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The Case for a Bankruptcy Code Priority for Environmental Cleanup Claims

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THE CASE FOR A BANKRUPTCY CODE PRIORITY FOR ENVIRONMENTAL CLEANUP CLAIMS

GARY E. CLAIR†

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I. INTRODUCTION

Two important federal policies are headed for a collision at the crossroads of environmental law and bankruptcy law. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)¹ evidences congressional intent that the costs of cleaning up hazardous waste should be assessed against those responsible for creating that waste. When the party responsible for creating hazardous waste files a petition in bankruptcy, however, the goals of CERCLA are in direct conflict with the policy of providing a debtor with a "fresh start" under the Bankruptcy Code.² This article proposes that the conflict be resolved by amending the Bankruptcy Code to grant a priority in the distribution of a debtor's assets to environmental cleanup claims.

Part I of this article describes the current conflict between environmental cleanup and bankruptcy legislation. Part II discusses the Bankruptcy Code priority scheme, paying close at-

1. CERCLA §§ 101-75, 42 U.S.C. §§ 9601-75 (1988). The Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA, imposes liability against those who release hazardous substances into the environment for the full cleanup costs.

2. See Title I of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-589, 92 Stat. 2549 (codified as amended at 11 U.S.C. § 101-1330 (1988)).

tention to the treatment of priority claims of governmental units. Part III analyzes CERCLA liability and suggests that the Bankruptcy Code drafters neither anticipated nor accounted for liability of this new and unique type. Part IV examines the wide range of possible priority levels for cleanup claims under the current bankruptcy law. Part V argues that a fixed and predictable level of priority for cleanup claims would better serve the interests of both environmental enforcers and creditors. Finally, Part VI proposes specific amendments to the Bankruptcy Code which would establish a new priority for cleanup claims and take a critical step toward harmonizing the competing federal interests behind CERCLA and the Bankruptcy Code.

II. THE CROSSROADS

With the passage of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA),³ Congress ushered in a powerful array of measures to remedy the growing problem of hazardous waste contamination.⁴ CERCLA provides for the prompt cleanup of hazardous waste sites with money from the federal "Superfund."⁵ After cleanup, liability for cleanup expenditures is imposed jointly and severally upon any or all potentially responsible parties (PRPs).⁶

Cost recovery from PRPs is CERCLA's critical feature. Cost recovery instills in the business community a high level of environmental consciousness. But most importantly, it evidences

3. CERCLA §§ 101-57, 42 U.S.C. §§ 9601-57.

4. Many states have enacted "mini-Superfund" statutes, analogous to CERCLA. However, this article discusses CERCLA as a paradigmatic example of environmental cleanup legislation. It does not address the particular differences among the various state analogues or the problems of interagency jurisdiction. The general term "cleanup claims" refers to cost recovery claims that may arise under either CERCLA or state superfund statutes.

5. See *infra* part II-B. See also 26 U.S.C. § 9507 (1988). The Hazardous Substance Response Trust Fund was originally promulgated as a part of CERCLA. See CERCLA § 221, 42 U.S.C. § 9631, *repealed by*, Superfund Revenue Act of 1986, Pub. L. No. 99-499, § 517(e), 100 Stat. 1772, 1773-74, *amended by*, Pub. L. No. 101-508, Title XI, § 11231(d), 104 Stat. 1388-45. In 1986, however, the maintenance of the Superfund was turned over to the Internal Revenue Service. *Id.* The current Superfund is funded by environmental taxes, monies recovered from CERCLA violators, monies recovered from violators of the Clean Water Act, and by money appropriated by the United States Treasury. 26 U.S.C. § 9507.

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

Congress' explicit policy choice not to "socialize" the costs of environmental cleanup in any way.⁷ Ultimately, the full costs are to be borne by the private polluters.⁸ Congress apportions none of the federal fisc to environmental cleanup except for that which is used to maintain the Superfund and to facilitate early responses to environmental hazards.⁹ Although CERCLA does create the possibility that a disproportionately large share of liability might be imposed on a PRP who is only remotely related to an environmental hazard,¹⁰ this contingency is part and parcel of the will of the enacting Congress.

Yet cost recovery from PRPs, so critical to CERCLA, is jeopardized in cases where PRPs avail themselves of another of Congress' powerful federal remedies: relief from debt and a "fresh start" under the Bankruptcy Code.¹¹ The Bankruptcy Code strives to give claimholders with equal legal rights equal shares in the distribution of the debtor's estate.¹² Only where there is a special need for a full recovery have certain types of claims been granted a statutory priority in distribution.¹³ One such priority is for certain "allowed unsecured claims of governmental units."¹⁴ As drafted, however, this priority covers only specifically enumerated claims for taxes and customs du-

7. See, e.g., Murray Drabkin et al., *Bankruptcy and the Cleanup of Hazardous Waste: Caveat Creditor*, 15 *Env'tl. L. Rep.* 10168 (1984).

8. CERCLA § 107(a), 42 U.S.C. § 9607(a). This section provides that: [o]wners and operators of vessels or facilities, now or at the time of disposal of hazardous waste, and any persons who completed or arranged for disposal, treatment or transport of hazardous waste shall be liable for all costs incurred by the government or others for removal or remedial action or other costs and for damages caused to or destruction of any natural resources and for any and all health assessment or health effects studies completed.

Id.

9. See 26 U.S.C. § 9507(a). The Treasury of the United States is authorized to appropriate in excess of \$250,000,000 for environmental cleanup during each year from 1987 until 1995. See Superfund Revenue Act of 1986, Pub. L. No. 99-499, § 517(b), 100 Stat. 1772, amended by, Pub. L. No. 101-508, Title XI, § 11231(d), 104 Stat. 1388-1445 (1990).

10. See Drabkin, *supra* note 7, at 10170. Innocent PRPs may be held solely liable when a culpable PRP is found judgment proof because courts have uniformly determined that all PRPs are jointly and severally liable.

11. See Title I of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-589, 92 Stat. 2549 (codified as amended at 11 U.S.C. § 101-1330 (1988)).

12. See, e.g., 11 U.S.C. § 726(b) (1988) ("Payment on claims of a kind . . . shall be made pro rata among claims of the kind.").

13. 11 U.S.C. § 507. See also *infra* part II-A. for discussion of statutory priority in distribution.

14. 11 U.S.C. § 507(a)(7).

ties; it does not mention compensatory government claims,¹⁵ environmental or otherwise. Thus, cleanup claims appear to receive regular treatment under the Bankruptcy Code: the claim is impaired, the government receives a share in the debtor's distribution, and the claim is discharged.

However, certain aspects of cleanup claims suggest that they *are* in special need of a full recovery and should be granted priority. Impairment of a cleanup claim affects more than the economic fate of the claimant; it also compromises the entire national cleanup effort by diminishing the Superfund. Regular debt treatment for cleanup claims does not show adequate comity for the specific policies behind the environmental laws, especially CERCLA. Furthermore, cleanup claims seem at least as deserving of special treatment as the prioritized tax claims.¹⁶ Like tax claims, cleanup claims are obligations arising from a statute. Thus, they are closely akin to other affirmative, non-monetary statutory obligations which are not avoidable by a debtor's resort to the bankruptcy process.¹⁷

On the other hand, cleanup claims tend to be very large and lay a greater claim on the bankruptcy estate than do tax claims or the other priority claims. If cleanup claims are accorded special treatment in bankruptcy, other creditors will face new, incalculable risks when they lend to industries connected with hazardous waste.¹⁸ In the face of these competing concerns, it is not surprising that the bankruptcy treatment of cleanup claims has been the subject of considerable judicial controversy.¹⁹

The United States Supreme Court has warned that environmental obligations cannot merely be cast aside in bankruptcy.²⁰ Some lower courts have found in the spirit of these

15. Compensatory claims are those in which the government seeks reimbursement from private parties for direct government outlays. See 11 U.S.C. § 507.

