210 (3d Cir. 1988) (holding that the automatic stay does not preclude claims due to the police power exception that allows for recovery of CERCLA response costs); *In re* Commerce Oil Co., 847 F.2d 291, 297 (6th Cir. 1988) (precluding application of automatic stay to claims under the Tennessee Water Quality Control Act that were within the police power exception to the automatic stay).

Other courts have reasoned that the Superfund was enacted "to protect the health, safety, and welfare of the public," rather than for financial or pecuniary reasons, and therefore the automatic stay does not apply. *See, e.g.*, United States v. Mattiace, Inc., 73 B.R. 816, 819 (E.D.N.Y. 1987) (citations omitted).

A minority of courts apply the automatic stay to environmental claims, as well as to all other claims in bankruptcy. *See* United States v. Standard Metals Corp., 49 B.R. 623, 625 (D. Colo. 1985) (requiring United States to collect fine payable under the Clean Water Act in bankruptcy court); Thomas Solvent Co. v. Kelley (*In re* Thomas Solvent Co.), 44 B.R. 83, 88 (Bankr. W.D. Mich. 1984) (applying automatic stay to order requiring site owner to remediate contaminated ground water if site owner converted case to Chapter 7 liquidation); United States v. Johns-Manville Sales Corp., 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,310, 20,311 (D.N.H. 1982) (applying the automatic stay because the order required "the expenditure of substantial funds," which is the equivalent of a money judgment and therefore prohibited).

95. Abandonment is another bankruptcy issue which conflicts with CERCLA. Section 554(a) of CERCLA concerns abandoned property of the bankruptcy estate, not abandonment of liabilities including those levied by CERCLA. *See generally* DOUGLAS BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 591 (2d ed. 1990) [hereinafter CASES, PROBLEMS, AND MATERIALS]. Consequently, abandonment of property will not relieve the owner of liability, just as sale to a third party does not. CERCLA § 107, 42

E. *Successor Liability*

Corporations, to avoid reimbursing the EPA for response costs resulting from CERCLA liability, allege that successor

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U.S.C. § 9607 (1988). Environmental laws require parties to maintain property and take security measures such as fencing and securing barrels. Trustees often abandon property to avoid such costly measures and escape liability. *See* CASES, PROBLEMS, AND MATERIALS, *supra*, at 592. One commentator "wonders by what rationale property that cannot be abandoned outside bankruptcy may be abandoned inside bankruptcy." Losch, *supra* note 22, at 150.

The Supreme Court addressed the abandonment issue in Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986). The Court held that the trustee's "absolute" power to abandon property of little value and subject to a state court order of cleanup was subordinate to the need to protect the public health and welfare. *Id.* at 501. The Court further stated:

> The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety. . . . [A] trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.

Id. at 507 (footnote omitted).

After *Midlantic*, courts have struggled to determine whether a threat to the public health and safety is necessary to restrict the trustee's power to abandon property or whether a mere violation of an environmental law designed to protect the public from "imminent and identifiable harm" is enough to trigger restrictions. *Midlantic* requires a threat to the public health and welfare before courts will impose limitations on abandonment power. *In re* FCX, Inc., 96 Bankr. 49, 55 (Bankr. E.D.N.C. 1989).

Full compliance with all environmental laws prior to abandonment is not always necessary. A minority of courts hold that abandonment is prohibited unless there is full compliance with environmental laws unless such compliance is so onerous as to interfere with the adjudication of the bankruptcy process. *See, e.g., In re* Peerless Plating Co., 70 B.R. 943 (Bankr. W.D. Mich. 1987) (applying the minority rule and finding that the depletion of the estate due to compliance with CERCLA was not onerous under *Midlantic*).

The Minnesota Bankruptcy Court in *In re* Franklin Signal Corp., 65 B.R. 268 (Bankr. D. Minn. 1986), enunciated several factors to determine whether abandonment may be allowed based upon the amount and type of funds available for cleanup. The factors are: "1) the imminence of danger to the public health and safety, 2) the extent of probable harm, 3) the amount and type of hazardous waste, 4) the cost to bring the property into compliance with environmental laws, and 5) the amount and type of funds available for cleanup." *Id.* at 272.

