CLEANING UP BANKRUPTCY: LIMITING THE DISCHARGEABILITY OF ENVIRONMENTAL CLEANUP COSTS

Sonali P Chitre
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ABSTRACT

This article reconciles the joint aims of environmental and bankruptcy law after Judge Posner’s myopic opinion in the Seventh Circuit’s resolution of U.S. v. Apex Oil. These two areas of law represent alternative means to the same end—the equitable distribution of limited resources—and share equity’s traditional emphasis of function over form. Ignoring these principles, Judge Posner ruled in Apex that a cleanup order constitutes a dischargeable “claim” when styled as a legal judgment but not when styled as an equitable injunction. This despite the fact that in either case the liability amounts to the same thing—payment must be made for pre-bankruptcy cleanup of environmental pollution. Although RCRA does not provide for money judgments, a RCRA cleanup order is still reducible to a “money equivalent” because there is a cost associated with compliance. This formalist holding simultaneously frustrated the aims of both environmental law, which seeks the most efficient cleanup at the least public expense, and bankruptcy law, which seeks to treat like creditors alike. Courts should treat environmental judgments for cleanup costs that were “fairly contemplated” at the time of filing the bankruptcy petition, whether “legal” or “equitable” in form, as dischargeable claims in bankruptcy.

As this article argues, the onus now falls upon Congress to harmonize these areas of law. Congress should adapt the public policy of environmental claims to bankruptcy law by adding them to § 507’s list of priorities, amending Title 11. This would balance the bankruptcy logic of tiered property rights against the environmental concern about negative externalities. A federal solution would offer a single, predictable rule, lowering compliance costs for firms engaging in interstate commerce. This article’s unified model would allow environmental and bankruptcy law to complement rather than obstruct one another.
CONTENTS

INTRODUCTION .................................................................................................................................1

I. BACKGROUND & LEGAL DOCTRINES .................................................................................................6
   A. How Bankruptcy Works .................................................................................................................6
      1. Goals in Bankruptcy ....................................................................................................................7
      2. Allowed Claims ...........................................................................................................................8
      2. Purpose & Mechanics of Discharge ...........................................................................................9
   B. Environmental Laws that Give Rise to Bankruptcy Claims ..........................................................11
      1. How Environmental Laws Work ...............................................................................................11
      2. CERCLA ...................................................................................................................................14
      3. RCRA .......................................................................................................................................15
   C. Treatment of Environmental Cleanup Costs in Bankruptcy .........................................................16
      1. Environmental Cleanup Costs as “Claims” .............................................................................16
         a. Current Law: What is the Status of These Claimholders? ..................................................17
            i. The Equivalent of Secured Status .....................................................................................18
            ii. Unsecured Status ..............................................................................................................20

II. THE CLASSIFICATION & TREATMENT OF ENVIRONMENTAL COSTS IN BANKRUPTCY ....22
   A. Should Pre-Petition Environmental Costs Be Allowable Claims? .............................................22
      1. Definitions Under the “Code” .................................................................................................23
         a. “Claims” Defined ....................................................................................................................23
      2. Interpretation of “Claim” .........................................................................................................26
         a. What “Claim” Encompasses ...............................................................................................27
         b. Which “Equitable Remedies” are Dischargeable “Claims” .................................................29
   B. Treatment of Pre-petition Environmental Claims: Extent of Dischargeability .........................30
      1. Ohio v. Kovacs & the “Spend Money” Test ...........................................................................31
      2. Pre-Petition Environmental Costs Should Be Dischargeable Claims ....................................33
      3. U.S. v. Apex Oil-Judge Posner’s Approach to Equity ............................................................34
         a. The Case ...............................................................................................................................34
         b. The Errors in Apex’s Reasoning ..........................................................................................36
   C. A Better Way to Analyze & Treat Environmental Harms ............................................................39
      1. Timing of the Claim ...................................................................................................................39
         a. Tests ...................................................................................................................................40
         b. Applying the Timing Analysis to Environmental Claims ..................................................42

III. TOWARD A SOLUTION: GIVING PRE-PETITION ENVIRONMENTAL CLAIMS PRIORITY UNDER § 507(b) .........................................................................................................................48
   A. Justification for Taking Action ....................................................................................................48
   B. Potential Solutions ......................................................................................................................48
      1. Problems with Judge Posner’s Solution ...............................................................................49
      2. Why Federal Regulation is Preferable Over State Superliens ..............................................50
      3. Under § 507: The Alternate Solution of Raising the Priority of Environmental Claims Higher than Wage Claims, etc. ..........................................................................................52
4. Under § 507: The Alternate Solution of Raising the Priority of Environmental Claims but Keeping it Lower than Tax Claims

C. A Better Solution

1. Justification of Raising Environmental Claims’ Priority
   a. Equity Considerations
   b. Efficiency Considerations

CONCLUSION
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INTRODUCTION

Imagine that a company owns two pieces of contaminated property, “Piece 1” and “Piece 2,” which are soiled by the same amounts of pollution pre-bankruptcy and pose identical risks to public health. On Piece 1, the government or a third party cleans up the pollution under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and sues for reimbursement before the company goes into bankruptcy. On Piece 2, the government or third party sues the owner company pre-bankruptcy for injunctive relief under the Resource Conservation and Recovery Act (RCRA) to get the company to clean up Piece 2. RCRA, which governs solid waste disposal, like CERCLA, which addresses remediating abandoned hazardous waste sites, has provisions to require cleanup of contaminated sites that occurred in the past. However, RCRA does not provide for money remedies while CERCLA does. In both cases, the remedies are functionally equivalent: they get pollution cleaned up on the properties by forcing someone to pay remediation costs.

However, using the Seventh Circuit’s approach from U.S. v. Apex Oil, Piece 1’s cleanup will result in a dischargeable claim for money damages, and Piece 2’s cleanup will result in an injunction that survives the bankruptcy. This does not make sense, because in the context of pollution that has already occurred, an injunctive cleanup order that demands cleanup of

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3 “RCRA Corrective Action,” available at: http://www.epa.gov/cleanup/basicinfo.htm#RCRA
4 U.S. v. Apex Oil, 579 F.3d 734 (7th Cir. 2009). In cases like Piece 1 in the example above, pre-petition environmental cleanup costs usually become general unsecured claims that are repaid in “tiny bankruptcy dollars.” See Hon. Robert D. Drain, “A Brief Summary of Chapter 11 of the United States Bankruptcy Code.” 918 PLI/Comm 617, 640 (November-December 2009). Under Apex, equitable remedies, such as injunctive relief under RCRA, are non-dischargeable, but all other money judgments, such as CERCLA claims, remain dischargeable in bankruptcy.
pollution costs exactly the same amount of money as a money judgment to cleanup the pollution: these are equivalent “environmental debts.”\textsuperscript{5} Both pieces will cost the same amount to clean up, but in the case of Piece 1, the government or third party cleaning up will get repaid as an unsecured creditor, last payable in bankruptcy, and in the case of Piece 2, the bankrupt estate will not be able to discharge the injunctive claim and therefore the reorganized company will continue to be burdened by it. Thus, the problem at the intersection of environmental law and bankruptcy law is that environmental cleanup costs receive inconsistent treatment, and bankrupt estates often do not repay environmental cleanup costs.

Bankruptcy law and environmental law both seek to allocate limited resources. Environmental law seeks to solve the “tragedy of the commons” problem,\textsuperscript{6} which is that individuals who modify the Earth, acting independently and rationally in their own self-interest, will ultimately deplete a shared limited resource although it is not in everyone’s long-term interest.\textsuperscript{7} Bankruptcy law operates on a similar premise - one must fairly distribute limited resources.\textsuperscript{8} Companies that cannot operate sustainably, or at least behave responsibly once pollution has occurred, are not ones that maximize resources, keeping the economy and the environment healthy. The purpose of this comment is to reconcile the two fields of law.

Environmental costs have been at the forefront because of the recent BP oil spill, and BP

\textsuperscript{5} This is because the injunction is reducible to a dollar amount, which is the cost of complying with the cleanup order.

\textsuperscript{6} Garrett Hardin, \textit{The Tragedy of the Commons}, 162 SCIENCE 1243 (1968).

\textsuperscript{7} Herman E. Daly & Kenneth Neal Townsend, \textit{VALUING THE EARTH} 142 (1993). See Robert V. Percival, Christopher H. Schroeder, Alan S. Miller, James P. Leape, \textit{ENVIRONMENTAL REGULATION, LAW, SCIENCE AND POLICY} 1 (4th ed. 2003). \textit{See also} Robert Costanza et al. \textit{AN INTRODUCTION TO ECOLOGICAL ECONOMICS} 132-38 (1997) (explaining the emergence of ecological economics, a new field that combines environmental law and economics, which is based on the fundamental assumption that the world’s resources are finite).

\textsuperscript{8} G. Eric Brunstad, Jr., “Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law.” 55 Bus. Law. 499, 590 (2000). There are not enough assets to repay all creditors, so debtors must work with creditors to develop a plan that will enable fair treatment of all parties involved. U.S. v. Maxwell, 157 F.3d 1099, (7th Cir. 1998); \textit{See also} 11 U.S.C. § 1123(a) (2009). The contents of a plan ensure that each class of creditors receives equal treatment and plans must meet the requirements of § 1129 to be confirmed. 11 U.S.C. § 1129 (2009).
could go into bankruptcy.\textsuperscript{9} BP was obligated to take measures to prepare for an oil spill,\textsuperscript{10} but
they failed in their compliance.\textsuperscript{11} Even using Learned Hand’s famous tort liability formula from
\textit{U.S. v. Carroll Towing}, it is clear that the cost of injury and probability of occurrence are higher
than previously thought.\textsuperscript{12} The BP disaster shows the importance of the use of the precautionary
principle.\textsuperscript{13} This tragedy will likely cost BP 37 billion dollars,\textsuperscript{14} but it would only have cost 10
million to 20 million dollars to prevent the damage.\textsuperscript{15} It is difficult to speculate the aggregate
cost of present and future harm, which includes contamination of land and water for years to
come, which includes damage to human health and the environment. However, it is possible to
measure how much an individual cleanup will cost. Companies are obligated to comply with
environmental laws to cleanup pollution, but many companies are able to discharge their
environmental liabilities in bankruptcy.\textsuperscript{16}

\textsuperscript{9} BP has lost about a third of its market value since the explosion. Linda Stern, “Gulf Oil Spill Could Cost BP as
Much as $37 Billion,” available at: http://moneywatch.bnet.com/economic-news/blog/daily-money/gulf-oil-spill-
Derek Thompson, “‘Reasonable high’ chance BP files for bankruptcy.” available at:
http://www.grist.org/article/2010-06-23-reasonably-high-chance-bp-files-for-bankruptcy/. Although BP has not
declared bankruptcy, another similarly situated company could easily file for Chapter 11 or 7. In that case, the
unsecured cleanup costs would become unsecured claims, last payable in bankruptcy. This means they would get
paid in “tiny bankruptcy dollars,” and the claimants and environment would suffer. BP’s spill may pose many risks
to human health. http://health.usnews.com/health-news/family-health/allergy-and-asthma/articles/2010/06/03/gulf-
oil-spill-workers-report-health-problems.html
\textsuperscript{11} Brian J. Donovan, “Oil Pollution Act Provides Federalization of the BP Oil Spill,” available at:
http://donovanlawgroup.wordpress.com/2010/06/05/the-oil-pollution-act-provides-for-the-federalization-of-the-bp-
oil-spill/
\textsuperscript{12} U.S. v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947). B<PPL, the famous formula, says that when the burden is
less than the cost of injury multiplied by the probability of occurrence, the accused has not met the standard of care
required. In the BP case, the burden was less than P x L.
\textsuperscript{13} Richard Posner, “If it seems unthinkable, plan for it.” \textit{THE WASHINGTON POST} at B5, Sunday June 6, 2010. Lack
or preparedness, or perhaps even negligence, has characterized the BP Oil spill.
\textsuperscript{14} The spill could cost $23 billion in clean up costs and $14 billion in claims paid to aggrieved watermen, tourism
officials, environmentalists, and more. Linda Stern, “Gulf Oil Spill Could Cost BP as Much as $37 Billion,”
available at: http://moneywatch.bnet.com/economic-news/blog/daily-money/gulf-oil-spill-could-cost-bp-as-much-
as-37-billion/728/
\textsuperscript{15} Peter Farley, “How to Prevent Deepwater Spills.” available at: http://www.technologyreview.com/energy/25525/.
BP may be liable for civil damages under the Clean Water Act.
\textsuperscript{16} The Clean Air Act, Clean Water Act, CERCLA, RCRA, and many other environmental statutes provide remedies
for environmental protection.
The word “environment” is not mentioned in the Bankruptcy Code, 11 U.S.C. § 101 et. seq. (the “Code”).\(^{17}\) Congress did not draft the Code with enough attention to the particular problems arising from environmental liability.\(^{18}\) These costs actually impose immense economic hardship that environmental cleanup costs might impose on companies and reorganizations, as well as society at large. When government or third parties clean up and then sue corporations for recovery of response costs, the amount they are unable to recover is shifted onto taxpayers.\(^{19}\)