16. See 11 U.S.C. § 507(a)(7). The prioritized tax claims include: 1) income taxes for taxable year ending on or before petition date, 2) taxes assessed within 240 days during which an offer of compromise has been made within 240 days after assessment, 3) taxes other than for which a return was not filed, 4) property taxes assessed before commencement of the case, 5) taxes required to be collected or withheld and for which debtor is liable, 6) employment taxes, and 7) certain excise taxes. *Id.*

17. See *infra* notes 51-58 and accompanying text.

18. Drabkin, *supra* note 7, at 10180.

19. See *infra* part V, which discusses various judicial approaches to the treatment of claims.

20. This warning has been given in two cases concerning affirmative cleanup orders, not monetary cleanup claims. See *Midlantic Nat'l Bank v. New Jersey Dep't of*

cases a license to elevate cleanup claims to priority status as administrative expenses of the estate.²¹ However, other courts have taken a more formalistic approach and found that cleanup claims do not literally meet the Code's definition of administrative expenses.²² In these cases, cleanup claims have been relegated to general unsecured status.²³

Furthermore, the Bankruptcy Code, under certain circumstances, does not seem to preclude the possibility of even more extreme resolutions to this problem, ranging from entirely barring cleanup claimants from participating in a bankruptcy distribution²⁴ to granting them an unassailable place first in line.²⁵ If these plausible theories gain judicial approval, the spectrum of possible bankruptcy treatments for cleanup claims will become wider and more complicated.

In practice, the confusion over the proper priority for cleanup claims in bankruptcy puts unnecessary burdens and risks on debtors, creditors, and environmental agencies alike. All parties need a predictable and consistent rule which will give proper deference to the environmental policy goals at stake. Such a rule, however, is unlikely to arise from further judicial manipulation of the existing priority rules. The Bankruptcy Code, as is, simply does not accommodate the unique and unforeseen problems of cleanup claims.

This commentator feels that the Bankruptcy Code should be amended to grant priority to environmental cleanup claims. There are three reasons for this proposal. The first reason is historical. The absence of such a priority from the Bankruptcy Code should not be interpreted as a determination by the drafters that cleanup claims are undeserving of priority. Rather, the omission seems to have arisen from the simple failure of the drafters to foresee the arrival of claims of this unique type. Only since the adoption of CERCLA in 1980 have environmental obligations come in the form of monetary,

Envtl. Protection (*In re Quanta Resources*), 474 U.S. 494, 502 (1986) ("[T]he trustee is not to have *carte blanche* to ignore non-bankruptcy law."); *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985) ("[W]e do not question that anyone in possession of the site . . . must comply with the environmental laws of the State of Ohio.").

21. See *infra* note 103 and accompanying text.

22. See *infra* notes 105-106 and accompanying text.

23. See *infra* notes 105-106 and accompanying text.

24. See *infra* part IV-C for discussion on the problem of categorizing cleanup claims under the Bankruptcy Code.

25. See *infra* part IV-A.

compensatory debts.²⁶ When the bounds of the priority for governmental unit claims were drawn, nothing comparable to today's CERCLA cleanup claim was in existence.

The second reason is grounded in comity. Congress has unequivocally decided to place the costs of environmental cleanup on private enterprise.²⁷ Yet the Bankruptcy Code threatens to recast a share of these costs upon the government in some cases.²⁸ To solve this conflict of federal policies, the more general principles of debt relief must bend to accommodate the more specific objectives of hazardous waste policy.

The third reason is grounded in pragmatism. Concerns about grave repercussions in the lending community that would result from the government's priority recovery cannot continue to hold sway. Large environmental liabilities have become a fact of life in the many industries connected with hazardous waste. It is no longer reasonable or fair to assume that lenders and credit markets cannot or should not account for the risks associated with the possible environmental obligations of borrowers.

III. THE BANKRUPTCY CODE PRIORITIES

The Bankruptcy Code priority rules contemplate a distribution of the debtor's assets in a Chapter 7 liquidation. However, the rules also come into play where the debtor is to be reorganized, since, in Chapter 11, a proposed plan of reorganization can be defeated by any single claimant who shows that he or she would have received more in a liquidation

26. See CERCLA § 107(a), 42 U.S.C. § 9607(a). A violator is liable for all costs of removal or remedial action incurred by the United States, a state or Indian tribe not inconsistent with the National Contingency Plan, any other necessary costs of response incurred by any other person consistent with the National Contingency Plan; damages for injury to or loss of natural resources; and costs of health assessment or health effects study carried out under section 9604(i). *Id.*

27. See CERCLA § 107(c), 42 U.S.C. § 9607(c). This section provides a cap to monetary liability for each release of hazardous material unless: the release was the result of willful misconduct or negligence; the primary cause of the release was a violation of applicable safety, construction, or operation standards; or the party fails to provide reasonable cooperation and assistance requested by a public official. *Id.* This section also authorizes the United States to recover punitive damages from responsible persons who fail to properly provide remedial action in response to an order issued under section 9604 or 9606. *Id.*

28. See *infra* part IV-A for discussion of Bankruptcy Code treatment of cleanup claims.

distribution.²⁹

A. General Order of Distribution

First, the Bankruptcy Code honors the valid and perfected liens³⁰ of secured creditors. Secured creditors may recover from the proceeds of the sale of their collateral and assert unsecured claims for any collateral deficiency.³¹ Such recovery can be diminished only for the "reasonable, necessary costs and expenses of preserving, or disposing of such property to the extent of any benefit to" secured creditors.³²

Next, three main types of unsecured claims are granted priority. First, most claims which arise post-petition are deemed administrative expenses of the estate and are payable while the case is pending.³³ These include the actual, necessary costs and expenses of preserving the estate, compensation for professionals, and some post-petition taxes.³⁴ Second, various pre-petition claims of individuals such as claims for employees' wages and benefit plans, and claims for jilted consumer creditors are also elevated.³⁵ Third, certain claims of governmental units receive priority.³⁶ A reorganization plan must provide that all priority claims be paid in full upon distribution.³⁷

The rest of the unsecured claimants recover equal propor-

29. 11 U.S.C. § 1129(a)(7). This section is commonly known as the "best interests test."

30. The Bankruptcy Code broadly defines lien as: "charge against or interest in property to secure payment of debt or performance of an obligation." 11 U.S.C. § 101(33).

31. A claim is a secured claim to the extent of the value of such creditor's interest in its collateral, or to the extent of the amount subject to setoff. 11 U.S.C. § 506(a). The allowed claim is "an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim." 11 U.S.C. § 506(a). The Code further provides that "the trustee, after notice and a hearing, shall dispose of property in which an entity other than the estate has an interest, such as a lien, and that has not been disposed of under another section of this title." 11 U.S.C. § 725.

32. 11 U.S.C. § 506(c).

33. See 11 U.S.C. § 503(b) (listing allowed administrative expenses, other than those allowed under section 502(f)); 11 U.S.C. § 507(a)(1) (providing that administrative expenses allowed under section 503(b) have the highest priority of the expenses and claims listed).

34. 11 U.S.C. § 503(b)(1)(A).

35. 11 U.S.C. §§ 507(a)(3)-(6).

36. See *infra* part III-B for a discussion of the special case of governmental unit claims.

37. 11 U.S.C. § 1129(a)(9) (providing the required payment schedules for 507(a) claims).

tions of their claims, except that late claims and penalties claims are subordinated.³⁸ Subordination of a claim also can be obtained by preexisting agreement or for equitable misconduct.³⁹

B. The Special Case of Governmental Unit Claims

Bankruptcy Code § 507(a)(7) grants certain unsecured claims of governmental units priority ahead of general unsecured claims but behind the other priority claims.⁴⁰ This priority is given to income taxes, unsecured property taxes, employment-related taxes, excise taxes, and customs duties which came due post-petition or in specified pre-petition periods.⁴¹

Some governmental claims, however, especially tax claims, are often secured claims created by statutory lien provisions. For these, the Code has devised a compromise method to preserve the secured character of the claim while allowing the higher-priority unsecured claims to recover ahead of the government.⁴² In a Chapter 7 case, therefore, the unavoidable liens of the taxing authorities become a unique type of secured claim.⁴³ The liens may be satisfied out of proceeds from the sale of collateral, but the proceeds must first be applied to any extant, non-tax, unsecured priority claims.⁴⁴ In effect, the

38. 11 U.S.C. § 726(a) (providing procedures for distribution of property of the estate).

39. 11 U.S.C. § 510.

The Code states:

(a) A subordination agreement is enforceable in a case under the title to the same extent that such agreement is enforceable under applicable nonbankruptcy law.

...
(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may —

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
(2) order that any lien securing such a subordinated claim be transferred to the estate.

Id.

40. 11 U.S.C. § 507(a)(7); *see also supra* note 16.

41. 11 U.S.C. § 507(a)(7); *see also supra* note 16.

42. *See* 11 U.S.C. § 724(b).