One court went so far as to state that "the trustee cannot be ordered to comply with a cleanup obligation that he does not have the financial resources to satisfy." *In re* Microfab, 105 B.R. 161, 169 (Bankr. D. Mass. 1989). In *Microfab*, the court found that even if the trustees expended all of the estate's assets on compliance, the cleanup would still be underfunded. Additionally, there was no assurance that the trustee would thereby "significantly improve the condition of the Site." The court, therefore, permitted abandonment. *Id.*

liability does not exist under CERCLA.[96] However, in *Louisiana-Pacific Corp. v. Asarco, Inc.*,[97] the Ninth Circuit held that, although Congress failed to address specifically the issue of corporate successor liability in CERCLA, Congress intended for successor liability to apply.[98] Whether the successor corporation is liable for all of the environmental liabilities of the predecessor corporations depends upon the manner in which such corporations were acquired.[99] Likewise, the issue of whether property laden with environmental liabilities must be transferred with such liabilities depends upon the interpretation of CERCLA.[100]

In *United States v. Distler*,[101] the United States District Court for the Western District of Kentucky also addressed the issue of corporate successor liability under CERCLA section 107(a)(3).[102] The court applied the doctrine of successor liability, which extends liability under CERCLA to include successor corporations that the statute does not cover expressly.[103] The court imposed such liability to further CERCLA's remedial purpose. The traditional doctrine of successor liability imposes liability assuming the corporation and its shareholders are separate beings, and therefore, when corporate stock changes hands, the corporation's obligations are not affected.[104]

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96. *See, e.g.*, Anspec Co. v. Johnson Controls, Inc., 734 F. Supp. 793, 795-96 (E.D. Mich. 1989).

97. 909 F.2d 1260 (9th Cir. 1990).

98. *Id.* at 1263. *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91-92 (3d Cir. 1988). *See also In re* Acushmet River & New Bedford Harbor Proceedings Re Alleged PCB Pollution, 712 F. Supp. 1010, 1013 (D. Mass. 1989). *But see* Anspec Co. v. Johnson Controls, Inc., 734 F. Supp. 793, 795-96 (E.D. Mich. 1989) (holding that successor liability does not exist under CERCLA).

99. Susan M. Girard, Casenote, *An Expansion of Corporate Successor Liability Under CERCLA*: United States v. Distler, 3 VILL. ENVTL. L.J. 205, 216-17 (1992).

100. *Id.* at 220-21.

101. 741 F. Supp. 637 (W.D. Ky. 1990).

102. This case is one of first impression as to the application of the doctrine of successor liability pursuant to CERCLA. *Id.* at 640.

103. *Id.* at 643. The traditional doctrine of successor liability imposes liability on the purchaser of assets only to the extent of liabilities expressly assumed by the purchaser. *Id.* at 642-43. *Distler* expanded the application of this "mere continuation" exception by eliminating the continuity of shareholder interest requirement. Andrew S. Hogeland & Mary Griffin, *Environmental Liabilities of Successor and Parent Corporations Under CERCLA*, 35 BOSTON BUS. J. 6 (1991).

104. Girard, *supra* note 99, at 207.

A corporation can transfer ownership in four ways: 1) a sale of its stock; 2) a sale of its assets; 3) a merger; or 4) a consolidation. *See generally* 19 AM. JUR. 2D *Corporations* § 2503 (1986). Generally, when a sale of stock, a merger, or a consolidation occurs, the liabilities of the previous ownership are

Some courts have adopted a version of the "mere continuation" exception, referred to as the "continuity of business enterprise" exception or "substantial continuity" exception.[105] Courts have employed the following factors to determine whether such an exception applies: (1) whether the successor retains the same employees, the same supervisory personnel, and the same production facilities; (2) whether it produces the same products; (3) whether it retains the same name; (4) whether it maintains continuity of assets and general business operations; and (5) whether the successor corporation holds itself out to the public as a continuation of the previous corporation.[106] Although the status of successor liability under CERCLA is unclear, it appears that most courts uphold such liability to further Congress' objective to make the responsible parties pay for their environmental misdeeds.