In August 2009, the Seventh Circuit held in \textit{U.S. v. Apex Oil} that a RCRA cleanup injunction was an equitable remedy, which did not give rise to a right to payment and was thereby non-dischargeable.\(^{20}\) Judges and practitioners have begun to worry about the implications of the \textit{Apex} decision.\(^{21}\) This holding is relatively narrow because it only allows RCRA injunctions to be non-dischargeable, maintaining the status quo that allows for dischargeability of other legal remedies arising under environmental statutes that provide for monetary remedies, such as CERCLA.\(^{22}\) Therefore the moral hazard of companies discharging environmental liabilities remains.

\(^{17}\) This is interesting considering that the Code enacted in 1978 and CERCLA was enacted in 1980. Elizabeth Warren & Jay Westerbrook, \textit{THE LAW OF DEBTORS & CREDITORS} 104 (6th ed. 2009); http://epa.gov/superfund/policy/cercla.htm (last visited February 20, 2010). There has been time and opportunity (including revisions to the Code) to include environmental considerations in the Code.


\(^{19}\) See Warren & Westerbrook, \textit{THE LAW OF DEBTORS & CREDITORS} 104 (6th ed. 2009);

\(^{20}\) \textit{U.S. v. Apex Oil}, 579 F.3d 734 (7th Cir. 2009).

\(^{21}\) American Bankruptcy Institute Journal, November, 2009 Resource Conservation and Recovery Act vs. Chapter 11: When is a “Discharge ‘not discharged?”’ Richard Fil, Patrick M. Birney, 2009. Apex Oil Co. will have to perform massive environmental cleanup of property formerly owned by a corporate predecessor (who had formerly emerged from Chapter 11). Richard Fil, Patrick M. Birney “Resource Conservation and Recovery Act vs. Chapter 11: When is a “Discharge ‘not discharged?”’ American Bankruptcy Institute Journal, 1, November, 2009; Bankruptcy Service Current Awareness Alert, Hon. Nancy C. Dreher, Oct. 2009. “7th Circuit rules that EPA’s claim based on a mandatory injunction requiring cleanup sued out decades after the plan was confirmed was not discharged in the Chapter 11. The plan was confirmed in 1986, and \textit{Apex} was decided in 2009. Hon. Nancy C. Dreher, “7th Circuit rules that EPA’s claim based on a mandatory injunction requiring cleanup sued out decades after the plan was confirmed was not discharge in the Chapter 11,” Bankruptcy Service Current Awareness Alert, Oct. 2009.

\(^{22}\) \textit{U.S. v. Apex Oil}, 579 F.3d 734 (7th Cir. 2009).
In light of *Apex* and the evolution of interpreting “claims” under the Code, environmental cleanup costs need to be reexamined and properly classified. This comment will focus on analyzing three issues: (1) why environmental cleanup costs should be treated as claims in bankruptcy, (2) how the distinction between “right to payment” claims and “equitable claims” from *Apex* is artificial in the context of pre-bankruptcy environmental pollution because equitable environmental injunctions, regardless of what statues they arise under, are reducible to money damages, and (3) why pre-petition environmental claims should be given § 507(a) priority, placing them before taxes.

Part I of the comment explains the bankruptcy’s fundamental legal doctrines, including goals, allowed claims, and discharge. Part I.B. proceeds to show how environmental laws give rise to claims, focusing on CERCLA and RCRA. Part I.C. examines the current treatment of environmental cleanup costs in Chapter 11. Part II argues that environmental cleanup costs should be viewed as claims in bankruptcy because they fit the definition of “claim” according to statutory interpretation, legislative history, and caselaw.

Part III analyzes the strengths and weaknesses of five potential solutions addressing the problem of the disparate treatment of environmental cleanup costs in bankruptcy. These are 1) Judge Posner’s solution, which is to make RCRA injunctive relief non-dischargeable, 2) the use of state superlien statutes that give environmental cleanup costs an effective superpriority, 23 3) raising the priority of environmental cleanup costs to a priority under § 507 between § 507(a)(4) and § 507(a)(5), and 4) raising the priority of environmental cleanup costs to make them payable eleventh in the order of § 507 priority unsecured claims.

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23 Superlien statutes enacted by states can effectively allow rights to environmental cleanup costs to prime secured creditors.
Part III.C proposes a fifth solution to the problem of inconsistent and unfair treatment of environmental cleanup costs in bankruptcy: Congress should pass an amendment to the Bankruptcy Code that adds an environmental priority in § 507(a) after § 507(a)(7) and before § 507(a)(8). Part III.C. analyzes why federal regulation is superior to state superlien statutes and provides equity and efficiency analysis to justify the placement of environmental cleanup claims in § 507.24

This comment aims to arrive at a compromise between bankruptcy law and environmental law. Ensuring that environmental cleanup costs are treated as claims is critical to the bankruptcy system. Limiting the dischargeability of these claims by giving them priority status under § 507(a) will enforce the policy of holding polluters accountable, which is at the foundation of environmental law, while still protecting secured creditors’ positions, which is of critical importance in bankruptcy law.

I. BACKGROUND & LEGAL DOCTRINES

A. How Bankruptcy Works

Bankruptcy law’s key function is to act as a collective debt collection device, determining “who gets what, in what order” and providing for the fair treatment of creditors.25 Bankruptcy law overrides many non-bankruptcy laws that would apply in the absence of bankruptcy in order to facilitate and promote bankruptcy law’s goals, which are either rehabilitation or liquidation. In rehabilitation, the goal is the successful reorganization of the company where creditors are treated fairly, and in liquidation, the goal is a fresh start for the debtor and an orderly liquidation

of assets that repays creditors fairly.\textsuperscript{26} Rehabilitating debtors gives them the opportunity to continue doing business and remain productive contributors to the economy.\textsuperscript{27} This allows for continued viability of the company: workers to keep their jobs, and the company can continue manufacturing goods and providing services.\textsuperscript{28}

1. \textit{Goals in Bankruptcy}

To analyze environmental cleanup costs in bankruptcy, this comment will now provide background on bankruptcy’s purpose: to provide creditors with an orderly distribution of assets so that businesses may either liquidate or reorganize.\textsuperscript{29} The goal is to treat creditors who are similarly positioned fairly, eliminating the “grabbing game” that is pervasive in state law debt collection, where the first to collect “wins.”\textsuperscript{30}

The comment analyzes environmental cleanup costs mainly in the context of Chapter 11 bankruptcies because Chapter 11 estates have the potential to actually repay cleanup costs since the goal is to rehabilitate the company and allow pre-petition creditors to collect at least some of what they are owed.\textsuperscript{31} The goals of Chapter 11 are to confirm a plan that repays creditors fairly\textsuperscript{32} and to provide finality for the debtor at the end of the bankruptcy proceeding.\textsuperscript{33} Under the best

\begin{flushleft}
\textsuperscript{26} The policy of a “fresh start” is especially poignant in the context of environmental cleanup, because the environment can never truly get to start afresh. Once it has been polluted, remedial measures can help but will rarely, if ever, return pieces of land or the atmosphere to a “fresh” condition.
\textsuperscript{29} \textit{See} Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930).
\textsuperscript{30} Bankruptcy eliminates the “grabbing game” of state law debt collection and solves the collective action problem of organizing assets by providing the tools to determining an orderly distribution of assets. Elizabeth Warren & Jay Westerbrook, \textit{THE LAW OF DEBTORS \& CREDITORS} 397-98 (6th ed. 2009).
\textsuperscript{31} The purpose of Chapter 11 is to rehabilitate companies and preserve their “going concern” value, even if they are balance sheet insolvent, or close to it. There is a potential for abuse, but salvaging the going concern of the company and making sure that similarly situated key creditors are treated in the same way is critical to moving forward in business after bankruptcy. \textit{See} Elizabeth Warren & Jay Westbrook, \textit{THE LAW OF DEBTORS AND CREDITORS} 422-23 (5th ed. 2009).
\textsuperscript{33} This allows the debtor to be certain about the effect of the discharge and reorganize profitably. \textit{See} Rederford v. U.S. Airways, Inc., 589 F.3d 3, 36 (1st Cir. 2009) (explaining how Chapter 11 adjudicates, disallows, or discharges claims before providing a discharge to provide a fresh start for debtors).
\end{flushleft}
interests test, creditors must get at least as much from the debtor’s plan as they would get in a hypothetical liquidation. 34 This liquidation analysis can only be determined by knowing the amount of available assets to be distributed. Therefore, the amount and priority of environmental cleanup costs is vital to every stage of a Chapter 11 negotiation. However, the analysis also applies to Chapter 7 and other chapters. The question here is what position an environmental creditor should occupy.

2. Allowed Claims

The first issue to determine is whether environmental remediation costs are allowed claims. 35 When claims are allowed, they are deemed valid and the creditor has a right to that amount of payment. 36 The allowable amount of the claim is that owed by the debtor “as of the date of the filing of the petition.” 37 Claims are typically pre-petition rights to collect, whereas post-petition claims, such as a claim by a trade creditor who allowed for continued electricity, are expenses of administration, payable under § 503, not § 502. 38 These post-petition administrative claims get first priority under § 507(a)(1)-(2). 39 Claims give the debtor notice, which allow the debtor to be given due process to adjudicate the claims. 40 Also, each claim is classified, which allows for its placement in the line of creditors in terms of order of repayment. 41 Public policy and economic concerns determine the order of repayment. 42

35 One core function of bankruptcy is to quantify the liabilities of the debtor by allowing or disallowing claims so that creditors and the debtor can negotiate a plan. Elizabeth Warren & Jay Westerbrook, THE LAW OF DEBTORS & CREDITORS 397 (6th ed. 2009). This invitation to negotiation gives the debtor leverage to get creditors to work together and with the debtor. Elizabeth Warren & Jay Westerbrook, THE LAW OF DEBTORS & CREDITORS 397-98 (6th ed. 2009).
Different types of claims are treated differently. Claims are either secured\(^{43}\) (which are paid first), unsecured administrative expense\(^{44}\) priority claims (paid second), or unsecured (paid last). Secured claims and unsecured claims get pre-petition interest, oversecured claims\(^{45}\) get post-petition interest up to the value of the collateral, and unsecured claims do not get post-bankruptcy interest.\(^{46}\) Claims that are oversecured are paid in full. Claims that are undersecured\(^{47}\) are bifurcated and the secured portion is paid in full (when assets are available) and the rest becomes an unsecured claim.\(^{48}\) Post-petition claims and “expenses of administration” under § 503 get paid under § 507(a)(1)-(2).\(^{49}\) Then administrative expense claims under § 502 are paid according to their priority under § 507.\(^{50}\) Unsecured creditors will still get a pro rata share of the remaining assets of the estate. Thus allowed claims must be classified to determine in what order they will be repaid in the Chapter 11 plan.