43. Unavoidable liens include perfected tax liens which do not secure penalty claims, 11 U.S.C. § 724(a), and perfected tax liens which arose for reasons other than the debtor's insolvency or bankruptcy. 11 U.S.C. § 545.

44. 11 U.S.C. § 724(b).

Code neutralizes the reach of government lien legislation to preserve a policy that the other priority claimants, who usually are individuals and post-petition trade creditors, are in greater need of a full recovery than the government.⁴⁵

A reorganization plan must provide that priority government claims be paid in full in installments over a six-year period from the date of assessment.⁴⁶ Taxes or duties arising outside the pre-petition window can become general unsecured claims provided that the government authorities' statute of limitations has not lapsed.⁴⁷ Any governmental unit claims of a type not covered by the priority are deemed administrative expenses if they arise post-petition⁴⁸ or general unsecured claims if they arise pre-petition.⁴⁹

IV. CERCLA CLEANUP CLAIMS: UNFORESEEN AND UNIQUE OBLIGATIONS

A. *Bankruptcy Treatment of Environmental Obligations as Contemplated by the Bankruptcy Code Drafters*

It is fair to say that, in 1978, when the Bankruptcy Code drafters created the present system of debt relief, they did not contemplate its application to environmental cleanup debts. In fact, before the passage of CERCLA and the creation of the Superfund in 1980, environmental obligations rarely, if ever, came in the form of monetary claims for compensation. Even today, most environmental statutes other than CERCLA are regulatory in nature.⁵⁰ These statutes typically establish affirmative obligations, such as standards of safety, and impose non-compensatory monetary penalties for violations. These were the types of environmental obligations that were anticipated and accounted for by the Bankruptcy Code's drafters.

45. See generally 11 U.S.C. § 507 (providing the expenses and claims priority scheme used in the Code).

46. 11 U.S.C. § 1129(a)(9)(C).

47. See 11 U.S.C. § 502. Section 502 provides that claims are deemed allowed unless a party in interest objects, and allows response to the objection to the claim after judicial determination of the amount at issue. Exceptions are enumerated in the statute. *Id.*

48. 11 U.S.C. § 503(b)(1)(B).

49. See *supra* note 33 and accompanying text.

50. Federal environmental regulatory statutes include the Toxic Substances Control Act, 15 U.S.C. § 2601-71 (1988), the Clean Water Act, 33 U.S.C. § 1251-1387 (1988), the Solid Waste Disposal Act, 42 U.S.C. § 6901-92 (1988), and the Clean Air Act, 42 U.S.C. § 7401-7642 (1988).

Affirmative environmental obligations clearly were regarded as inescapable in bankruptcy. Environmental enforcement against debtors was facilitated under the Code by the inclusion of certain "governmental unit" exceptions to the automatic stay.⁵¹ The express legislative intent of such provisions was "to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety or similar police or regulatory laws."⁵² Furthermore, non-monetary obligations were not included within the Code's definition of "claim"⁵³ and thus were made non-dischargeable in bankruptcy.⁵⁴

Penalties imposed by governmental units also were accorded the privilege of being non-dischargeable in an individual's bankruptcy case.⁵⁵ During the case, however, it was felt that creditors who sustained an actual pecuniary loss were in greater need of a quick recovery than the government. Thus, the Code stays government enforcement of money judgments⁵⁶ and subordinates penalty claims to the claims of general unsecured creditors for distribution purposes.⁵⁷

The drafters also included provisions for the non-penalty, monetary claims of governmental units although, at that time, environmental agencies did not impose liabilities of this type. Thus, when the Code's drafters singled out only tax claims for

51. Governmental units are generally subject to the automatic stay. Exceptions are provided for "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), or for "the enforcement of a judgment, other than a money judgment obtained in [such] an action or proceeding." 11 U.S.C. § 362(b)(5).

52. S. REP. NO. 989, 95th Cong., 2d Sess. 52 (1978) (emphasis added).

53. 11 U.S.C. § 101(4). A claim is:

- (A) right to payment, whether or not such right is reduced to judgement, 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 a right to an equitable remedy is reduced to judgement, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Id. If, however, a non-monetary obligation can be reduced to a monetary obligation, then it is a claim within the meaning of the Bankruptcy Code. *Id.*

54. See 11 U.S.C. § 727(a) (discharge for individuals); 11 U.S.C. 1141(d) (discharge for reorganizing corporations).

55. 11 U.S.C. § 523(a)(7) (discharge exceptions include fines or forfeiture payable to the government).

56. 11 U.S.C. § 362(b)(5) (filing of petition operates as a stay for the enforcement of money judgment, but not for other judgments which enforce police or regulatory power).

57. 11 U.S.C. § 726(a)(4) (property of the bankruptcy estate is distributed to penalty claims only after unsecured claims are paid).

the governmental unit priority described above,⁵⁸ they did not pass judgment on environmental liabilities.

The drafters, when limiting the bounds of the governmental unit priority, more likely were concerned about other existing pre-petition governmental unit claims, such as those arising from government lending activity. When the government merely acts as a creditor, its claims are not deserving of priority. Unlike tax claims or cleanup claims, claims arising from government lending are contractual and consensual in nature, not obligations of statute. Failure to pay them is a breach, not a crime.

B. CERCLA Liability

With hazardous waste release becoming an increasingly threatening public health problem, the need arose for a strong remedial supplement to the environmental regulatory regime. In response, CERCLA was drafted in 1980 and the age of monetary compensatory environmental obligations was upon us.⁵⁹ CERCLA established the \$1.6 billion Hazardous Substance Response Trust Fund (Superfund) for the purpose of financing cleanups.⁶⁰ The Environmental Protection Agency (EPA) is authorized to draw from Superfund to perform cleanup at the site of any release of hazardous waste.⁶¹ Alternatively, the EPA may issue an administrative order directing a party to perform cleanup at its own expense.⁶²

When the EPA incurs response costs, a cause of action for cost recovery arises under CERCLA section 107.⁶³ In some instances, state agencies or private parties may also perform cleanup and may bring actions to recover costs.⁶⁴ Such cost-

58. See *supra* part III-B for discussion of the special case of governmental unit claims in Bankruptcy Code priority scheme.

59. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

60. See *supra* note 5.

61. CERCLA § 106(b)-(c), 42 U.S.C. § 9606(a)-(b). After consultation with the Attorney General, the Environmental Protection Agency may draw from the Superfund to compensate or repair imminent and substantial endangerment to the environment. *Id.*

62. CERCLA § 104, 42 U.S.C. § 9604.

63. CERCLA § 107(a), 42 U.S.C. § 9607(a). Violators are liable for recovery costs for violation of CERCLA provisions. *Id.*

64. See CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (stating that a responsible person will be liable for "any other necessary costs of response incurred by

recovery actions must be commenced within three years.⁶⁵ Interpreters have found reason in CERCLA section 107 to make recovery as quick and easy as possible.⁶⁶

A cost recovery action may be brought against any or all potentially responsible parties (PRPs). CERCLA section 107(a) defines four classes of PRPs: present owners and operators of a hazardous waste facility, past owners and operators who owned or operated at the time of disposal of hazardous waste, hazardous waste generators, and hazardous waste transporters.⁶⁷ Although the statute is silent as to a standard of liability, the courts have uniformly found strict liability to apply.⁶⁸ CERCLA does, however, allow PRPs to assert an affirmative defense to liability where the release of hazardous waste was caused solely by an act of God, an act of war, or an act of a third-party non-agent.⁶⁹ Such defenses are very narrow in scope and are rarely availing.⁷⁰ Ordinarily, the government's case will involve no more than a showing that a party qualifies as at least one of the four types of PRPs, irrespective of an absence of that party's fault.⁷¹

Furthermore, the courts have found that each PRP is jointly and severally liable for all response costs incurred, unless the injury is divisible.⁷² Thus, a single PRP-defendant has no right to demand a fair apportionment of liability in the govern-

any other person consistent with the national contingency plan"); *id.* § 111(a)(2), 42 U.S.C. § 9611(a)(2) (stating that Superfund monies may be used for the "[p]ayment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan").

65. CERCLA § 112(d), 42 U.S.C. § 9612(d).

66. See *infra* notes 72-73 and accompanying text.

67. CERCLA § 107(a); 42 U.S.C. § 9607(a).

68. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (holding that CERCLA imposes strict liability on the owner of a facility from which there is a release or threatened release); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983) (holding that standard of liability under CERCLA left to common-law principles); *United States v. Tyson*, 25 Env't Rep. Cas. (BNA) 1897 (E.D. Pa. 1986) (citing *Shore Realty*, 759 F.2d at 1044).