The EPA's current approaches, including the equity stake approach, for obtaining response cost reimbursement do not solve the conflict between the Code and CERCLA. The EPA currently must conduct extensive negotiation with the debtor(s),[107] but this is of little aid to the EPA as a solution in bankruptcy. Therefore, a proposal is needed that will resolve the conflict between the two statutes. Creating a non-lien "superpriority" status to be applied both inside and outside of bankruptcy will result in just such a resolution.

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not retained by the new corporate entity. 15 WILLIAM M. FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 7122-7123 (perm. ed. rev. vol. 1990).

Common law provides that the scope of successor corporation liability is dependent upon the type of transaction used by the corporation and its successor. *Id.* § 7122. For example, when a corporation buys the assets of another it is liable only to the extent of the liabilities expressly assumed in the acquisition agreement. *Id.* There are several exceptions, including (1) when there has been an express or implied assumption of liability by the purchasing corporation; (2) when the transaction amounts to an actual or de facto merger; (3) when there is evidence that the transfer was fraudulent or lacking in good faith; or (4) when the transferee corporation is a mere continuation of the transferor. *Id.*

105. *See, e.g.*, Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 175 (5th Cir. 1985) (enumerating factors to consider when applying the continuous business enterprise exception); Cyr v. B. Offen & Co., 501 F.2d 1145, 1153-54 (1st Cir. 1974) (finding successor corporation liable because it was "carrying on with the manufacture and servicing of the same line of equipment").

106. Louisiana-Pacific Corp. v. Asarco, 909 F.2d 1260, 1265 n.7 (9th Cir. 1990) (citing factors enumerated in *Mozingo*, 752 F.2d at 175).

107. Moses, *supra* note 24, at B7 (quoting Martin Baker, an environmental attorney at Stroock & Stroock & Laven in New York); see also *supra* note 38 and accompanying text for a discussion of substantial delay in reorganization due to failing negotiations.

IV. WHY CERCLA'S CURRENT REIMBURSEMENT PROCEDURE IS INADEQUATE

CERCLA and SARA authorize the EPA to obtain reimbursement for costs expended from the Superfund, but they do not give the EPA an enhanced status claim.[108] Therefore, the EPA often is treated like any other unsecured creditor.[109] The EPA is not the same as an ordinary unsecured creditor because it neither solicited the debtor nor bargained to extend credit. Consequently, the Code should not treat the EPA as an unsecured creditor that bargained for the inherent risk of collection.[110]

Commentators previously have suggested that the Bankruptcy Code should be amended to provide the EPA with a special priority claim in bankruptcy.[111] However, this approach has several problems. First, the EPA's actions against companies that liquidate rather than file for bankruptcy would not be helped by the priority.[112] While many of the EPA's claims are against debtors in bankruptcy,[113] the majority of its claims are

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108. Some claims are given administrative priority, such as CERCLA § 106 claims. However, most claims are treated as unsecured claims. See *supra* notes 60-70 and accompanying text for a discussion of the priority of CERCLA claims.

109. See *supra* notes 69-70 and accompanying text for a discussion of the courts' treatment of this issue.

110. In *Chateaugay Corp.*, the PBGC contended that it should be treated as the equivalent of a federal taxing authority and receive a seventh priority position in bankruptcy. 115 B.R at 778. The court rejected this position because the automatic stay prevented PBGC's claims from ripening into liens, and therefore the corporation's claims did not have the status of tax claims (7th priority) under § 507(a)(7)(A) of the Bankruptcy Code. The court found that the underlying claim at issue should not automatically receive tax priority status simply because the PBGC is authorized to create a lien similar to a federal tax lien. *Chateaugay*, 115 B.R. at 779. In addition, ERISA claims are not included in the detailed list of § 507(e)(7) of the Bankruptcy Code, nor is there any indication in the legislative history of § 507 that Congress intended to grant PBGC liens seventh priority. *Id.* The Supreme Court agreed in Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990), and held that the PBGC should be treated like an unsecured creditor.