3. **Purpose & Mechanics of Discharge**

The Seventh Circuit’s opinion in *U.S. v. Apex Oil* makes injunctive environmental claims that do not provide for an alternative “right to payment” non-dischargeable, and to analyze this holding, this comment will first analyze discharge in Chapter 11. Discharge is not defined in 


\(^{43}\) This means that there is a lien on or an interest in an asset.


\(^{45}\) Oversecured claims are defined by being security interests that are secured by collateral worth more than the amount of the claim. Undersecured claims are secured by collateral worth less than the amount of the claim.


\(^{47}\) Undersecured claims are defined by being claims that are secured by collateral worth less than the amount of the claim.


\(^{50}\) Elizabeth Warren & Jay Westerbrook, *THE LAW OF DEBTORS & CREDITORS* 227 (6th ed. 2009). Each member in class of administrative claims is entitled to a pro rata share, and under the absolute priority rule, no class member with a lesser priority status can get paid before claimholders with higher status are paid in full. Elizabeth Warren & Jay Westerbrook, *THE LAW OF DEBTORS & CREDITORS* 663 (6th ed. 2009).
the Code, so one can use the plain meaning rule to define it as “to release from an obligation.”\textsuperscript{51} This would suggest that the limited dischargeability provided in Chapter 11 reorganizations would relieve debtor corporations of certain responsibilities. Discharge happens at the time of confirmation of the reorganization plan.\textsuperscript{52} The company post-confirmation is re-established as the “new company,” and property of the estate is re-vested in the original debtor.\textsuperscript{53} Upon confirmation of a plan, all pre-confirmation claims and interests cease to exist.\textsuperscript{54} However, environmental cleanup costs may not be part of the Chapter 11 discharge, and therefore they may create additional hurdles for reorganizing debtors.\textsuperscript{55}

Chapter 11 does not guarantee a full discharge for corporations.\textsuperscript{56} Chapter 11 only provides for a limited discharge upon confirmation of a reorganization plan. When corporate reorganizations fail under Chapter 11 because they cannot confirm a plan that meets the best interests test and feasibility test of creditors and other options,\textsuperscript{57} they simply liquidate their assets. If the reorganization plan actually provides for “liquidation of all or substantially all of the property of the estate”\textsuperscript{58} then confirmation does not discharge the debtor.\textsuperscript{59} This is because the purpose of liquidation bankruptcy is to repay creditors from what is left of the debtor’s assets. If the company liquidates, the company just dies. There are no individual needs that

\footnotesize{
\textsuperscript{51} http://www.merriam-webster.com/netdict/discharge (last visited January 24, 2010).
\textsuperscript{52} 11 U.S.C. § 1141(d) (2009).
\textsuperscript{53} 11 U.S.C. § 1141(b) (2009).
\textsuperscript{55} Brian A. Cahalane, “CERCLA and the Fresh Start: Quelling the External Conflict.” 4 Am. Bankr. Inst. L. Rev. 265 (arguing that Congress should amend CERCLA to grant the EPA a first priority lien on all the debtor’s property when the debtor is the actual polluter).
\textsuperscript{57} Arranging classes so that an impaired class can vote for the plan over the objections of other classes, called “cramdown,” is an option companies often use.
}
must be met because individuals can just get new jobs and keep the economy functioning. If it is no longer viable, the company can no longer contribute to the economy.

Chapter 11 plans designate a new set of rights for creditors, and a major goal of bankruptcy is maximizing creditors’ recovery on claims. After the confirmation of a plan, the bankruptcy law discharges the debtor’s remaining obligations. Once this discharge takes place, the only remedy for new breaches or failures to repay lie in state law debt collection. This means that if the creditor agreed to accept less from the Chapter 11 plan than what they were owed outside of bankruptcy, they have lost their right to the remaining amount.

B. Environmental Laws that Give Rise to Bankruptcy Claims

Environmental liability is incurred based on when pollution occurred or may occur, and then cleanup may be voluntary or mandatory under federal or state laws. Federal and state environmental laws give causes of action to governmental and private parties who may file proof of claims in Chapter 11. Environmental liabilities can include affirmative legal obligations to refrain from polluting, requirements to remediate contaminated sites (that the debtor currently or formerly owned or operated), obligations to reimburse other parties (including the government), and fines and penalties imposed by courts and government agencies. Federal and state statutes provide for actions for relief (and strict liability) regarding environmental cleanups. The environmental laws are largely designed to prohibit or remediate environmental hazards by requiring violators to clean up or pay to clean up.

1. How Environmental Laws Generally Work

SP3-Monograph3 Collier on Environmental Law and Bankruptcy Section 3 [1] Policy Conflicts and Environmental Claims
One major goal of environmental law is preventing and cleaning up pollution, making polluters and other potentially responsible parties (PRPs) pay the costs of damage they cause to the environment. Cleaning up the environment may be expensive and it may seem unaffordable to Chapter 11 debtors who are expending resources restructuring their companies. Many companies have tried to walk away from costly cleanups by declaring bankruptcy. However, when companies internalize cleanup costs, taxpayers and citizens are less burdened by their impacts.

Federal environmental laws that give rise to bankruptcy claims include RCRA and CERCLA. Federal environmental laws also include the Clean Water Act, Clean Air Act, etc., and many of these laws have state versions, or states and the federal government work cooperatively in enforcement and compliance efforts. CERCLA establishes prohibitions and requirements concerning closed and abandoned hazardous waste sites, provides for liability of persons responsible for releases of hazardous waste at these sites, and establishes a trust fund, the

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66 See U.S. Bank Nat. Ass’n v. EPA, 563 F.3d 199 (6th Cir. 2009) (finding the bankruptcy court did not abuse its discretion in not allowing more evidence of divisibility of harm under CERCLA). See also C.R. “Chip” Bowles Jr., “Plan, Divide and Estimate: U.S. Bank v. U.S. EPA and Clean-up Claims.” 28-JAN Am. Bankr. Inst. J. 34 (explaining that the debtor in U.S. bank was the only person responsible are therefore the Sixth Circuit affirmed the bankruptcy courts holding to allow the EPA’s claim for past and their claim for future costs).


“Superfund,” to provide for cleanup when no responsible party can be identified.\(^{70}\) RCRA\(^{71}\) authorizes the EPA to enjoin waste activities that pose an imminent and substantial endangerment to health and the environment and orders responsible parties to mitigate hazards and clean up sites.\(^{72}\) RCRA section 7002(a)(1)(B) extends a similar cause of action to private citizens providing for citizen suits to abate an imminent hazard, although, as with CERCLA, such suits are rare.\(^{73}\)

Also, state environmental agency regulations and other environmental laws may give rise to causes of action against debtor companies.\(^{74}\) Many state environmental protection laws mirror the federal laws and give rise to similar causes of action.\(^{75}\) The ways in which environmental laws define liability are critical to determining which types of environmental cleanup costs are claims in Chapter 11 so that the cleanup costs are dealt with in the bankruptcy proceeding.\(^{76}\) To understand how environmental claims arise, CERCLA and RCRA will be explained in greater

\(^{70}\) epa.gov/superfund/policy/cercla.htm.
\(^{71}\) RCRA was enacted in 1976. http://www.epa.gov/compliance/civil/rcra/index.html
\(^{72}\) http://epa.custhelp.com/cgi-bin/epa.cfg/php/enduser/std_adp.php?p_faqid=174&p_created=1065036796. RCRA addresses past, present, and future contamination of hazardous waste sites (that are often currently operational) whereas CERCLA remediates uncontrolled releases of hazardous substances (that are often abandoned). http://www.cee.vt.edu/ewr/environmental/teach/gwprimer/rcra/rcra.html
\(^{73}\) SP3-Monograph3 Collier on Bankruptcy Section 2
\(^{74}\) 42 U.S.C.A. § 6901 Congressional Findings.
\(^{75}\) See ENVIRONMENTAL PROTECTION LAW AND POLICY, Glicksman, Markell, Buzbee, Mandelker, Tarlock 103-22 (5th ed. 2007).
\(^{76}\) See generally Angus Macbeth & Stephen D. Ramsey eds., 1984 HAZARDOUS WASTE AMENDMENTS, AND SUPERFUND DEVELOPMENTS: THE TOUGH NEW REGULATORY ENVIRONMENT (1985). According to Apex, an equitable claim may not be dischargeable, whereas claims that are reducible to payment are likely dischargeable. CERCLA, 42 U.S.C.A. § 9601-9675 (commonly known as the Superfund) was enacted on December 11, 1980. It created a tax on chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances (pollution) that may endanger public health or environment. $1.6 Billion was collected for trust fund. Also, NCP, the National Contingency Plan, provided guidelines and procedures to respond to releases of pollution. http://epa.gov/superfund/policy/cercla.htm. The Superfund Amendments and Reauthorization Act (SARA) amended CERCLA on October 17, 1986. http://epa.gov/superfund/policy/sara.htm. Stressed the importance of permanent remedies and innovative treatment technologies in cleaning up hazardous waste sites; required Superfund actions to consider the standards and requirements found in other State and Federal environmental laws and regulations provided new enforcement authorities and settlement tools; increased State involvement in every phase of the Superfund program; increased the focus on human health problems posed by hazardous waste sites; encouraged greater citizen participation in making decisions on how sites should be cleaned up; and increased the size of the trust fund to $8.5 billion.
detail below.  

2. **CERCLA**

The parties who can sue under CERCLA, and thus became bankruptcy claimants, are limited. The government or third parties can bring claims in the form of money judgments or injunctive relief. CERCLA authorizes two kinds of response actions: 1. Short-term removals, where actions may be taken to address releases or threatened releases requiring prompt response; and 2. Long-term remedial response actions that permanently and significantly reduce the dangers associated with releases or threats of releases of hazardous substances that are serious, but not immediately life threatening. Typically the U.S. EPA or state environmental agency sues potentially responsible parties (PRPs) to undertake cleanup or reimburse the government for cleanup costs. Private parties who incur cleanup costs in remediating hazardous waste disposal sites (either voluntarily or because of a government order) may seek to recover response costs under a joint and several cost recovery action under § 107(a) of CERCLA or under a contribution action pursuant to § 113(f) of CERCLA.

To establish a claim, the government or a private party plaintiff must show that: 1) the contaminated site is a “facility” under § 101(9) of CERCLA; 2) the defendant falls within the four categories of PRPs in § 107(a); 3) a release or threat of release of hazardous substance has

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77 Other environmental statutes are outside the scope of this comment. See Robert L. Glicksman, David L. Markell, William W. Buzbee, Daniel R. Mandelker, A. Dan Tarlock, *ENVIRONMENTAL PROTECTION LAW AND POLICY* (5th ed. 2007).
79 Am Jur Proof of Facts 3d 281 § 7 Private cost recovery actions, generally. The four classes of PRPs are: 1) current owners or operators of a site; 2) past owner or operators of a site at the time hazardous substances were disposed of at the site; 3) anyone who arranged for the disposal, transport or treatment of hazardous substances found at the site; and 4) anyone who accepted hazardous substances for disposal and selected the site. Am Jur Proof of Facts 3d 281 § 5 Categories of potentially responsible parties (PRPs); CERCLA § 107(a)(1)-(4), 42 U.S.C.A. § 9607(a)(1)-(4).
occurred at the facility; and 4) the release or threatened release has caused the government or private party to incur necessary response costs which are consistent with the National Contingency Plan; finally, no defense is applicable.  

Since CERCLA allows for joint and several liability, each PRP is responsible for the whole amount of cleanup costs.  

CERCLA claims are quite common in Chapter 11s and need to be dealt with uniformly so that businesses can operate with certainty about the status of their potential CERCLA liability in bankruptcy.  

3. **RCRA**

RCRA, originally the Solid Waste Disposal Act of 1965, gives the EPA the authority to regulate solid waste.  

Hazardous waste is a subset of solid waste, and there are permit programs for hazardous waste treatment, storage, and disposal facilities.  