69. CERCLA § 107(b), 42 U.S.C. § 9607(b) (precluding liability for any combination of these acts).

70. Drabkin, *supra* note 7, at 10171.

71. See Drabkin, *supra* note 7 at 10171.

72. See, e.g., *United States v. Stringfellow*, 661 F. Supp. 1053, 1059-61 (C.D. Cal. 1987) (imposing joint and several liability); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807 (S.D. Ohio 1983) (finding legislative history supports joint and several liability under CERCLA). See generally SUSAN COOKE, *THE LAW OF HAZARDOUS WASTE* § 14.01(6)(c) (Bender, Supp. 1990) (discussing liability under Superfund).

ment's action. Instead, the PRP must wait until it is adjudged liable and then attempt to seek contribution from other PRPs.⁷³

C. *The Problem of Categorizing Cleanup Claims for Bankruptcy Code Treatment*

CERCLA has caused a new type of governmental liability to emerge. Unlike a tax, cleanup claim liability is traceable to actual pecuniary expenditures made on the debtor's behalf. But unlike a debt on a government loan, it is non-consensual and more closely akin to an obligation of law which should not be escapable in bankruptcy.

Furthermore, CERCLA allows for possible disproportionate assessments of cleanup liability against parties only remotely related to the hazard.⁷⁴ With the EPA's average expenditure per site exceeding \$12 million,⁷⁵ many such liabilities are destined to become claims in bankruptcy cases. Such claims might be asserted by state or federal governmental units seeking cost recovery. Others will be asserted by jointly liable PRPs who seek contribution. In bankruptcy, CERCLA claims share attributes with many different types of claims which command very different levels of priority under the Bankruptcy Code. As such, the proper classification of CERCLA claims for purposes of a bankruptcy distribution is not readily apparent.

Theoretically, CERCLA cleanup claims serve the same purpose as the affirmative, non-monetary environmental obligations which were made inescapable in bankruptcy.⁷⁶ Both are merely different enforcement mechanisms by which environmental safety is achieved. The inviolability of CERCLA claims could be roughly preserved under the Bankruptcy Code by granting cleanup claims administrative expense priority or secured status. However, CERCLA claims also share elements with the general claims of most lenders, lienors, and trade creditors in that they are monetary claims against the debtor for actual pecuniary amounts owing.⁷⁷ As such, the Code does not clearly accord cleanup claims any special treatment. More-

73. CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1) ("Any person may seek contribution from any other person who is liable or potentially liable" under CERCLA.).

74. See *supra* notes 72-73.

75. Drabkin, *supra* note 7, at 10169.

76. See *supra* note 51 and accompanying text.

77. Compare CERCLA § 107, 42 U.S.C. § 9607 (providing liability for recovery

over, because CERCLA claims usually arise for the benefit of governmental agencies, there are grounds to suggest that they be subordinated, like penalty claims, to allow a better recovery for general creditors less capable of bearing loss.

As the next section shows, the Bankruptcy Code lends itself to plausible arguments for the placement of CERCLA cleanup claims almost anywhere along the priority ladder, depending on the circumstances. One can only wonder how the Code's drafters would have peremptorily avoided the confusion over cleanup claim priority had they anticipated legislation like CERCLA and the age of cleanup claims.

V. POTENTIAL LEVELS OF CLEANUP CLAIM PRIORITY UNDER CURRENT BANKRUPTCY CODE PRINCIPLES

The problem is not that cleanup claims do not fit among the Bankruptcy Code priorities but that, depending on the circumstances, they can plausibly fit almost anywhere.⁷⁸ Where the Code recognizes "superpriorities" or "superliens," the case can be made for certain environmental claimants to recover ahead of secured creditors.⁷⁹ To the extent that cleanup expenditures can be said to "preserve" the bankruptcy estate,

costs for violation of CERCLA provisions) with 11 U.S.C. § 507 (providing priority scheme in bankruptcy).

78. Moreover, at certain stages of cleanup, costs expended may not even qualify as "claims" in bankruptcy. See, e.g., *Al Tech Specialty Steel Corp. v. Allegheny Int'l, Inc.* (*In re Allegheny Int'l, Inc.*), 126 B.R. 919, 925 (W.D. Pa. 1991) ("Mere knowledge of the existence of hazardous waste coupled with knowledge of the identities of potentially responsible parties . . . does not suffice as a legal relationship adequate to justify inclusion of the claim in the bankruptcy prior to the claim's development as a cause of action.").

Under existing case law, bankruptcy claims have arisen in three ways: 1) with the right to payment; 2) upon the establishment of the relationship between the debtor and the creditor; and 3) based on the debtor's conduct. See *Avellino & Bienes v. M. Frenville Co.* (*In re M. Frenville Co.*), 744 F.2d 332 (3d Cir. 1984) (holding that right to payment gave rise to claim), *cert. denied*, 469 U.S. 1160 (1985); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (D. Minn. 1990) (holding that right to payment gave rise to claim); *United States v. LTV Steel Co.* (*In re Chateaugay Corp.*), 112 B.R. 513, 520-21 (S.D.N.Y. 1990) (holding that the establishment of the relationship between the debtor and the creditor created claim), *aff'd*, 944 F.2d 997, 1004-05 (2d Cir. 1991); *In re John Mansville Corp.*, 57 B.R. 680 (Bankr. S.D.N.Y. 1986) (holding that, because debtor's conduct gives rise to the claim, the court should focus on the time when the acts giving rise to the alleged liability were actually performed). See also *infra* note 109, which discusses the time at which a CERCLA cleanup claim accrues.

79. See *infra* parts V-A and V-B-1.

claimants can argue for administrative expense priority.⁸⁰ Where no special priority provisions are found applicable, the cleanup claim will be cast into the general unsecured pool.⁸¹ Finally, the cleanup claimant may receive no share of the bankruptcy estate, if the debtor or trustee can successfully invoke the Code's provisions for abandonment or contingent claim estimation.⁸²

A. *Cleanup Claims as Top Priority?—Environmental Superliens*

Environmental claimants may be able to recover cleanup costs ahead of all secured creditors through the use of the "superlien" provisions of certain analogous state superfund statutes.⁸³ Such statutes create liens in favor of state environmental agencies senior to all other liens, prior or future, on any assets of the debtor.⁸⁴

CERCLA, since the 1986 amendments, contains a provision for the creation of a federal lien for all costs of removal or remedial action incurred by the United States.⁸⁵ However, this lien is not a superlien; it is subject to the rights of all pre-existing liens properly perfected under applicable law.⁸⁶ Thus, in cases where the debtor has no unsecured assets, the government's lien will be valueless and its claims will be rendered unsecured.⁸⁷

The extent to which CERCLA's lien and the various state

80. See *infra* notes 93-103 and accompanying text.

81. See *infra* notes 104-106 and accompanying text.

82. See *infra* part V-C.

83. See, e.g., Massachusetts Oil and Hazardous Material Release Prevention and Response Act, MASS. GEN. L. ch. 21E, § 13 (1983) (establishing liens in favor of the state against property of persons liable for cleanup debts under this act) New Hampshire Solid and Hazardous Waste Management Act, N.H. REV. STAT. ANN. § 147-B:10b(III) (1983) (stating that liens created under this statute are given priority treatment in bankruptcy); New Jersey Spill Compensation and Control Act, N.J. REV. STAT. § 58-10-23.11 f(f) (1980) (stating that cleanup costs "shall constitute a first priority claim and lien paramount to all other claims and liens").

84. See *supra* note 83.

85. CERCLA § 107(l)(1), 42 U.S.C. § 9607(l)(1). The provision states:
All costs and damages for which a person is liable to the United States . . . shall constitute a lien in favor of the United States upon all real property and rights to such property which
(A) belong to such person; and
(B) are subject to or affected by a removal or remedial action.

Id.

86. CERCLA § 107(l)(3), 42 U.S.C. § 9607(l)(3).

87. See *supra* note 31 (defining unsecured claim).

superliens will be honored in bankruptcy is just beginning to be addressed by the courts.⁸⁸ However, such claims will have to overcome serious constitutional challenges. The more ambitious superlien statutes may violate any of the following constitutional doctrines: federal preemption, impairment of contract, or uncompensated taking of property.⁸⁹

B. Unsecured Cleanup Claims as Superpriorities, Administrative Expenses, or General Unsecured Claims

1. Superpriority Claims

Even in the absence of a superlien, the Bankruptcy Code may permit a cleanup claimant to recover ahead of certain secured creditors in limited circumstances. Where the claimant's cleanup efforts can be said to have added value to a secured creditor's collateral, the claim may become a "superpriority" claim under Bankruptcy Code § 506(c).⁹⁰ As such, the claim can be satisfied out of proceeds from the sale of the secured creditor's collateral to the extent of the benefit conferred upon the secured creditor.