111. McBain, *supra* note 58, at 234. Commentators have advocated the same approach for the PBGC. *See, e.g.*, David Levin, *Pension Corporation Once Again Confronts Serious Fiscal Woes*, LEGAL TIMES, July 27, 1987, at 32 (advocating that Congress create a bankruptcy priority for the PBGC); *see also* Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65, 92 n.154 (listing commentators who recommend amendment of the Bankruptcy Code to create a priority for PBGC).

112. Keating, *supra* note 111, at 92.

113. See *supra* note 23 and accompanying text noting an estimate that almost one-third of all environmental claims will be against corporations in bankruptcy.

against corporations outside of bankruptcy. Therefore, an approach that provides a priority to the EPA exclusively in bankruptcy is not adequate.

Additionally, such an amendment would result in conflict between the EPA and private creditors. The EPA would encourage debtors to file bankruptcy to ensure that it would receive a priority status. Conversely, the independent creditors would attempt to deter such a filing even when a Chapter 11 reorganization would be the most effective means of distributing assets.[114] The problem with bankruptcy avoidance is that state debtor-creditor law is a "race" to the courthouse.[115] Because each creditor is self-centered, it is unlikely that a reorganization will occur outside of bankruptcy[116] — even if it would mean better results for the creditors as a group.[117]

Chapter 11 reorganizations ensure that a corporation's assets are put to their best use.[118] Unlike creditor arrangements outside of bankruptcy, Chapter 11 prevents single creditors from refusing to participate and thereby preventing the corporation from reorganizing.[119] In addition, the automatic stay[120] prevents piecemeal liquidation after the debtor files the petition.[121]

In response to the conflicting purposes of CERCLA and the Code, the *Chateaugay* court stated that:

> If the Code, fairly construed, creates limits on the extent of environmental cleanup efforts, the remedy

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114. Keating, *supra* note 111, at 94.

115. *Id.* at 93.

116. A nonbankruptcy "workout" is based upon each party's perception of its position in a Chapter 11 reorganization, and consequently, a Chapter 7 liquidation. WARREN & WESTBROOK, *supra* note 19, at 434. *See also supra* note 32 and accompanying text.

117. Keating, *supra* note 111, at 93.

118. Filing for bankruptcy creates an estate containing, with limited exceptions, "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1988).

119. A creditor may elect not to file a claim in the bankruptcy, 11 U.S.C. § 501(a) (1988) (creditor "may" file proof of claim), but only "claimants" are entitled to distribution from the estate in a chapter 7 case or from the post-confirmation debtor in a confirmed chapter 11 reorganization.

Keating, *supra* note 111, at 94 n.158 (citing 11 U.S.C. §§ 726, 1141 (1988)).

Debtors are considered to have "prepackaged" Chapter 11 cases when they have already negotiated an acceptable agreement with their creditors before the petition is filed, but need the help of the bankruptcy law to overcome one or more intolerant creditors. WARREN & WESTBROOK, *supra* note 19, at 435. Intolerant creditors, who ordinarily present insurmountable obstacles outside of Chapter 11, can be outvoted by the accepting creditors in the same class and thereby coerced into accepting the plan. *Id.*

120. *See supra* notes 71-93 and accompanying text.

121. *See* BAIRD, *supra* note 19, at 195.

> 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 a bankruptcy law in order to promote objectives evident in more focused statutes.[122]

The *Chateaugay* court is absolutely right. Congress must remedy the conflict between CERCLA and the Code to achieve an objective favorable to the EPA.

A. *Proposal: An EPA Superpriority Status*

This Note proposes that Congress mandate that corporations with CERCLA liabilities shall not transfer any assets until the EPA's reimbursement claim is completely satisfied.[123] Under such a statute, the EPA would be given the authority to enjoin a corporation from transferring its assets until the agency's reimbursement claim was satisfied in full. Consequently, private creditors of the company would be prevented from levying and selling assets of the corporation to satisfy their debts until the EPA received payment for its reimbursement claim.

The statute should be subject to two limitations. First, the statute would only apply prospectively.[124] This would protect the interests of the current secured creditors.[125] Second, the EPA's superpriority status would be subordinate to any purchase-money security interest.[126] Purchase-money security interests allow the use of money in return for a security interest in the purchased property.[127] Without security in the purchased collateral, the debtor would not be able to obtain the loan.