Corrective action allows for cleanups of accidents at facilities that house hazardous wastes that release pollutants into soil, groundwater, surface water, and air.  

RCRA, unlike CERCLA, typically is

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82 Am Jur Proof of Facts 3d 281 § 2 CERCLA liability-elements of prima facie case, burden of proof. Congress in 1980 enacted CERCLA to facilitate the cleanup of contaminated sites and subsequent litigation has focused on who should be held accountable for paying the cleanup costs at these sites. Am Jur Proof of Facts 3d 281 § 2 CERCLA liability-elements of prima facie case, burden of proof. When a private party brings an action, they have the burden of proving all four elements. Am Jur Proof of Facts 3d 281 § 2 CERCLA liability-elements of prima facie case, burden of proof. When the government brings the action, it must prove the first three elements but enjoys a rebuttable presumption regarding the fourth element. Am Jur Proof of Facts 3d 281 § 2 CERCLA liability-elements of prima facie case, burden of proof. There are some limited statutory defenses to actions to recover costs by the government, but these are very hard to prove (for example, the third party defense can only be shown if a third party not in a contractual relationship with the defendant solely caused the harm). Michael B. Gerrard and Sheila R. Foster, eds., THE LAW OF ENVIRONMENTAL JUSTICE, THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, ABA Section of Environment, Energy, and Resources 578-79 (2d ed. 2008).


86 http://www.epa.gov/lawsregs/laws/rcra.html

preventative, often focusing on resource recovery and recycling, but both statutes allow for cleanup of spilled waste.  

C. Treatment of Environmental Cleanup Costs in Bankruptcy

Environmental costs are treated in four ways in bankruptcy: 1) they may not be treated as claims at all, 2) they can be money judgments, considered a “right to payment,” or “legal,” claim, 3) they can be “equitable remedies” which are reducible to a “right to payment,” or 4) they can be “equitable remedies” which are irreducible to a “right to payment.” Often, environmental cleanup costs are not repaid in bankruptcy when they are either not allowed claims or, if environmental cleanup costs are allowed claims, they are typically treated as general unsecured claims, receiving only a small percentage of the original amount owed. Thus one problem is that courts diverge on how to treat and classify environmental cleanup costs.

Under the Seventh Circuit’s logic in Apex, the fourth category of claims above would be non-dischargeable, but this special treatment only arises when statutes do not provide for an alternative right to payment, and this is rarely the case. Even if there is no statutory alternative right to payment, equitable remedies that can be monetized should be dischargeable claims. This illustrates the unfairness in treating functionally equivalent environmental cleanup differently.

1. Environmental Cleanup Costs as “Claims”

Conflicts arise between the policies of bankruptcy law and environmental law, and thus there are many difficulties in how environmental claims are handled in bankruptcy.  

Bankruptcy courts view CERCLA claims in two ways. One view is that the response costs are

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88 Corrective action allows for cleanups of accidents at facilities that house hazardous wastes that release pollutants into soil, groundwater, surface water, and air. “RCRA Corrective Action,” available at: http://www.epa.gov/cleanup/basicinfo.htm#RCRA

89 Brian A. Cahalane, “CERCLA and the Fresh Start: Quelling the External Conflict.” 4 Am. Bankr. Inst. L. Rev. 265 (arguing that Congress should amend CERCLA to grant the EPA a first priority lien on all the debtor’s property when the debtor is the actual polluter).
pre-petition claims, regardless of when they are incurred, if they concern the release or threatened release of hazardous substances that occurred before filing the Chapter 11 petition.\textsuperscript{90} Under the second view, the CERCLA claimant has a contingent claim if the potential claimant can 1) tie the bankruptcy debtor to a known release of a hazardous substance that the claimant knows will lead to CERCLA response costs; and 2) the claimant has conducted tests concerning the contamination.\textsuperscript{91} Pre-petition claims and contingent claims are dischargeable in bankruptcy.\textsuperscript{92} Also, future response costs based on pre-petition conduct that can be “fairly contemplated” by the parties at the time of filing the Chapter 11 petition are dischargeable.\textsuperscript{93}

Courts have generally held that the government may pursue the litigation to enforce CERCLA § 107 Recovery costs to judgment, but cannot execute on that judgment because of the automatic stay.\textsuperscript{94}

When the government or third parties represent the environment (environmental plaintiffs against the estate, hereinafter called “plaintiffs”), the environment can be viewed as a creditor, because it may sue for repayment of cleanup costs (that it expended under CERCLA, the RCRA, or other state statutes). These creditors have environmental claims against the estate. For the purposes of this discussion, this comment will call holders of an interest against the estate “environmental claimholders.”

\textit{b. Current Law: What is the Status of These Claimholders?}

Environmental claimholders need to know when and how much they will get paid.\textsuperscript{95}

\textsuperscript{90} \textit{In re} Chateauguay Corp., 944 F.2d 992. (2d Cir. 2007). This approach is like the “fair contemplation” test. See note 179 infra.

\textsuperscript{91} \textit{In re} Jenson, 995 F.2d 925. (9th Cir. 1993). This approach is similar to using the “conduct test.” See note 179 infra.

\textsuperscript{92} 11 U.S.C. § 1141(d) (2009).

\textsuperscript{93} \textit{In re} National Gypsum Co. 139 B.R. 397 (N.D. Tex. 1992); \textit{In re} Jenson, 995 F.2d 925. (9th Cir. 1993).


Knowing one's place in the queue in terms of order or repayment is critical for creditors because their classification gives them leverage to negotiate for better treatment.96

i. The Equivalent of Secured Status

Third party plaintiffs are definitely not secured creditors because they do not have a prepetition security interest. However, the government plaintiff can choose to assert a lien97 on a debtor’s property for the amount of the costs associated with the cleanup of the debtor’s property, which is equivalent to a secured interest.98 This would prime the liens of secured creditors under § 506(c).99 § 506(c) says that:

The trustee may recover from property securing an allowed secured claim the reasonable, necessary cost and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property.100

The government can also obtain statutory liens under § 107(l) of CERCLA, entitling the government to repayment to the extent of the value of the property before all other creditors, but these claims are secondary to preexisting liens on the property.101 Several states have enacted superlien statutes to secure cleanup costs,102 which are controversial because of the profound

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97 These can be CERCLA liens or state environmental protection liens.
101 42 U.S.C. § 9607(l)(3); See Reardon v. U.S., 947 F.2d 1509 (1st Cir. 1991). The CERCLA lien is secondary to the rights of a purchaser who buys the property prior to the EPA perfecting its CERCLA lien. If the amount of the claim exceeds the value of the property, the claim is bifurcated resulting one secured claim and one unsecured claim that equals the amount that is greater than the value of the property. See Strochak, Adam P., Wine, Jennifer L., Yates, Erin K., § 6[5][a][i] Priority of Environmental Claims and Obligations, Secured Claims, Statutory Liens Environmental Issues in Bankruptcy Cases, a Collier Monograph (Matthew Bender & Co. 2009) at 61.
policy implications of securing environmental debt while leaving domestic support obligations, employee wage claims, and taxes as unsecured claims. TIBs may not be able to avoid state environmental superliens under § 546(b). § 546(b)(1)(A) limits the trustee’s avoidance powers subject to any applicable law that “permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection.”

State environmental superliens may effectively be perfected before other liens and take precedence. Also, secured creditors whose claims are oversecured are usually allowed to accrue post-petition interest and attorney’s fees up to the value of the collateral, so if environmental claims are oversecured, they may also be allowed these funds.

Allowing environmental cleanup costs to prime the liens of other secured creditors in effect charges the other secured creditors for these costs. The TIB or DIP can charge secured creditors for all reasonable, necessary, costs and expenses of preserving or disposing of secured

102 AMJUR Pollution § 1330 Preconditions to enforcement-Effect of Bankruptcy (2009).
property to the extent of the benefit to the holder of the secured claim\textsuperscript{109} if: 1) the expenditures are reasonable and necessary to the preservation or disposal of the property and 2) the expenditures provide a direct benefit to the secured creditor.\textsuperscript{110} However, courts have limited the application of § 506(c) to expenses which are “specifically incurred for the express purpose of ensuring the property is preserved and disposed of in a manner which provides secured creditors with a maximum return.”\textsuperscript{111} If the secured creditor’s lien is on the contaminated property itself, courts have reasoned that the secured creditor will benefit from a cleanup to that property.\textsuperscript{112} However, when the secured creditor’s lien is on other assets besides the contaminated property, courts have declined to give environmental expenditures a superpriority.\textsuperscript{113}

\textit{ii. Unsecured Status}

Environmental plaintiffs are most likely unsecured creditors, which gives their claims last priority in bankruptcy. However, the government may seek administrative expense priority for claims involving post-petition costs of cleaning up pre-petition releases.\textsuperscript{114} Allowable


\textsuperscript{110} \textit{In re C.S. Assocs.,} 29 F.3d 903 (3d Cir. 1994).

\textsuperscript{111} \textit{In re C.S. Assocs.,} 29 F.3d 903, 907 (3d Cir. 1994); \textit{In re Cascade Hydraulics & Util. Servs., Inc.,} 815 F.2d 546, 548 (9th Cir. 1987).

\textsuperscript{112} Strochak, Adam P., Wine, Jennifer L., Yates, Erin K., § 6[5][a][ii] Priority of Environmental Claims and Obligations, Secured Claims, Charging Secured Creditors for Environmental Cleanup Costs-Section 506(c), \textit{Environmental Issues in Bankruptcy Cases, a Collier Monograph} (Matthew Bender & Co. 2009) at 63.

\textsuperscript{113} Strochak, Adam P., Wine, Jennifer L., Yates, Erin K., § 6[5][a][ii] Priority of Environmental Claims and Obligations, Secured Claims, Charging Secured Creditors for Environmental Cleanup Costs-Section 506(c), \textit{Environmental Issues in Bankruptcy Cases, a Collier Monograph} (Matthew Bender & Co. 2009) at 63.

\textsuperscript{114} Strochak, Adam P., Wine, Jennifer L., Yates, Erin K., § 6[5][b][iii] Priority of Environmental Claims and Obligations, Administrative Expense Status of Prepetition Claims, \textit{Environmental Issues in Bankruptcy Cases, a Collier Monograph} (Matthew Bender & Co. 2009) at 67. Contamination that occurred during the administration of the estate in bankruptcy would merit administrative expense priority because it is an actual and necessary cost of preserving the estate that benefits all creditors. However, some pollution may be a pre and post-petition problem, and courts may be more willing to treat this type of claim as an administrative expense. \textit{In re Wall Tube & Metal Prods. Co,} 831 F.2d 118 (6th Cir. 1987) (administrative expense priority was appropriate for plaintiff state government after the company filed its Chapter 7 petition because pollution was a continuing problem that was a threat to health and safety and violated the Tennessee Hazardous Waste Management Act, a local statute). For claimants that may be jointly and severally liable along with the debtor, courts are less willing to allow for
administrative expenses under § 503(b)(1)(A) include preservation costs under § 507(a)(2). These are given second priority because preserving the estate benefits every creditor and rehabilitates the estate. Administrative expenses are usually considered to be post-petition costs of running and maintaining the estate, including “actual, necessary costs and expenses of preserving the estate” (and this usually includes payment to employees for services rendered during the case, as well as examiners, accountants, consultants, and attorneys in Chapter 11 cases). Priority should be granted only to reflect actual value conferred on the bankrupt estate, so if there is a cleanup order that requires money to be spent in excess of the value of the property, the claim must be bifurcated so that the assessment up to the value of the land is a priority claim and the remaining amount becomes unsecured.

Environmental claims that are generally unsecured are paid last, and they get paid out pro rata in accordance with the plan. CERCLA cost recovery claims would be given the same treatment as other non-priority unsecured claims. There will likely be a large difference between the amount owed and what is actually paid back to the government for a claim for administrative expense priority. In re Dant & Russell, Inc., 853 F.2d 700 (9th Cir. 1988) (holding no administrative expense priority would be granted to plaintiff third-party lessor).