On two occasions thus far, the bankruptcy courts have denied creditors' motions to assert § 506(c) superpriority for environmental cleanup claims, finding that no benefit was conferred upon secured creditors.⁹¹ Nevertheless, the two opinions do not foreclose the possibility of future claimants' success in this area under other factual circumstances. In *In re T.P. Long Chemical, Inc.*, the court noted that the EPA has proper standing to move for recovery of costs under § 506(c) because the EPA "stands in the shoes of the trustee since it performed a duty imposed upon the trustee to remove the hazardous wastes."⁹²

88. The First Circuit Court of Appeals recently held that the federal lien provision in CERCLA § 107(l) is unconstitutional on its face because it provides for the deprivation of property interests without according debtors their due process right to an immediate, post-seizure hearing. *Reardon v. United States*, 947 F.2d 1509, 1517-23 (1st Cir. 1991) (en banc).

89. Drabkin, *supra* note 7, at 10180.

90. 11 U.S.C. § 506(c).

91. *In re Corona Plastics, Inc.*, 99 B.R. 231 (Bankr. D.N.J. 1989) (holding no benefit shown where collateral was "wholly unrelated" to property subject to cleanup); *In re T.P. Long Chem., Inc.*, 45 B.R. 278 (Bankr. N.D. Ohio 1985) (holding that no benefit from environmental cleanup exists under CERCLA, at least in terms of "positive" reuse).

92. *T.P. Long Chem.*, 45 B.R. at 287.

2. *Administrative Expenses or General Unsecured Claims?— Inconsistent Rulemaking*

Environmental claimants have had greater success arguing that cleanup costs are “necessary costs and expenses of preserving the estate” and, thus, administrative expenses.⁹³ Accordingly, these claimants have sometimes been able to fully recover cleanup costs ahead of all other unsecured creditors.⁹⁴ However, not all environmental claimants have been allowed to so elevate their claims; some have been subjected to the rigors of impairment in the general unsecured pool.⁹⁵ The rules for determining the disparate fates of these claimants have developed in a somewhat unclear and inconsistent manner.

Administrative expenses have been allowed most commonly on the theory that the estate is “preserved” by expenditures which keep it in compliance with the law.⁹⁶ However, other decisions indicate that linking the cleanup expenditures to estate preservation is not an absolute necessity for administrative expense awards.⁹⁷ Instead, these courts have invoked the rule

93. See 11 U.S.C. § 503(b)(1)(A). “[T]here shall be allowed administrative expenses . . . including . . . the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.” *Id.* Administrative expenses allowed under section 503(b) have priority over other allowed claims. *Id.* § 507(a)(1).

94. *Windolph Trust v. Leitch (In re Kent Holland Die Casting & Plating, Inc.)*, 125 B.R. 493, 497 (Bankr. W.D. Mich. 1991) (“Administration expense statute is very important because, upon distribution, these claims have a first class priority over all other secured claims.”).

95. See *infra* notes 90-91 and accompanying text.

96. See, e.g., *United States v. LTV Steel Co. (In re Chateaugay Corp.)*, 112 B.R. 513, 525 (S.D.N.Y. 1990) (reasoning that monies spent to comply with environmental laws would be “actual and necessary costs and expenses of preferring the estate” and are thus entitled to an administrative priority), *aff’d*, 944 F.2d 997 (2d Cir. 1991); see also *Borden, Inc. v. Wells-Fargo Business Credit (In re Smith Douglass)*, 856 F.2d 12, 17 (4th Cir. 1988) (holding that abandonment by trustee is permissible if act does not conflict with state environmental code); *In re Peerless Plating*, 70 B.R. 943, 948-49 (Bankr. W.D. Mich. 1987) (holding that, per *Midlantic*, trustee cannot abandon property if abandonment violates CERCLA or state law).

97. See *Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 123 (6th Cir. 1987) (holding that state’s expenses for response costs for debtor’s estate are administrative expenses under CERCLA); *Spunt v. Charlesbank Laundry, Inc. (In re Charlesbank Laundry, Inc.)*, 755 F.2d 200, 201-03 (1st Cir. 1985) (holding that civil compensatory fine for debtor’s violation of an injunction qualified for first priority treatment as an administrative expense); *Juniper Devel. Group v. Kahn (In re Hemingway Transp., Inc.)*, 73 B.R. 494, 504-05 (Bankr. D. Mass. 1987) (holding that costs incurred by purchaser of real property from debtor for cleanup entitled to priority treatment as administrative expenses), *aff’d*, 126 B.R. 656 (D. Mass. 1991).

of *Reading v. Brown*,⁹⁸ a 1968 Supreme Court case, which held that administrative expenses include damages arising from the negligence of the bankruptcy trustee.⁹⁹

Some opinions suggest a third theory, although it has not yet been the explicit basis for an administrative expense award. The theorists suggest that administrative expense treatment of environmental cleanup awards is a necessary extension of the Supreme Court's ruling in *Midlantic National Bank v. New Jersey Department of Environmental Protection*.¹⁰⁰ In *Midlantic*, the Court refused to allow a trustee to abandon property subject to a cleanup order despite the trustee's explicit permission from the Bankruptcy Code to abandon any burdensome estate asset.¹⁰¹

The court found that a "well-recognized" exception to the abandonment power existed where abandonment would defeat laws "reasonably designed to protect the public health or safety from identified hazards."¹⁰² Although *Midlantic* concerned abandonment and affirmative, non-monetary environmental cleanup obligations, a few courts have suggested that the *Midlantic* holding forbids the escape from monetary

98. 391 U.S. 471 (1968) (holding that damages resulting from the negligence of a receiver acting within the scope of his authority as receiver give rise to "actual and necessary" costs of operation for the debtor's business and are entitled to priority status).

99. *Id.* at 485.

100. 474 U.S. 494 (1986).

101. 11 U.S.C. § 554(a) (1988) (addressing abandonment of property of estate). Abandonment is the release from the debtor's estate of property previously included in that estate. *Brown v. O'Keefe*, 300 U.S. 598, 602-03 (1937). Prior to the enactment of the Bankruptcy Code in 1978, abandonment in liquidation cases was a judicial doctrine. Dissenting in *Midlantic Nat'l Bank v. New Jersey Dep't of Env't. Protection*, 474 U.S. 494 (1986), Justice Rehnquist stated:

[C]ourts had developed a rule permitting the trustee to abandon property that was worthless or not expected to sell for a price sufficiently in excess of encumbrances to offset the costs of administration. This judge-made rule served the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor's property to money, for equitable distribution to creditors. Forcing the trustee to administer burdensome property would contradict this purpose, slowing the administration of the estate and draining its assets.

Id. at 508 (Rehnquist, J., dissenting).

102. *Midlantic*, 474 U.S. at 502-05. The Court stated:

Where the Bankruptcy Code has conferred special powers upon the trustee and where there was not common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety.

Id. at 502 (emphasis added).

cleanup liabilities through Bankruptcy Code channels.¹⁰³ This theory would seem to countenance administrative expense priority for cleanup claims, regardless of whether it can be said that the estate was actually preserved or the trustee was actually negligent.

On the other hand, courts that have ruled against priority treatment have looked very closely at whether the cleanup expenditures in question were truly costs of "preserving the estate."¹⁰⁴ In these cases, administrative expense applications have failed where the hazardous waste site in question was not part of the bankruptcy estate,¹⁰⁵ and where the underlying claim was found to have arisen before the estate was created by the filing of the petition.¹⁰⁶

The trouble is, however, that where administrative expenses have been permitted, the property in question was not always

103. See *United States v. LTV Steel Co. (In re Chateaugay Corp.)*, 944 F.2d 997, 1009-10 (2d Cir. 1991) ("If property on which toxic substances pose a significant hazard to public health cannot be abandoned, it must follow . . . that expenses to remove the threat posed by such substances are necessary to preserve the estate."); *Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co.)*, 831 F.2d 118, 121-23 (6th Cir. 1987) (holding that state's response costs recoverable as administrative expenses in bankruptcy proceeding); *In re Stevens*, 68 B.R. 774, 783 (D. Me. 1987) ("Implicit in *Midlantic* is the recognition that in some circumstances the priorities of the Bankruptcy Code must give way to laws designed to protect the public health and safety."). See also *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 286 (Bankr. N.D. Ohio 1985) (holding that, prior to *Midlantic*, administrative expense treatment necessarily follows when abandonment is denied).