The commerce clause authorizes Congress to create a statute that would preempt state-law property rights.[128] In fact, this would not be the first time that Congress has used the commerce clause to grant a superpriority position to a specific creditor class. The Fair Labor Standards Act (FLSA)[129] entitles workers of a company to a first-priority lien for the amount of any

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122. *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991).

123. *Cf.* Keating, *supra* note 111, at 100 (proposing that the reimbursement claim of the PBGC be satisfied fully before a company with a terminated pension program can transfer assets).

124. *Id.*

125. *Id.*

126. *Id.*

127. U.C.C. § 9-107 (1977).

128. U.S. CONST. art. I, § 8, cl. 3.

129. 29 U.S.C. § 202(b) (1988) (stating that Congress' authority to enact the FLSA derived from "its power to regulate commerce among the several States and with foreign nations").

unpaid federal minimum wage. If workers are not paid, the Secretary of Labor may request a court to enjoin the sale of the firm's goods until the unpaid workers are paid at least the minimum wage for the work performed.[130]

The superpriority statute also would state specifically that the EPA's superlien is superior to secured creditors.[131] Finally, the statute would govern in bankruptcy proceedings as well as outside bankruptcy.[132] Although Congress did not mandate such provisions in the FLSA, courts have interpreted the statute to allow priority over secured creditors, and to apply in bankruptcy.[133]

B. *Advantages of the Proposal*

The primary advantage of the proposal is that CERCLA's objectives — to protect the public health and welfare and the environment[134] — are at least as significant as the objective that Congress used to enact the FLSA superpriority status. One of FLSA's purposes is to ensure that workers receive the federal minimum wage.[135] CERCLA's objective is much more expansive because it protects the public's health and welfare.[136] CERCLA's important objective deserves to receive a superpriority status to ensure that the Superfund will continue to protect the public.

Second, a superpriority statute would prevent corporations from entering bankruptcy unnecessarily because they would no longer have an advantage over those corporations outside of bankruptcy.[137] The statute would also further reduce the "moral hazard"[138] of corporations that do not take the necessary pre-

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130. 29 U.S.C. §§ 206(a)(1), 207(a)(1), 215(a)(1) (1988 & Supp. IV 1992).

131. Keating, *supra* note 111, at 104.

132. *Id.*

133. In Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27 (1987), the Supreme Court prohibited secured creditors from selling their collateral until the company complied with the FLSA.

134. *See supra* note 5 and accompanying text.

135. 29 U.S.C. § 206(b) (1988).

136. 42 U.S.C. § 9604(a)(1) (1988).

137. See *supra* notes 33-93 and accompanying text for a discussion of the current advantages of bankruptcy and the Code's conflict with CERCLA.

138. The term "moral hazard" has been used by commentators to describe the situation in which the federal government "insures" parties, such as the FSLIC and the PBGC, against certain risks, such as underfunded banking reserves and pension plans, so that the parties have a decreased incentive to take precautionary measures to avoid the risks of underfunding such plans. *See generally* James R. Barth et al., *Moral Hazard and the Thrift Crisis: An Empirical Analysis*, 44 CONSUMER FIN. L.Q. REP. 22 (1990); Donald R. Deere, Note, *On the Potential for Private Insurers to Reduce the Inefficiencies of Moral Hazard*, 9 INT'L REV. L. & ECON. 219 (1989); Richard S. Higgins,

cautions to prevent the release or potential release of hazardous waste into the environment. Although hazardous waste will continue to exist, corporations will be more prudent in their disposal because the statute will prevent them from discharging the majority of their liability in bankruptcy.[139]