116 Collier on Bankruptcy, Chapter 5 Bankruptcy Code, Creditors, the Debtor, and the Estate. § 503.06 Costs and Expenses of Preserving the Estate; § 503(b)(1)(A).
119 Strochak, Adam P., Wine, Jennifer L., Yates, Erin K., § 6[5][b][iii] Priority of Environmental Claims and Obligations, Administrative Expense Status of Prepetition Claims, Environmental Issues in Bankruptcy Cases, a Collier Monograph (Matthew Bender & Co. 2009) at 68. Where the debtor’s estate lacks unencumbered assets with which to finance cleanup, the debtor company may be allowed to unconditionally abandon their property where there is no imminent harm or danger to the public. In re Smith-Douglass, Inc., 856 F.2d 12 (4th Cir. 1988) (holding abandonment appropriate although debtor’s fertilizer plant contained violations of state environmental laws and regulations).
cleanup costs. This difference may be a cost that the government spreads onto taxpayers.\footnote{121} Prepetition environmental penalties are usually treated as subordinated claims, which get paid after general unsecured claims.\footnote{122} Environmental cleanup costs are often not repaid in full or even in large part in the payout of Chapter 11 plans.

Pre-petition environmental cleanup costs are treated in many different ways, which creates a lack of predictability and clarity in the law. One can analyze the problems in the inconsistencies of bankruptcy’s treatment of pre-petition environmental cleanup costs by (1) considering how the pre-petition cleanup costs should be classified as claims, (2) examining the definition and interpretation of “claim” in the Code, (3) analyzing case law, which includes defining claims by using the “fair contemplation” test, and (4) proposing a solution for the problems of pre-petition environmental cleanup costs in Chapter 11 bankruptcies: raising the priority of environmental claims.

II. THE CLASSIFICATION & TREATMENT OF ENVIRONMENTAL COSTS IN BANKRUPTCY

A. Should Pre-Petition Environmental Costs Be Allowable Claims?

If environmental cleanup costs are not claims, then the Bankruptcy system cannot deal with them.\footnote{123} However, if they are claims, they may be wholly or partly dischargeable in

\footnote{121} Although the Superfund is a tax on polluting companies that is often used for hazardous waste cleanups, this money may not be sufficient and additional taxpayer money is often used, or cleanups are left incomplete. See H. Josef Hebert, “Superfund is running out of money,” SpokesmanReview.com, July 10, 2001, available at http://www.spokesmanreview.com/news-story.asp?date=071001&ID=s989745.

\footnote{122} 11 U.S.C. § 1122, 1123, 726 (2009). Since state and federal governments can be made into a separate class of unsecured creditors under § 1122 (which allows creditors to be placed in the same class if their interests are “substantially similar” to others in the class), if they are the only holders of environmental claims, they may be treated specially under the Chapter 11 plan or be crammed down. 11 U.S.C. § 1122, § 1129(b) (2009). If a violative act occurs during the case, the debtor may be required to pay fines, which, if left unpaid, may become administrative expenses. Strochak, Adam P., Wine, Jennifer L., Yates, Erin K., § 6[5][d] Priority of Environmental Claims and Obligations, Fines and Penalties, Environmental Issues in Bankruptcy Cases, a Collier Monograph (Matthew Bender & Co. 2009) at 69; See supra note 65.

\footnote{123} See Lawrence Ahern & Darline T. Marsh, “Environmental Obligations in Bankruptcy,” 24-SUM Nat. Resources & Env’t 58, Summer 2009.
Bankruptcy. To analyze Apex’s new application of the definition of claim in the environmental context, this comment will explore the definition of “claims” in the Bankruptcy Code. The statute says that both “legal” and “equitable” claims that are reducible to money damages should be dischargeable. The legislative history tells that the bankruptcy should allow the greatest number and type of claims to provide relief. Case law shows that the “spend money” test must be applied and environmental costs that are “fairly contemplated” at the time of filing the bankruptcy petition should be dealt with as dischargeable claims.

“Legal” and “equitable” environmental claims should be treated equally in bankruptcy, and equitable claims that do not arise from law that grants alternative rights to payment but result in the quantifiable remediation of past harm should be dischargeable claims. The solution to the problem of dischargeability of environmental cleanup costs is to create an environmental priority in the Bankruptcy Code.

1. Definitions Under the Code


Judge Posner in Apex argues that an injunctive order for environmental cleanup is a non-dischargeable “equitable remedy” claim. However, the plain meaning of “claim” in the Code does not provide for this limit on the dischargeability of “equitable remedy” claims. Understanding how environmental cleanup costs should be dealt with within the Bankruptcy Code begins with the meaning of “claim.” Under 11 U.S.C. § 101(12), “debt” means “liability on a claim.” Under 11 U.S.C. § 101(5), the term “claim” means-

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

11 U.S.C. § 101(5) (2009). Using the plain meaning rule, one can use a standard English-language dictionary to define “liability” for further clarification. Black’s Law Dictionary defines “liability” as “the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.”

The rules of construction in § 102(2) provide that “claim against the debtor’ includes claim against property of the debtor.” This suggests that claims are particularly important regarding property of the estate. Therefore, using a plain meaning approach to understand § 101(5), environmental liabilities, which are costs incurred against property of the debtor, should be construed as claims against the estate.

b. “Right to Payment” Claims v. “Equitable Remedy” Claims

There are two kinds of “claims” according to the definitions in § 101: “right to payment” claims and “equitable remedy” claims. “Claim” is treated in a unitary fashion throughout the

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130 William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 223 (2000). The plain meaning rule is often considered the best way to interpret statutes because ordinary language is the most obvious and most objective view to tell us what the rule of law requires. William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 223 (2000). Strict constructionists, or textualists, like Justice Scalia, think that only textual sources are relevant to statutory interpretation and legislative history is irrelevant or misleading. William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 227-282 (2000).


132 11 U.S.C. § 102(2) (2009). Property is defined as something owned, a possession, a piece of real estate, or something tangible or intangible to which its owner has legal title. http://www.thefreedictionary.com/property last visited January 17, 2010. Thus property is a key element to bankruptcy law because the law revolves around how to maximize the value of property to increase the distribution of assets to creditors and to help the debtor have collateral upon which to get post-financing to operate in Chapter 11.

Code, which implies that different kinds of claims are to be treated similarly. The Bankruptcy Code is viewed holistically, and its terms should be viewed under the “whole act rule” to give it full force. Terms have a presumption of statutory consistency in the Bankruptcy Code. “Equitable” and “right to payment” claims are not discussed separately in the Code. For example, § 501 Filing of Proofs of Claims or Interest and § 502 Allowance of Claims or Interest do not distinguish between the two types of claims.

A “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment” still allows for equitable remedies to be monetized. § 502(c) allows estimation for purpose of allowance “(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.” This does not suggest that “right to payment” claims be treated differently than “equitable” claims; instead, it shows that such claims are to be estimated, meaning calculated as to a fixed amount.

Thus the construction of the definition of “claim” provides for two types of claims, those that are “rights to payment” and those that are “equitable remedies” for breach of performance if

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134 This is an application of the “whole act rule.” William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 220-21 (2000).
139 Another argument supporting treating “right to payment” and “equitable remedy” claims in the same way involves purposivism. “Purposivism” is another term used to show that the purpose of the statute is a guiding principle in interpreting it. William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION 220-21 (2000). The underlying purpose of the Code is the equal treatment of creditors, based on the treatment of creditors in § 1122 Classification of Claims or Interests, § 1123(a)(4) (explaining how the contents of a plan must provide the same treatment for each claim or interest of a particular class). With this purpose of equal treatment in mind, one can look at the provision of the Code that defines “claim” (§ 101(5)) and applied it in ways that fit the purpose of treating the two kinds of claims equally.
the breach gives rise to a right of payment, and does not provide for what should happen when the equitable remedy does not allow for an alternative right to payment. Therefore it is logical to assume that, in such a case, the quantifiable portion of the remedy should be estimated and dealt with as a dischargeable claim in bankruptcy, while the non-quantifiable portion, or the affirmative obligation to do something besides pay a money award, should be treated differently, perhaps surviving the bankruptcy.\textsuperscript{142} The unintended result in \textit{Apex} was to allow equitable remedies in the form of RCRA injunctions to be non-dischargeable while CERCLA money judgments for equivalent site remediation are treated as general unsecured claims.\textsuperscript{143} This means a RCRA creditor gets superior treatment compared with a CERCLA creditor. This is inconsistent with the Code’s purpose of equal treatment of similarly situated creditors.

The term “equitable” is used often in the definitions section and in other sections of the Code.\textsuperscript{144} Equity is about fair treatment, and “equitable remedies” should not be treated differently than “rights to payment,” because the Code encapsulates all creditors’ rights against an estate, and similarly situated creditors must be treated alike.\textsuperscript{145} Both “right to payment” claims and “equitable remedy” claims are equivalent under the Code in terms of importance and should not receive disparate treatment.

2. \textit{Interpretation of “Claim”}

Since the meaning of “claim” in the Bankruptcy Code has some ambiguity, one can look to the legislative history of the Code.\textsuperscript{146}

\textsuperscript{142} But see U.S. v. Apex Oil, 579 F.3d 734 (7th Cir. 2009) (finding that, regardless of the outcome, when the underlying law does not provide a money remedy, the equitable remedy is non-dischargeable).

\textsuperscript{143} U.S. v. Apex Oil, 579 F.3d 734 (7th Cir. 2009) (finding a cleanup order under RCRA was non-dischargeable).


\textsuperscript{146} William N. Eskridge, Jr., Philip P. Frickey, Elizabeth Garrett, \textit{LEGISLATION AND STATUTORY INTERPRETATION} 295 (2000).
a. What “Claim” Encompasses

The legislative history of “claim” comes from the 1978 Senate Report and House Report. \(^{147}\) Under the 1978 Bankruptcy Code, “claim” was § 101(4), and its proposed meaning was “a significant departure from present law.” \(^{148}\) Before the 1978 Code, “claim” was used along with provability under § 63 of the Bankruptcy Act, which was a narrower definition. \(^{149}\) The debtor rehabilitation chapters contained a broad definition of “claim.” \(^{150}\) The Senate wanted to adopt a broader definition than what was contained in the debtor rehabilitation chapters. \(^{151}\) This would include “any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, mature, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” \(^{152}\) This also includes “a claim as an equitable right to performance that does not give rise to a right to payment.” \(^{153}\) The Senate called for the “broadest possible definition” and intended that all the debtor’s legal obligations, “no matter how remote or contingent” would be dealt with within the Bankruptcy Code’s framework. \(^{154}\) This “permits the broadest possible relief in the Bankruptcy court.” \(^{155}\)

Under the initial U.S. House of Representatives bill, H.R. 8200, the House would have deemed a right to an equitable remedy for breach of performance a claim even if it did not give rise to a right of payment. \(^{156}\) The initial U.S. Senate definition of claim was narrower than the