104. See *Drabkin*, *supra* note 7, at 10177-78 (discussing judicially established priorities for administrative expenses).

105. See, e.g., *Southern Ry. v. Johnson Bronze Co.*, 758 F.2d 137, 142-43 (3d Cir. 1985). In *Southern Railway*, the court rejected a cross-defendant's request to allow its claims for cleanup costs to be afforded priority as an administrative cost of the bankruptcy estate. *Id.* The court, citing *Ohio v. Kovacs*, 469 U.S. 274 (1985), reasoned that the property was no longer part of the bankruptcy estate because the cross-defendant acquired the leasehold interest in the property. *Id.*

106. E.g., *Burlington N. R.R. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 708-09 (9th Cir. 1988) (holding that courts may not give claims for cleanup costs which arose pre-petition administrative expense priority until Congress enacts law providing for such priority); *Walsh v. West Virginia (In re Security Gas & Oil, Inc.)*, 70 B.R. 786, 795 (Bankr. N.D. Cal. 1987) (explaining that duty to cleanup hazardous waste arising pre-petition is a general unsecured claim and is not entitled to priority under Bankruptcy Code); *In re Peerless Plating Co.*, 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987) (holding that even if EPA had pre-petition claim against debtor, estate could not avoid liability for costs incurred by EPA's performance of post-petition cleanup at debtor's plant); *In re Pierce Coal and Constr., Inc.*, 65 B.R. 521, 530 (Bankr. N.D. W. Va. 1986) (recognizing that Congress may be aware of the problem caused by the omission of environmental damages from the list of pre-petition priorities but nonetheless, Congress has yet to address the problem).

estate property¹⁰⁷ and, in some cases, the claim in question was explicitly deemed to have arisen pre-petition.¹⁰⁸ Moreover, the issue of when a cleanup claim actually arises has not been conclusively resolved by the courts.¹⁰⁹ Therefore, the rule of law is ambiguous and makes it difficult for today's cleanup claimant to predict the likelihood of his or her recovery as an administrative expense claimant.

Further potential for inconsistent rulemaking exists in cases where cleanup claims are asserted, not by the government against the debtor, but rather by a private party who has been adjudged liable to the government and who seeks contribution from the debtor. To date, contribution claimants' administra-

107. *E.g.*, *Lancaster v. Tennessee*, (*In re Wall Tube & Metal Prods. Co.*), 831 F.2d 118, 123-24 (6th Cir. 1987) (granting administrative expense priority for cost of cleanup of property leased by the debtor); *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 286-87 (Bankr. N.D. Ohio 1985) (same).

108. *E.g.*, *United States v. LTV Steel Co. (In re Chateaugay Corp.)*, 112 B.R. 513, 521 (Bankr. S.D.N.Y. 1990) ("The Court concludes, therefore, that in the absence of a pre-petition release or threatened release of hazardous waste, any subsequent liability for environmental cleanup or remedial action is not dischargeable in bankruptcy."), *aff'd*, 944 F.2d 997, 944 (2d Cir. 1991); *In re Peerless Plating Co.*, 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987) (holding that, if the trustee is unable to abandon the contaminated property under *Midlantic* without complying with CERCLA, then the trustee has an implicit duty to use the estate's unencumbered assets to cleanup the site).

109. *Compare LTV Steel* 112 B.R. at 522 (holding CERCLA claim arises only upon "release or threatened release of hazardous waste") and *Jensen v. California Dep't of Health Servs. (In re Jensen)*, 127 B.R. 27 (Bankr. 9th Cir. 1991) (applying theory that CERCLA claim arises when debtors commit acts giving rise to a cause of action) with *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (D. Minn. 1990) (holding CERCLA claim arises when response costs are incurred by the United States) and *Sylvester Bros. Devel. Co. v. Burlington Northern R.R.*, 133 B.R. 648, 652-54 (D. Minn. 1991) (following *Union Scrap* and holding that a cleanup claim had not been discharged in bankruptcy because the full extent of the debtor's liability had not been assessed at the time of discharge). See also *Carter Day Industries, Inc. v. EPA (In re Combustion Equip. Assocs., Inc.)*, 838 F.2d 35, 40 (2d Cir. 1988) (suggesting in dicta that a CERCLA claim might accrue in stages as the EPA incurs costs).

In *Union Scrap Iron & Metal*, the debtor argued that its potential CERCLA liability was a contingent claim under the Bankruptcy Code and was therefore discharged upon confirmation of its reorganization plan. The court relied on CERCLA to determine when the relationship between the debtor and the EPA became a "legal obligation reflecting a claim for bankruptcy purposes." *Union Scrap*, 123 B.R. at 835.

The court further determined that four elements must be present to establish a legal obligation under CERCLA: (1) a facility; (2) a release or threatened release of a hazardous substance at the facility; (3) a responsible party; and (4) response costs incurred by the federal government. *Id.* The court held that the "mere release of a hazardous substance prior to the confirmation of a bankruptcy reorganization plan does not give rise to a CERCLA claim which is discharged by that confirmation." *Id.* at 838.

tive expense applications have been both granted¹¹⁰ and denied.¹¹¹ The courts have not yet addressed the particular issue of the claimant's status. There has been no mention of whether a contribution claimant might command a different legal standard than a party who seeks to recover cleanup costs directly outlaid.

C. *No Recovery at All?—Abandonment and Contingent Claim Estimation*

As general unsecured claims, cleanup expenditures are likely to be only partially recovered from a debtor-PRP. However, certain avenues exist in the Bankruptcy Code by which the cleanup claimant might lose its entire share in the debtor's distribution.¹¹²

One potential avenue of recovery is through the estate's abandonment of the property from which the cleanup claim arose.¹¹³ Although in *Midlantic* the Supreme Court frowned on the escape from environmental obligations through abandonment, subsequent cases have interpreted *Midlantic* narrowly as precluding abandonment only where an "imminent public health risk" exists.¹¹⁴ Upon a successful abandonment, title to

110. *Juniper Devel. Group v. Kahn (In re Hemingway Transp., Inc.)*, 108 B.R. 378, 384 (Bankr. D. Mass. 1987) (holding trustee liable to plaintiff for response costs excluding attorney's fees as fees not deemed "necessary and consistent with National Contingency Plan"), *aff'd*, 126 B.R. 650 (1991); *In re Pierce Coal and Constr., Inc.*, 65 B.R. 521, 525, 531 (Bankr. N.D. W. Va. 1986) (affirming trial court's decision to classify contribution as administrative expenses).

111. *Burlington N. R.R. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 708 (9th Cir. 1988) (holding pre-petition damages not entitled to administrative expense priority as court has no authority to create such a priority); *Southern Ry. v. Johnson Bronze Co.*, 758 F.2d 137, 142-43 (3d Cir. 1985) (denying cross-defendant's claim for priority as an administrative expense).

112. These avenues include abandonment, *see infra* notes 115-118 and accompanying text, and contingent claim estimation, *see infra* notes 119-120.

113. *See, e.g., Ohio v. Kovacs*, 469 U.S. 274, 284 n.12 (1985). In *Kovacs*, the Court, discussing abandonment under the Bankruptcy Code, stated, "If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property . . ." But "[i]f the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability." *Id.*

114. *Borden, Inc. v. Wells-Fargo Business Credit (In re Smith-Douglass, Inc.)*, 856 F.2d 12, 17 (4th Cir. 1988) (holding that cleanup costs were properly considered an administrative expense); *In re Brio Ref., Inc.*, 86 B.R. 487, 489 (N.D. Tex. 1988) (holding that bankruptcy court had authority to authorize abandonment under 11 U.S.C. § 554(a)); *White v. Coon (In re Purco, Inc.)*, 76 B.R. 523, 531-33 (Bankr. W.D.

the abandoned asset would revert in the debtor.¹¹⁵ Thus, it has been suggested that, in certain cases where cleanup action has not yet begun, abandonment may effectively render the bankruptcy estate a non-polluting past owner of the site with immunity to CERCLA liability.¹¹⁶ Subsequently, the EPA would have recourse solely against the post-discharge debtor, absent the bankruptcy estate assets. Unfortunately, recovery prospects are likely to be scant in such cases.