Third, private creditors will have more incentive to examine the existing CERCLA liabilities, as well as potential environmental liabilities of corporations, and therefore price their goods and services accordingly.[140] Banks and lending organizations will use their knowledge about the particular industries in which they are involved to determine the terms of their loan agreements.[141] Trade creditors similarly will use information acquired through repeated dealings with customer corporations concerning the different industries, corporations, and the financial status of corporations.[142] Consequently, creditors are likely to be aware of environmental liabilities. For example, financially unstable corporations involved in risk-bearing industries[143] are likely to have numerous liabilities, including those CERCLA imposes. Creditors would be aware that their claims were subordinate to CERCLA and would insist that the corporation reimburse the EPA for their CERCLA liabilities before they would extend credit for goods or services. Such creditor demands would be equivalent to the private creditors monitoring the industry to ensure that the EPA is reimbursed for CERCLA liabilities.[144]

C. *Potential Criticism of the Proposal*

This proposal may result in criticism concerning whether private creditors would assume the risk of being subordinated

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Products Liability Insurance, Moral Hazard, and Contributory Negligence, 10 J. LEGAL STUD. 111 (1981); Keating, *supra* note 111, at 67-68.

The concept of "moral hazard" can also be applied to CERCLA. PRPs may be less efficient in their disposal of hazardous waste when they know that other PRPs exist and will have to contribute to the cleanup if and when such time occurs. Likewise, corporations and the public at large rely on the EPA, CERCLA, and the Superfund to authorize, fund, and perform environmental cleanup. Without such an "insurance agency" to fall back on, one wonders if PRPs would be more cautious in their handling, storage, and disposal of hazardous wastes.

139. See *supra* notes 20-23, 33-93 and accompanying text discussing the refuge that debtors currently find in bankruptcy.

140. Keating, *supra* note 111, at 102.

141. *See* Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 100 (1985).

142. *See* Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1160-61 (1979).

143. Risk-bearing industries include chemical and industrial corporations. Barr, *supra* note 2, at 923.

144. Keating, *supra* note 111, at 104 (discussing the subordination of secured creditors to the state's cost of cleanup under superlien statutes).

to the EPA's reimbursement claim. Unsecured creditors are already subordinated to most claims, including secured claims, administrative expenses, and priority claims such as federal tax claims. Therefore, they have already accepted the risk of extending credit to corporations with the knowledge that their claims are subordinate to a vast number of others.[145]

Moreover, there are existing legal doctrines similar to this proposed solution that have not eliminated private creditors from extending credit to corporations. One significant example is the state "superlien" statute.[146] Six states currently have superlien statutes that subordinate even fully-perfected secured creditors to the state's expenses of hazardous waste cleanup.[147] Also, case law holds secured lenders fully responsible for the environmental cleanup of land on which it has a security interest.[148] Thus, trade creditors and lending institutions still will be willing to extend credit to corporations, while the inherent CERCLA risks will simply be reflected in the cost of the goods and services provided.

CONCLUSION

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Bankruptcy Code currently are unclear as to the existence of CERCLA claims and their priority status in bankruptcy. Many corporations take advantage of this disparity and declare bankruptcy in an effort to escape CERCLA liability. The EPA's recent approach of acquiring an equity stake in a successor corporation does not solve the existing problem. Congress must enact a statute that gives CERCLA claims a superpriority status both inside and outside of bankruptcy. By doing so, corporations will no longer seek protection

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145. See *supra* notes 60-70 and accompanying text for a discussion of the priority of claims in bankruptcy, in particular the courts' position as to the current priority of CERCLA claims in bankruptcy.

146. The discussion of state superlien statutes is beyond the scope of this Note. *See generally* Ballantine, *supra* note 34 (discussing state superlien statutes).

147. Donald W. Stever, *ECRA and Other Restrictions on the Transfer of Hazardous Waste Sites*, *in* THE IMPACT OF ENVIRONMENTAL REGULATIONS ON BUSINESS TRANSACTIONS 163, 168-69 (PLI Real Estate Law & Practice Course Handbook Series 1988).

148. *See generally* Roslyn Tom, Note, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 929 (1989) (stating that a court interpreting CERCLA held secured creditors liable for cleanup costs if they participated excessively in the management of the contaminated site in which they had a security interest). The discussion of secured lenders' liability is beyond the scope of this Note.

from such claims in bankruptcy, and the EPA will be reimbursed for the funds expended from the Superfund.

*Susan J. Zook**

* J.D. 1994, Washington University.

RECENT DEVELOPMENTS