\(^{156}\) H.R. 8200, 95th Cong., 1st Sess., 309-10 (House Committee print 1977), as reported September 8, 1977.
House definition.\textsuperscript{157} However, the final “compromise” definition in the Code never defined “liability,” “equitable remedy,” or “right to payment.”\textsuperscript{158} The Bankruptcy Reform Act’s sponsors stated that they intended to allow equitable remedies to be susceptible to discharge in bankruptcy, particularly in the context of specific performance of contracts.\textsuperscript{159} Congress intended courts to interpret “claim” broadly, as is reflected in cases decided soon after adoption of the 1978 Code, and therefore environmental liabilities should fall within the rubric of claims. Congress contemplated that all legal obligations of the debtor would be dealt with in the bankruptcy case.\textsuperscript{160} The breadth of claim effectuates the Code’s policy of providing a fresh start for debtors.\textsuperscript{161} Defining “claim” broadly creates certainty because all possible potential calls on the debtor’s assets are brought forward, their demands allowed or disallowed, and their priority and dischargeability determined.\textsuperscript{162} Existence of a valid bankruptcy claim depends on whether the claimant possessed a right to payment and on whether that right arose prior to filing the bankruptcy petition.\textsuperscript{163} Courts have also found that “claim” should include equitable and legal rights to payment, including contingent rights.\textsuperscript{164} Because bankruptcy can only discharge claims, a narrow definition of claim would undercut the critically important “fresh start” policy in bankruptcy.\textsuperscript{165} The concept of claim is broadly construed and intended to encompass virtually any type of obligation in

\begin{itemize}
\item \textsuperscript{157} S. 2266, 95th Cong., 1st Sess., 299 (1977), as introduced October 31, 1977.
\item \textsuperscript{158} 11 U.S.C. § 101(4) (1978).
\item \textsuperscript{160} In re Kasco, 378 B.R. 207 (Bankr. N.D. Ill. 2007). This was a Chapter 13 case. In re Kasco, 378 B.R. 207 (Bankr. N.D. Ill. 2007); In re Onieda Ltd., 383 B.R. 29, 49 Bankr. Ct. Dec. (CRR)
\item \textsuperscript{161} In re Jastrem, 253 F.3d 438, 437 (9th Cir. 2001).
\item \textsuperscript{162} In re Caldor, Inc., 240 B.R. 180, 42 (Bankr. S.D.N.Y 1999).
\item \textsuperscript{163} In re Orseno, 390 B.R. 350 (Bankr. N.D. Ill. 2008); In re Karp, 373 B.R. 837 (Bankr. N.D. Ill. 2007).
\item \textsuperscript{164} Fogel v. Zell, 221 F.3d 955 (Ill. 2000)
\end{itemize}
monetary equivalence\textsuperscript{166} and to permit the bankruptcy court to consider and resolve virtually all financial responsibilities of the debtor.\textsuperscript{167}

\textit{b. Two Types of Claims}

An equitable remedy gives rise to a right of payment and is deemed to be a claim when the payment of monetary damages is an alternative to the equitable remedy.\textsuperscript{168} The terms “equitable remedy,” “breach of performance,” and “right to payment” are not defined in the Code.\textsuperscript{169} The legislative history is helpful.\textsuperscript{170} The key factor in determining whether there is a dischargeable claim is whether a monetary award could substitute for the injunctive relief.\textsuperscript{171} In the case of wrongful discharge, the only remedy may be getting one’s job, or an equivalent job, back.\textsuperscript{172} In the case of covenants not to compete, some courts have held that these are not claims when injunctions were issued with findings that damages were an inadequate remedy,\textsuperscript{173} while other courts have found that where the injunction can be reduced to a money judgment, or there is a “money equivalent,” it should be a claim that would survive the bankruptcy.\textsuperscript{174}

\textsuperscript{169} Bankruptcy Litigation § 10:4. “Equitable remedies which constitute a claim” (2010).
\textsuperscript{170} [It] is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, an alternative right to payment may satisfy a judgment for specific performance in the event performance is refused; in that event, the creditor entitled to specific performance would have a ‘claim’ for purposes of a proceeding under title 11.
\textsuperscript{172} In re Indian River Estates, Inc., 293 B.R. 429 (Bankr. N.D. Ohio 2003).
\textsuperscript{173} But see In re Continental Airlines, Inc., 236 B.R> 318 (Bankr. D.Del. 1999) (finding that a monetary payment is an alternative remedy for the equitable remedy of seniority integration in a wrongful discharge case)
\textsuperscript{175} Silk Plants, Etc. Franchise Systems, Inc. v. Register, 100 B.R. 360 (M.D. Tenn. 1989).
Although there are bankruptcy reasons to treat legal and equitable claims differently, in the context of pollution that arises pre-bankruptcy, the distinction between “legal” money judgments for cleanups and “equitable” injunctive cleanup orders disappears. Since having a claim to specific performance does not preclude having a claim, an environmental creditor can certainly seek both injunctive relief and money damages. Injunctions should be non-dischargeable in terms of avoiding future harm from pollution, and these can also be divided from the dischargeable portion of the claim.

Debtors do have to pay to comply with cleanup injunctions for pre-bankruptcy environmental damage because here will always be a cost associated with the cleanup. In the case of pollution that has already happened, the remedy is to cleanup the damage, which takes a finite and calculable sum of money. Therefore one can substitute a money award for injunctive relief in the context of environmental cleanup orders. All remedies that are “money equivalent” should be non-dischargeable. As a practical matter, if the company must act by spending money, the result is the same: the value of the estate’s assets is diminished by having to pay environmental cleanup costs.

B. Treatment of Pre-petition Environmental Claims: Extent of Dischargeability

The Supreme Court and other federal courts have examined the dischargeability of environmental cleanup costs, both rights to payment and equitable remedies, in bankruptcy.

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175 This comment argues that pre-bankruptcy pollution should include harm that is “fairly contemplated” at the time of the bankruptcy. In re National Gypsum, 139 B.R. 397 (1992).
176 It should not matter if the underlying law does not provide for a relief in the form of a fee “in lieu of” performing an affirmative or negative obligation. If one has to “spend money” to comply with an obligation, then it should be a dischargeable claim. Ohio v. Kovacs, 469 U.S. 274, 276 (1985).
180 See In re Ben Franklin Hotel Associates, 186 F.3d 301 (3d Cir. 1999).
Precedent suggests that Judge Posner’s approach in *U.S. v. Apex Oil* is incorrect. Ohio v. Kovacs is the defining Supreme Court case on environmental debts.\(^{181}\) *In re Torwico Electronics, Inc.* and *Industrial Salvage, Inc. v. Illinois* are erroneous interpretations of how to deal with environmental costs. A better approach comes from tracing the reasoning of *In re Jenson, In re Chateaugay, In re National Gypsum, Midatlantic, and finally In re American Coastal Energy, Inc.* Using the “fairly contemplated” test, one can estimate more environmental claims at the time the bankruptcy petition is filed. These claims, both “legal” and “equitable,” for the remediation of pre-bankruptcy pollution, should be dischargeable claims. This dischargeability can be limited through the creation of an environmental priority.

1. **Ohio v. Kovacs**

In *Ohio v. Kovacs*, the Supreme Court held that the obligation of the debtor to comply with state court injunctions requiring it to clean up hazardous waste disposal sites was a “debt” or “liability on a claim” subject to discharge under the Bankruptcy Code.\(^{182}\) Here, the state of Ohio sued Kovacs, the chief executive officer and stockholder of an industrial and hazardous waste disposal site.\(^{183}\) The state obtained an injunction against Kovacs forbidding him from causing further air and water pollution.\(^{184}\) Kovacs filed a personal bankruptcy petition under Chapter 11, and the case was converted to a Chapter 7 liquidation.\(^{185}\) The state sought a declaration that Kovac’s obligation under the cleanup order was not dischargeable in bankruptcy.\(^{186}\) Affirming the decision of the lower courts, the U.S. Supreme Court held that Kovac’s obligation under the affirmative injunction entered against him was essentially a right.

to payment that was dischargeable in bankruptcy.\textsuperscript{187} This means that the claims were unsecured, so they would get paid last, if at all.\textsuperscript{188} Justice White, writing for the majority, found that there is no indication in the Bankruptcy Code’s language in § 101(4)(B)\textsuperscript{189} providing that a right to performance cannot be a claim (unless it arises from a contractual arrangement).\textsuperscript{190} The Court said “defendant [could not] render performance under the affirmative obligation other than by payment of money.”\textsuperscript{191} This essentially articulates Kovac’s “spend money” test, that says if the debtor has to spend money to comply with an obligation, that constitutes a dischargeable claim.\textsuperscript{192}

The Court rejected the State’s arguments that (1) their injunction was not a claim because Kovac’s default was the breach of the environmental statute, not an ordinary commercial contract, and (2) that Kovac’s breach of his obligation under the injunction did not give rise to a right to payment.\textsuperscript{193} The Court reasoned that the cleanup order entered to remedy a statutory violation could be a claim and if Congress had wanted to limit the application of the term “claim” to contracts, it would have done so as it had in other sections of the Code.\textsuperscript{194} Concurring, Justice O’Connor said, “[A] State may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens of secured

\textsuperscript{187} Ohio v. Kovacs, 469 U.S. 274 (1985).
\textsuperscript{188} Often unsecured creditors are left with nothing.
\textsuperscript{190} Ohio v. Kovacs, 469 U.S. 274, 276 (1985).
\textsuperscript{192} See Ohio v. Kovacs, 469 U.S. 274, 105 S.Ct. 705, 708 (1985). Also, the Sixth Circuit held in \textit{U.S. v. Whizco} that a coal company operator’s Chapter 7 discharge discharged the obligation to comply with the Secretary of Interior’s statutory cleanup order to the extent that it required the operator to spend money.\textsuperscript{192}
Justice O’Connor would thus leave the decision on whether to allow environmental superliens up to the states. 196

2. Pre-Petition Environmental Costs Should Be Dischargeable Claims

Caselaw illustrates the evolution of the term “claim” in the context of environmental costs in bankruptcy. Generally environmental cleanup costs are allowable claims, and if the claims are allowed, they are dischargeable. However, some courts have found that environmental cleanup costs do not constitute allowed claims. Prepetition environmental costs should be treated as claims that can be dealt with within the bankruptcy system because then they will be counted as real costs of operating and these costs need to be quantified and dealt with by estates looking to reorganize. Otherwise it will be difficult for creditors, environmental and others, and debtors to know with certainty where they stand in order to promote good faith and fair dealing in bankruptcy. 197

In In re Torwico Electronics, Inc., a Chapter 11 debtor sought to preclude New Jersey Department of Environmental Protection and Energy (DEPE) from imposing liability or obligation for environmental cleanup. The Third Circuit held the state’s attempt to force the debtor to comply was not a claim within the meaning of the Bankruptcy Code. 198 This case involved an injunctive order to abate ongoing pollution, not the remediation of past harms. This was not a “repackaged claim for damages” and did not threaten the finality of the bankruptcy proceeding. 199 Also, in Industrial Salvage, Inc. v. Illinois, the debtor’s obligations under a state

198 In re Torwico Elecs., Inc., 8 F.3d 146 (3d Cir. 1993).
administrative order\textsuperscript{200} to close landfills and mitigate associated damage was not a claim because it did not involve money damages, and thus it was non-dischargeable.\textsuperscript{201}

These cases incorrectly interpret the Code’s broad definition of claim. Environmental cleanup costs, in the form of injunctive orders and money judgments, should be allowed claims in Chapter 11 bankruptcy so that the costs can be treated in the reorganization plan.