Also, in cases where PRPs file for bankruptcy before cleanup has been commenced, the possibility arises for the loss of the cleanup claim through the Bankruptcy Code's provision for contingent claim estimation.¹¹⁷ Under this provision, it is not uncommon for rather speculative contingent claims to be given a low or zero estimate. Furthermore, one court has already found a contingent cleanup claim to be a valid candidate for estimation.¹¹⁸

The contingent contribution claims of co-PRPs are slated for an even worse fate under Bankruptcy Code section 502(e)(1)(B).¹¹⁹ This section has been interpreted so as to disallow contingent contribution claims in the environmental cleanup context.¹²⁰

Pa. 1987) (reviewing cases interpreting trustees authority to abandon property under 11 U.S.C. § 554; holding that abandonment will be permitted where it will not endanger public health and safety); *In re Franklin Signal Corp.*, 65 B.R. 268, 272 (Bankr. D. Minn. 1986) (holding that abandonment is allowed where no imminent danger or impending threat to public health and safety); *In re Oklahoma Ref. Co.*, 63 B.R. 562, 565 (Bankr. W.D. Okla. 1986) (permitting abandonment because the current situation would not worsen or present "immediate and menacing harm to public health and safety").

115. *LaRoche v. Tarpley (In re Tarpley)*, 4 B.R. 145, 146 (Bankr. M.D. Tenn. 1980) (holding that, once abandoned, title to property reverts in the debtor as of the commencement date of the bankruptcy proceedings).

116. *Drabkin, supra* note 7, at 10170.

117. 11 U.S.C. § 502(c)(1). This section provides: "There shall be estimated for purposes of allowance under this section . . . (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 . . ." *Id.*

118. *See Juniper Devel. Group v. Kahn (In re Hemingway Transp., Inc.)*, 108 B.R. 378, 379 (Bankr. D. Mass. 1987) (holding trustee liable for certain response costs, excluding attorneys' fees, pursuant to evidentiary hearing conducted to estimate such costs), *aff'd*, 126 B.R. 650 (1991).

119. 11 U.S.C. § 502(e)(1)(B) (providing for the disallowance of any claim for reimbursement or contribution which is contingent).

120. *See Syntex Corp. v. Charter Co. (In re Charter Co.)*, 81 B.R. 644, 650 (M.D. Fla. 1988) (holding that contingent claim was properly disallowed under 11 U.S.C.

VI. THE NEED FOR A FIXED RULE FOR CLEANUP CLAIM PRIORITY

There are two troubling aspects of the rule for cleanup claim priority developing in the courts. One aspect is legal uncertainty: the idea that a particular court's notions on certain unsettled questions of law can be determinative of priority.¹²¹ The other aspect is factual uncertainty: that the facts of a case can be determinative of the claimants' recovery prospects.¹²² While these same uncertainties apply to many other types of claims, the stakes are invariably higher when the fate of a cleanup claim is at issue. Impairment of a cleanup claim affects not only the economic fate of the claimant; it also stands to compromise the entire national cleanup effort by diminishing the Superfund. Ultimately, the quality of our public health and safety will sway with the whimsy of the rule of law for cleanup claim recovery in bankruptcy. The stakes are especially high for other creditors as well, since cleanup liabilities can become gargantuan and lay claim on most or all of the bankruptcy estate.

A. Legal Uncertainty

The legal uncertainty surrounding the rule plays havoc upon the economic expectations of creditors. CERCLA itself, with its power to impose liabilities on parties only remotely connected to hazardous waste disposal, has added new and immeasurable risks to most credit transactions. However, confusion about the bankruptcy priority of cleanup claims compounds this problem exponentially. If creditors had only CERCLA risk to contend with, creditors could eliminate their risk by choosing lending instruments which are of higher priority than cleanup claims. However, because the bankruptcy priorities are uncertain and because there exists the remote

§ 502(e)(1)(B) and that this section does not conflict with contribution claims under CERCLA).

121. Such unsettled questions include when a cleanup claim arises, *see supra* note 109, whether a cleanup lien will be honored in bankruptcy, *see supra* notes 83-89 and accompanying text, and whether claims arising from property outside the bankruptcy estate can be administrative expenses, *see supra* notes 105-107.

122. Such factual determinations may include when hazardous waste is released, whether the contaminated property is part of the bankruptcy estate, and whether the claim is asserted by a cleanup party or a contribution claimant.

possibility that cleanup claims may prime even secured claims, such safe harbors for creditors disappear.

Legal uncertainty also affects the EPA's outlook. The lack of a guaranteed recovery places any expenditures from the Superfund at risk. This creates pressure on the EPA to pursue only the most solvent PRPs for recovery. Ultimately, such pressures may effectively deprive the EPA of its cleanup-and-recover enforcement mechanism altogether. The EPA may be forced to order debtors to perform cleanup themselves, which, in many cases, debtors will be unable to do. Accordingly, the national cleanup program could be compromised and certain CERCLA provisions could be drained of much of their vitality.

B. Factual Uncertainty

Even if the legal uncertainties are eventually resolved by the courts, the factual uncertainty surrounding the rule would still put creditors in a bind. Cleanup claim priority might still depend upon whether the claim arose pre-petition or post-petition, whether the contaminated property is property of the estate, or whether the claim is asserted by the cleanup party or a contribution claimant. However, such factual determinants are not things which can be predicted at the time credit agreements are negotiated. Creditors have to assume the worst and take extra precautions. Therefore, the conditional nature of the treatment of cleanup claims places unnecessary constricting pressures on credit markets.

Conditional treatment also puts the EPA in an awkward position. For example, if the EPA is to receive a better priority for a post-petition claim than a pre-petition claim, it will behoove the EPA to delay the accrual of its claim when a PRP seems to be on the brink of bankruptcy. Concurrently, PRPs will try to forestall filing for bankruptcy until they are sure that the EPA will be a pre-petition creditor. The result is a senseless waiting game in which important cleanup efforts are stalled.

C. The Need for a Legislative Solution

If the rule for cleanup claim priority could be fixed at a consistent and predictable level, the benefits would be felt by environmental agents, debtors, and creditors. However, as recent case law reveals, it is unlikely that a fixed rule will

emerge any time soon.¹²³ The judiciary is not completely to blame for this impasse. Rather, the problem is systemic. It has arisen because the Bankruptcy Code's drafters did not anticipate that claims arising from government law enforcement would one day come in the form of direct monetary debts. The resulting confusion over cleanup claim treatment is merely an outgrowth of this shortcoming in the Code.

VII. PROPOSED PRIORITY TREATMENT OF CLEANUP CLAIMS

The necessary reform can be best accomplished by amending the Bankruptcy Code to establish a fixed level of treatment for environmental cleanup claims in bankruptcy distributions. This will require drawing a line between the competing interests of environmental enforcement and creditors.

A. *Where to Draw the Line?*

The Bankruptcy Code priority for claims of governmental units is a logical starting point for the analysis.¹²⁴ Recall that

123. See *supra* part V, which discusses the varied judicial approaches to cleanup claim priority. See also *Carter Day Industries, Inc. v. EPA (In re Combustion Equip. Assocs., Inc.)*, 838 F.2d 35, 41 (2d Cir. 1988) (holding that declaratory judgment action brought by PRPs for determination of whether liability had been discharged in bankruptcy was not ripe for review since EPA had not yet decided whether to order cleanup); *Borden, Inc. v. Wells-Fargo Business Credit (In re Smith-Douglass, Inc.)*, 856 F.2d 12, 17 (4th Cir. 1988) (holding that debtor is allowed to abandon hazardous waste site where debtor's estate lacked unencumbered assets to finance cleanup and plant did not present imminent harm to public); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (D. Minn. 1991) (holding that discharge prior to debtor's Chapter 11 filing was not sufficient to allow federal CERCLA claim for possible response costs); *Al Tech Specialty Steel Corp. v. Allegheny Int'l, Inc. (In re Allegheny Int'l, Inc.)*, 126 B.R. 919, 923 (Bankr. W.D. Pa. 1991) (holding that claim brought by purchaser of debtor's property to recover sums expended for cleanup constituted direct contingent claim not excluded under Bankruptcy Code provisions excluding claims in which claimant and debtor are directly liable to third party); *United States v. LTV Steel Co. (In re Chateaugay Corp.)*, 112 B.R. 513, 521 (Bankr. S.D.N.Y. 1990) (holding that, in absence of pre-petition release, any subsequent liability for cleanup is not dischargeable in bankruptcy), *aff'd*, 944 F.2d 997 (2d Cir. 1991); *Dery v. Becker (In re Sterling Steel Treating, Inc.)*, 94 B.R. 924, 931 (Bankr. E.D. Mich. 1989) (holding that cost of hazardous waste cleanup was to be borne equally by bankruptcy estate of seller and purchaser); *In re Corona Plastics, Inc.*, 99 B.R. 231, 234-35 (Bankr. D. N.J. 1989) (holding that secured creditor entitled to turnover of collateral without first complying with cleanup act, and potential cost of compliance did not take priority over creditor's secured claim); *In re Peerless Plating Co.*, 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987) (holding that trustee, who could not abandon debtor's plant without violating CERCLA, had duty to expend estate's unencumbered assets for cleanup).