3. \textit{U.S. v. Apex Oil-Judge Posner’s Approach to Equity}

The United States brought an action under the Resource Conservation and Recovery Act (RCRA) seeking injunctive relief requiring the successor company to the owner of an oil refinery to clean up a contaminated site in \textit{U.S. v. Apex Oil Co.}\textsuperscript{202} The Seventh Circuit held that the government's equitable claim to an injunction was not dischargeable in bankruptcy.\textsuperscript{203} \textit{Apex} partly overrules an earlier Seventh Circuit decision, \textit{Udell}, which focuses on the fact that injunctions are not claims in bankruptcy and are therefore not dischargeable.\textsuperscript{204}

\textit{a. The Case}

The EPA, under RCRA, required Apex Oil (through an injunction) to "abate th[e] nuisance" of an oil plume trapped underground. The bankruptcy judge approved confirmation

\textsuperscript{200} An administrative order in this sense is similar to an injunction.
\textsuperscript{201} \textit{Industrial Salvage, Inc. v. Illinois}, 1996 Bankr. LEXIS 643 (S.D. Ill. 1996). In \textit{Boston and Maine Corp. v. Massachusetts Bay Transportation Authority}, a state transportation authority was barred from making contribution claims for pre-discharge cleanup costs because the authority had actual knowledge of the claim and a contingent claim. \textit{Boston and Me. Corp. v. Mass. Bay Transp. Auth.}, 587 F.3d 89 (Mass. 2009). The First Circuit refused to use the “fair contemplation” test, which looks at when the parties had “fair contemplation” that a claim exists, finding it to be inconsistent with the congressional purpose of giving debtors a fresh start. \textit{Boston and Me. Corp. v. Mass. Bay Transp. Auth.}, 587 F.3d 89, 103 (Mass. 2009).
\textsuperscript{202} \textit{U.S. v. Apex Oil Co.}, 579 F.3d 734 (7th Cir. 2009).
\textsuperscript{203} \textit{U.S. v. Apex Oil Co.}, 579 F.3d 734 (7th Cir. 2009). The Seventh Circuit has also relied on their reasoning in \textit{Apex's} to define equitable remedies in 2010 cases. \textit{Follis v. Memorial Medical Center}, 2010 WL 431920, 5 (7th Cir. 2010).
\textsuperscript{204} \textit{Udell v. Standard Carpetland USA}, 18 F.3d 403 (7th Cir. 1994). In \textit{Udell}, an employer’s right to injunction to prevent a former employee from violating a covenant not to compete was not a claim. \textit{Udell v. Standard Carpetland USA}, 18 F.3d 403 (7th Cir. 1994). The court relied on its decision in \textit{Matter of CMC Heartland Partners} where a CERCLA cleanup injunction was deemed an obligation that “runs with the land” and survives bankruptcy. \textit{Udell v. Standard Carpetland USA}, 18 F.3d 403, 407 (7th Cir. 1994) \textit{citing} \textit{Matter of CMC Heartland Partners}, 966 F.2d 1143, 1146-47 (7th Cir. 1992). The court reasoned that here the “equitable remedy” did not give rise to a right to payment, because the injunction did not give rise to a right to liquidated damages, and therefore the injunction was not a claim. \textit{Udell v. Standard Carpetland USA}, 18 F.3d 403, 408-10 (7th Cir. 1994).
of a plan under § 1141(d)(1)(A) discharging the debtor corporation from any debt that arose before the date of confirmation.\(^{205}\) Judge Posner’s opinion examines the meaning of “gives rise to a right of payment,” reasoning that the RCRA, the basis for the government’s equitable demand, did not authorize any form of monetary relief.\(^{206}\) Thus there was no rise to a right to payment arising from the “equitable remedy for breach of performance.”\(^{207}\) The Seventh Circuit extended *Meghrig v. KFC Western Inc.*\(^{208}\) in Apex by finding the EPA’s equitable action under the RCRA could not provide monetary relief.\(^{209}\) Thus both citizen and government actions for enforcement of injunctions under RCRA will now result in non-dischargeable cleanup orders.

The Court relied on *In re Torwico Electronics, Inc.* to find that the state would have a difficult time enforcing laws because virtually all enforcement actions impose some costs on the violator.\(^{210}\) The Code only envisages a “limited right to the discharge of equitable claims.”\(^{211}\) The government’s equitable claim could only require the defendant to clean up the contaminated site and could not be reduced to money damages.\(^{212}\) The Seventh Circuit does not actually say that the injunctive relief was not a claim, but it does find that the injunction does not fit under the definition of equitable remedy for breach of performance that gives rise to right to payment, and therefore the injunction was not dischargeable.\(^{213}\) This is equivalent to saying the injunction

\(^{205}\) U.S. v. Apex Oil, 579 F.3d 734, 736 (7th Cir. 2009).
\(^{206}\) U.S. v. Apex Oil, 579 F.3d 734, 736 (7th Cir. 2009); 42 U.S.C. § 6973(a).
\(^{210}\) U.S. v. Apex Oil, 579 F.3d 734, 736 (7th Cir. 2009) (*citing In re Torwico Electronics, Inc.*, 8 F.3d at 150 note 4).
\(^{211}\) U.S. v. Apex Oil, 579 F.3d 734, 737 (7th Cir. 2009). “[The] discharge must indeed be limited to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do.” U.S. v. Apex Oil, 579 F.3d 734, 738 (7th Cir. 2009).
\(^{212}\) U.S. v. Apex Oil, 579 F.3d 734, 736 (7th Cir. 2009).
\(^{213}\) U.S. v. Apex Oil, 579 F.3d 734 (7th Cir. 2009).
was not a claim at all and would survive the bankruptcy.\(^{214}\) The Court rejected the argument that denying discharge of the injunction precludes reorganization, which disserves the government’s long-term interest in environmental quality.\(^{215}\) Also, even if companies are forced into liquidation rather than reorganization, that would not guarantee the discharge of environmental obligations in Chapter 11.\(^{216}\) The Court also rejected the defendant’s argument that, in the absence of a specific exception in the Code, all equitable claims are dischargeable.\(^{217}\)

\[b. \text{ The Errors in Apex’s Reasoning: the Two Types of Claims Should Not Be Treated Differently} \]

Apex Oil Company, Inc. has petitioned for certiorari to the U.S. Supreme Court\(^ {218}\) and the decision may be overruled because of its departure from precedent, inconsistency with statutory interpretation providing for a uniform treatment of claims, and because other circuits, such as the Sixth Circuit,\(^ {219}\) have different approaches to environmental law that scholars consider superior. It is a legal fiction to say that the injunction is not reducible to money

\[^{214}\text{If the injunction is not a claim, then it cannot be treated in bankruptcy and it will not be treated as co-equal with money judgment claims. Also, if the costs survive the bankruptcy, the debtor (either the old or new management) will have more difficulty reorganizing because of this burden. This will impede the debtor’s fresh start.}\]

\[^{215}\text{U.S. v. Apex Oil, 579 F.3d 734 (7th Cir. 2009) (opinion by Judge Posner). Distinguishing \textit{Ohio v. Kovacs}, Judge Posner says the government in U.S. v. Apex Oil did not seek a payment and the injunction does not entitle it to payment, whereas in the older case the receiver appointed to take the assets in that case was seeking money rather than an order that the debtor clean up the contaminated sight. That was a claim to a “right of payment.” U.S. v. Apex Oil, 579 F.3d 734, 737 (7th Cir 2009). Since Apex was no longer in the refining business, it would have to hire a third-party to do the cleanup. U.S. v. Apex Oil, 579 F.3d 734, 735 (7th Cir. 2009). Judge Posner reasoned that Apex’s position would discourage polluters from developing an internal capability of cleaning up their pollution, even if hiring third parties to do it would be more expensive. Moreover, the cost of cleaning up pollution when the polluter does the cleaning up himself is as real a cost as the price paid to an outsider to clean it up.}\]


\[^{217}\text{U.S. v. Apex Oil, 579 F.3d 734, 3 (7th Cir. 2009).}\]

\[^{218}\text{Bankruptcy Discharge for Environmental Cleanup Obligations? The Impact of U.S. v. Apex Oil, ABA CLE (event code RP0RAP) by Section of Real Property, Trust, & Estate Law, 1:00-2:30pm February 17, 2010.}\]

\[^{219}\text{U.S. v. Whizco, Inc., 841 F.2d 147, 150-51 (6th Cir. 1988) (holding obligations to the EPA to reclaim abandoned mines were dischargeable because the debtor had to spend money to comply with the clean up order).}\]
The Seventh Circuit found that “discharge must indeed be limited to cases in which the claim gives rise to right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do.” The Seventh Circuit found that “discharge must indeed be limited to cases in which the claim gives rise to right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do.”

According to the Seventh Circuit, since RCRA does not include money remedies, RCRA injunctions cannot be monetized, and thus the injunctions must be obtainable. However, if equitable remedies can be reduced to money judgments for the value of the remedy, then that money judgment should be a dischargeable “claim” because of the bankruptcy policy of the equal treatment of creditors.

Other courts, such as the Third Circuit, have found that an “equitable remedy” can only be a claim within the meaning of the Bankruptcy Code if “a monetary payment is an alternative for the equitable remedy.” Also, the Sixth Circuit held in *U.S. v. Whizco* that a coal company operator’s Chapter 7 discharge released the obligation to comply with the Secretary of Interior’s statutory cleanup order to the extent that it required the operator to spend money. The purpose of including equitable remedies that may be reduced to payment is similar to the purpose of

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220 One must separate the equitable from the legal part of the claim-in cases where there is an obvious “in lieu of” fee, meaning that the company can pay for the pollution instead of simply promising to cleanup, it is clear that that should be a legal claim. The fifteen year cleanup order including monitoring, vapor control systems, etc., is an injunctive remedy not to pollute in the future, which could remain non-dischargeable. *US v. Apex Oil, 579 F.3d 734, 739 (7th Cir. 2009).*

221 *U.S. v. Apex Oil, 579 F.3d 734, 738 (7th Cir. 2009).*


223 *Air Line Pilots Ass’n v. Cont’l Airlines, 125 F.3d 120, 133 (3d Cir. 1997); see also Ohio v. Kovacs, 469 U.S. 274, 283 (1985); In re the Ground Round, Inc., 482 F.3d 15, 19-20 (1st Cir. 2007).*

224 *U.S. v. Whizco, Inc., 841 F.2d 147, 150-51 (6th Cir. 1988).* *Apex* cannot be reconciled with *Whizco* because *Whizco* says that an equitable remedy that requires money to be spent is a claim. *U.S. v. Whizco, Inc., 841 F.2d 147, 150-51 (6th Cir. 1988).* As a practical matter, it is always possible to quantify the cost of complying with equitable remedies.
including contingent claims in § 101(5)(A): to ensure that even “uncertain and difficult to estimate” claims can be adjudicated in the bankruptcy proceeding.\textsuperscript{225}

The “spend money” test from \textit{Kovacs} is practically impossible to fail because both claims that are rights to payment and those that are rights to equitable remedies would require money to be spent.\textsuperscript{226} Judge Posner distinguishes \textit{Apex} from \textit{Kovacs} by finding that in \textit{Kovacs} the debtor had failed to comply with a pre-bankruptcy injunction ordering cleanup and the receiver sought money from the estate, not an order.\textsuperscript{227} The Seventh Circuit relied on an earlier decision, \textit{AM Intern., Inc., v. Datacard Corp.}, where the court found that a purchaser could directly pursue response costs as a citizen plaintiff (with proper standing) and his CERCLA and RCRA claims were not discharged in the former owner-debtor’s prior bankruptcy.\textsuperscript{228} The result of Judge Posner’s analysis is that the Seventh Circuit now favors RCRA claims (which are not rights to payment) over CERCLA claims (which are rights to payment).

Judge Posner seeks to limit the dischargeability of injunctive relief under RCRA where RCRA does not provide for an alternative right to payment. The bankruptcy code relies on underlying state and federal substantive law, and here RCRA does not provide monetary relief. However, when calculating claims at the time of the bankruptcy filing, actual costs of compliance with injunctions should be estimated and included as dischargeable monetary claims. The current distinction between 1) legal and equitable claims, both of which give rise to a right to payment, and 2) equitable claims which do not give rise to a right to payment, causes the former to be dischargeable while the latter are not. However, this framework is not workable in

\begin{itemize}
\item \textsuperscript{225} 11 U.S.C. § 101(5) (2009).
\item \textsuperscript{226} Ohio v. Kovacs, 469 U.S. 274, 105 S.Ct. 705, 708 (1985).
\item \textsuperscript{227} U.S. v. Apex Oil, 579 F.3d 734, 737 (7th Cir. 2009).
\item \textsuperscript{228} AM Intern., Inc., v. Datacard Corp., 106 F.3d 1342 (7th Cir. 1997).
\end{itemize}
the case of environmental pollution, because the cost of complying with a cleanup order must be taken into account when allowing dischargeable claims.

There is no real difference between “equitable remedy” claims that arise from a breach of performance which do not also provide a right to payment and all other claims in this case. The artificial distinction is a contrivance used by the Seventh Circuit to mask the real public policy reason for its decision: it is simply unfair and against societal goals to release the polluter from their environmental liabilities. However, giving the two types of claims disparate treatment goes against the fundamental bankruptcy policy of fair and equal treatment of similarly situated creditors.