124. See 11 U.S.C. § 507(a)(7).

certain tax claims, whether secured or unsecured, are slated for a recovery after non-tax unsecured priority claims but ahead of general unsecured claims.¹²⁵ This priority treatment codifies the notion that the potential tax liability of a debtor is a component of the risk assumed by creditors when they extend credit. The subordination of tax claims to other priority claims is a reflection that the taxing authorities can absorb losses better than the individual claimants deserving of priority.

Cleanup claims are worthy of at least the same treatment as tax claims. Like taxes, cleanup liability serves as compensation to the government for services it provides. Also like taxes, cleanup claims are legal obligations arising under statutory fiat which should not be escapable in bankruptcy. Of course, because cleanup claims can be so large, the assumption of this risk by creditors will cause repercussions in the credit markets of a kind never occasioned by tax risks. But environmental liability has become a foreseeable economic reality today. If it is to be imposed directly on business and industry, it must also become a factor to be considered by creditors who deal with business and industry.

In fact, because cleanup liability is imposed directly on business and industry, cleanup claimants should recover *ahead* of tax claimants. Cleanup liabilities supply funds to only one government program while taxes supply funds to most of the others. Although a single debtor's escape from cleanup claim liability will not bankrupt the Superfund, it detracts from environmental enforcement dollar for dollar. A single debtor's escape from tax liability usually creates a small loss which can be spread among many government programs. Still, the Superfund is far less vulnerable than the individual claimants who assert unsecured priority claims.¹²⁶ Their priority recovery should be preserved.

B. Proposed Amendments

The above principles can be incorporated into the Bankruptcy Code through the following set of amendments (proposed language appears underlined):

125. See *supra* part III-B.

126. See 11 U.S.C. § 507(a)(3)-(6) (1988).

1. *Proposed Amendment to Bankruptcy Code Section 507(a)
Establishing a Priority for Environmental Cleanup
Claims*

§ 507. PRIORITIES.

(a) The following expenses and claims have priority in the following order:

...

(7) Seventh, allowed unsecured claims for reimbursement of actual pecuniary expenditures for the cleanup of hazardous waste which expenditures were —

(A) authorized under applicable law, and

(B) incurred after three years before the date of the filing of the petition or incurred before such time if the expenditures were the subject of a pending recovery action on the date of the filing of the petition.

(8) Eighth, allowed unsecured claims of governmental units

This amendment would set the priority for cleanup claims after the priority claims of individuals but before the priority claims of the taxing authorities.¹²⁷ The provision not only covers the cleanup claims of governmental units, it also recognizes that applicable law, such as CERCLA, may countenance private party cleanup and cost recovery.¹²⁸

The provision does not explicitly answer the question of whether priority extends to private claimants who did not perform cleanup but who seek contribution for joint and several cleanup liability assessed against them.¹²⁹ Therefore, to avoid any confusion, the legislative comments should make clear that contribution claimants are *not* covered by the new priority. Though these contribution claimants might find themselves subject to huge, disproportionate liabilities, their plight is created by CERCLA, not by the Bankruptcy Code. Such harsh treatment may one day cause CERCLA's liability apportion-

127. The priority for tax claims would be pushed back to section 507(a)(8). The new priority for claims of the FDIC and RTC would be pushed back to § 507(a)(9).

128. See *supra* note 63.

129. See *supra* notes 110-111 and accompanying text.

ment provisions to be reassessed. Bankruptcy Code amendments, however, are not the proper forum for such redress.

The three-year pre-petition window in proposed subpart (B) incorporates the three-year statute of limitations within which cleanup claimants must bring actions for cost recovery under CERCLA.¹³⁰ Under the proposal, costs recovery actions pending at the commencement of the bankruptcy case are also afforded priority. Therefore, the EPA may undertake cleanup as its first imperative at any hazardous waste sight without facing the danger of losing its rights to recovery if the PRPs file for bankruptcy. Such a window of priority also prescribes a limit on the exposure of unsecured creditors. When assessing a borrower's environmental risk at the time of a credit transaction, creditors need only look into recently-discovered hazards with which the borrower might have been involved.

2. *Proposed Amendment to Bankruptcy Code Section 724(b) to Preserve the Priority Recovery of Claims Described in Section 507(a)(1)-(6) over Environmental Cleanup Claims*

§ 724. TREATMENT OF CERTAIN LIENS.

...
(b) Property in which the estate has an interest and that is subject to a lien that is not avoidable under this title and that secures an allowed claim for a tax or an allowed claim for reimbursement of expenditures for the cleanup of hazardous waste, or proceeds of such property, shall be distributed

...
(2) second, in the case of a cleanup expenditure lien, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), or 507(a)(6) of this title, or in the case of a tax lien, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax or cleanup expenditure claim that is se-

130. CERCLA § 112(d), 42 U.S.C. § 9612(d).

cured by such tax or cleanup expenditure lien;

This provision would broaden section 724(b) to prescribe treatment for statutory liens securing claims for reimbursement of cleanup costs similar to the treatment already in place for tax liens.¹³¹ Thereby, the Bankruptcy Code would not wholly invalidate such secured environmental claims but would cause them to yield in part to the higher-priority unsecured claims specified in section 507(a)(1)-(6).

The proposed changes to subsection (b)(2) are necessary to carry the favored status of cleanup claims over tax claims, established in proposed section 507(a)(7), into the realm of secured claims. Several further cosmetic amendments would also be necessary throughout section 724(b). In places where the terms "tax claim" or "tax lien" are employed, amendments should be made to reflect the section's broadened application to "cleanup reimbursement liens and claims" as well.

This provision might bring to the forefront the issues posed by the ambitious "superlien" provisions of some state statutes which purport to alter the Bankruptcy Code priorities.¹³² The proposed amendment does not attempt to resolve such issues but rather leaves them to be resolved in the bankruptcy courts during the claim allowance process.

3. *Proposed Amendment to § 1129(a)(9)(C) Regarding Deferred Cash Payout for Environmental Cleanup Claims in Reorganization Plans*

§ 1129. CONFIRMATION OF PLAN.

(a) The court shall confirm a plan only if all of the following requirements are met:

. . . .

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

. . . .

(C) With respect to a claim of a kind specified in section 507(a)(7) or 507(a)(8) of this title, the holder of

131. See *supra* notes 42-47 and accompanying text.

132. See *supra* notes 83-89 and accompanying text.

such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

This amendment provides that priority cleanup claims receive the same treatment as priority tax claims in a plan of reorganization. This proposed amendment is a concession to debtors which recognizes that cleanup claimants, as well as the taxing authorities, usually are not in as great a need of an immediate recovery as are other priority claimants. Therefore, they can afford to be paid over a six year period rather than on the effective date of the plan.

VIII. CLOSING NOTE

Opponents of a Bankruptcy Code priority for environmental cleanup claims have one predominant concern: that such a provision will cause a large and undesirable decline in the credit available to industries connected with hazardous waste. This concern is undoubtedly real. However, it is not a valid reason to hold back a necessary Bankruptcy Code amendment. Comity requires a Bankruptcy Code priority for environmental cleanup claims. Through CERCLA, Congress has demanded that the costs of environmental cleanup be borne by private enterprise alone and that credit markets absorb the adverse consequences. This federal policy evidences a special need for full recovery that should be accommodated, not defeated, by the Bankruptcy Code. No directly competing federal policy behind the Bankruptcy Code militates against the specific environmental objective. On the contrary, the Bankruptcy Code shows signs of considerable deference to the special recovery needs of governmental units. The time has arrived for this policy of deference to be expanded to protect the new and unique type of government claim created by CERCLA.