C. A Better Way to Analyze & Treat Environmental Harms

Although the Seventh Circuit does not explicitly say that equitable remedies for cleanup injunctions under RCRA are not claims, from a functionalist standpoint, the costs for compliance will survive bankruptcy. Instead, injunctive relief should be a claim that is dischargeable. However, dischargeability should be limited by raising the priority of environmental claims in bankruptcy. One must classify claims as prepetition or post-petition. The real issue is when the claim arose, whether it is for an injunction or a right to payment. Pre-petition harms can give rise to future liability, but that should be dealt with in the Chapter 11 reorganization plan as a contingent claim. The claim is contingent claim if it was “fairly contemplated” by the parties pre-petition. If the claim is for post-petition cleanup costs of pre-petition pollution that threatens public health and safety, it should be given administrative expense priority. If there are costs incurred for post-petition cleanup of post-petition pollution, these will be given administrative expense priority. Thus the timing of the claim is critical to classifying and treating it in Chapter 11.
1. **Timing of the Claim**

The timing of the claims’ occurrence is critical in determining their status in Chapter 11. Claims are classified as pre or post-petition. Often, future environmental costs are contingent claims and it is difficult to know if they arose pre-petition. The debtor is only responsible for pre-petition obligations. Since bankruptcy law discharges the debtor’s remaining obligations, environmental claims must be brought during the reorganization in order to be treated by the plan. Otherwise the debtor-company would be able to discharge contingent CERCLA and other environmental liabilities. Post-petition obligations, if they are incurred, are either dealt with as administrative expenses of the estate under § 503(b)(1) or as part of the debtor’s fresh start.

One must figure out which test should be used to determine when present or future contingent claims arose in the environmental context. This comment will argue that the “fair contemplation” approach is the best because it enlarges the number of future claims that are contingent pre-petition claims. These pre-petition environmental claims should be given a higher priority in the order of repayment.

   a. **Tests**

   Environmental claims, like tort claims, require a timing analysis to determine when the claim accrued. There are various tests to determine when claims arise in bankruptcy. There is the “payment test,” which looks at when the injured party has a cause of action under state law,

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229 Some courts have found that when claims arise under environmental statutes pre-petition, liabilities are discharged. See *In re Reading Co.*, 115 F.3d 1111, 18 (3d Cir. 1997) (*abrogation recognized by E.I. DuPont De Nemours and Co.*)


231 *See* *Signature Combs, Inc. v. U.S.*, 253 F.Supp. 2d 1028, 1033 (W.D. Tenn, 2003).

232 In the case of environmental cleanup, the government or a third-party must cleanup the estate or issue an injunctive order to cleanup post-petition in order for the estate to incur a post-petition claim.

the “conduct test,” which focuses on when the conduct giving rise to the claim occurs, the “relationship test,” 234 which looks for a specific and identifiable pre-petition relationship between the debtor and the claimant, and the “fair contemplation test,” which looks at when the parties had “fair contemplation” that a claim exists. 235

The court in *In re Chance Indus.* 236 utilized the “pre-petition relationship test” to determine whether unknown future claimants may have product liability claims susceptible to discharge. In *In re Johns-Manville Corp.*, the court held that future claimants were “parties in interest” to the Chapter 11 and they were entitled to a representative. 237 Also, the court found that a claim arises at the time when acts giving rise to alleged liability are performed. 238 This case was one of the first mass torts cases where all claims were channeled into a post-confirmation trust, but it was not easy to resolve all of the claims. 239 The court in *Grady v. A.H. Robing Co.* used the definition of “contingent” to determine what must be addressed in the bankruptcy system. 240 Jurisprudence evolved and in *In re Morgan* the court found that the “fairly contemplated” test should apply. 241

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234 In *Epstein v. Piper Aircraft Corp.*, the court found that a modified pre-petition relationship test, meaning that pre-petition conduct could give rise to a claim if there is a relationship established before confirmation, should apply to potential product liability claimants. Epstein v. Piper Aircraft Corp., 58 F. 3d 1573, 1577 (11th Cir. 1995). The court declined to use the “conduct test” because pre-petition conduct that was too remote could be included and then the number of future claimants could increase without reasonable bounds. Epstein v. Piper Aircraft Corp., 58 F. 3d 1573, 1577 (11th Cir. 1995). Any manufacture, design, sale, or distribution of the aircraft could potentially give rise to liability under the “conduct test.” Epstein v. Piper Aircraft Corp., 58 F. 3d 1573, 1577 (11th Cir. 1995).


240 Grady v. A.H. Robins Company, Inc., 839 F.2d 198, 203 (4th Cir. 1988). Plaintiff was a Dalkon Shield claimant injured by an intrauterine contraceptive device. The court found that although plaintiff’s harm occurred post-petition, the insertion of the device, which was the act that gave rise to liability, should be the point at which the claim arose. Grady v. A.H. Robins Company, Inc., 839 F.2d 198 (4th Cir. 1988).

The “fair contemplation” test is the best test in the environmental context because the PRPs knowledge of potential liability is the best measurement in determining whether a claim arises.\(^{242}\) The main problem is that future claims by unknown claimants may not give debtors due process in adjudicating the claims.\(^{243}\) However, if the claims can be estimated at the time of forming a Chapter 11 plan, then the debtor can deal with these liabilities for future harm in bankruptcy. Thus the “fair contemplation” test\(^{244}\) should be used to determine when environmental claims arise.

b. Applying the Timing Analysis to Environmental Claims

Some courts use the “conduct” test to determine whether environmental costs are dischargeable claims. The court in *In re Jenson* held that the state’s claim against a Chapter 7 debtor for cleanup costs of hazardous waste located on the property of the debtors’ bankruptcy corporation arose pre-petition and thus was dischargeable.\(^{245}\) The court used the “conduct test” and found there was a petition claim based on the debtor’s conduct giving rise to a right to payment.\(^{246}\) The court rejected the plaintiff’s claims that the right of payment claim arose when the plaintiff had to clean up the debtor’s hazardous waste\(^{247}\) because “right to payment” should not trigger the recognition of a bankruptcy claim.\(^{248}\)

\(^{242}\) *In re Jensen*, 995 F.2d 925, 930-31 (9th Cir. 1993); *In re National Gypsum*, 139 B.R. 397 (1992). These cases found that PRPs knowledge was more important that specific instances on conduct in determining whether a claim had accrued.


\(^{244}\) *In re Morgan*, 197 B.R. 892 (N.D. Cal. 1996) (holding that the “fairly contemplated” test was proper test to determine when fraud action arose).


\(^{248}\) *In re Jenson*, 127 B.R. 27, 31 (1991). But *See In re Frenville*, 744 F.2d 332 (3d Cir. 1984) (using the “payment test” to determine when a claim arose). The court rejected the state health department’s contention that environmental claims should be treated differently than other claims for public policy reasons, citing *In re Dant & Russell, Inc.* for the proposition that courts are not free to formulate their own rules of super or sub-priorities within
Other courts have found that post-petition cleanup costs for pre-petition environmental damage should not be given administrative expense priority. In *In re Piece Coal and Construction Inc.*, the court held that the cost of reclaiming an area disturbed by DIP was entitled to administrative priority, but the costs of repairing pre-petition damage was not entitled to administrative priority. The court said, “Congress was aware of the problem…and recognized the impact that environmental regulations may have on bankruptcies.” The court reasoned that Congress allowed enforcement of environmental regulations under 11 U.S.C. § 362(b)(4) but “preclude[d] governmental units from gaining a favored position as creditors while acting under the umbrella of their enforcement powers…in 11 U.S.C. § 362(b)(5)…money judgments are the exception to the exception and are subject to the automatic stay.” Thus only the costs of reclamation for areas disturbed by the DIP could be given administrative priority under § 503(b)(1)(A).

Furthermore, in *In re Chateaugay*, the Second Circuit held that response costs incurred by the EPA under CERCLA were pre-petition claims dischargeable in bankruptcy, regardless of when they were incurred (conditioned upon the costs concerning the release or threatened release of hazardous waste that occurred pre-petition). The court reasoned that an order obtained by the EPA against a debtor, that to any extent ends or ameliorates continued pollution,

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249 *In re Piece Coal and Construction Inc.*, 65 B.R. 521 (N.D. W.Va. 1986); *In re Dant & Russell, Inc.*, 853 F.2d 700, 709 (9th Cir. 1988).
250 *In re Pierce Coal and Construction, Inc.*, 521 F.2d 137 (3d Cir. 1985); *In re Dant & Russell, Inc.*, 853 F.2d 700, 709 (9th Cir. 1988).
251 *In re Pierce Coal and Construction, Inc.*, 65 B.R. 521 (N.D. W.Va. 1986). Debtor was a mining company in West Virginia that used surface mining methods to mine coal. During the operation of the debtor’s business, an inspector with the Department of Energy from the State of West Virginia observed violations in back filling, regarding, drainage, and revegetation. *In re Pierce Coal and Construction, Inc.*, 65 B.R. 521, 523 (1986).
252 *In re Pierce Coal and Construction, Inc.*, 521 F.2d 137 (3d Cir. 1985);
253 *In re Pierce Coal and Construction, Inc.*, 521 F.2d 137 (3d Cir. 1985);
254 *In re Chateaugay Corp. v. LTV Corp. v. LTV Steel Co.*, Inc., 944 F.2d 977 (2d Cir. 1991).
is not a dischargeable “claim.” The court reasoned further that injunctions could only be claims if they impose an obligation entirely as an alternative to a payment right. If such equitable remedies as injunctions can be reduced to money damages in the alternative, then they are subject to discharge. The court used a separation of powers analysis to determine that if the Code is to be narrowly construed to better serve environmental interests, Congress must provide an exception in the Code instead of the Courts reading in an implied exception to allowable claims.

The court wrestled with the idea that pre-petition conduct that causes future harm, in the tort context, would not give a future tort victim a “claim,” finding that obligations to the EPA “arising out of public regulation” were closer to unmatured contract claims mentioned in the Code than future tort claims. This is an application of the “fair contemplation” test. The court reasoned that the EPA might want to keep its recovery action for response costs outside of bankruptcy so that it could present the whole amount against the reorganized “new company.” However, monies spent to comply with environmental laws post-petition for pre-petition releases or threatened releases could be given administrative expense priority because

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255 In re Chateaugay Corp. v. LTV Corp. v. LTV Steel Co., Inc., 944 F.2d 977 (2d Cir. 1991).
256 In re Chateaugay Corp. v. LTV Corp. v. LTV Steel Co., Inc., 944 F.2d 977, 1008 (2d Cir. 1991).
257 In re Chateaugay Corp. v. LTV Corp. v. LTV Steel Co., Inc., 944 F.2d 977 (2d Cir. 1991). See also Rederford v. U.S. Airways, Inc., 589 F.3d 30 (1st Cir. 2009) (finding that an employee discharged from an airline had a cause of action under the Americans with Disabilities Act that was a claim discharged in the Chapter 11 proceeding).
258 In re Chateaugay Corp. v. LTV Corp. v. LTV Steel Co., Inc., 944 F.2d 977, 1002 (2d Cir. 1991).
259 Rederford v. U.S. Airways, Inc., 589 F.3d 30 (1st Cir. 2009) (finding that an employee discharged from an airline had a cause of action under the Americans with Disabilities Act that was a claim discharged in the Chapter 11 proceeding).
261 In re Chateaugay Corp. v. LTV Corp. v. LTV Steel Co., Inc., 944 F.2d 977, 1005 (2d Cir. 1991).
262 In re Chateaugay Corp. v. LTV Corp. v. LTV Steel Co., Inc., 944 F.2d 977, 1005 (2d Cir. 1991). The court also noted that keeping the action to recover response costs out of bankruptcy might make reorganizing more difficult. In re Chateaugay Corp. v. LTV Corp. v. LTV Steel Co., Inc., 944 F.2d 977, 1002 (2d Cir. 1991).
they are “actual, necessary cost and expenses of preserving the estate.”

The “fair contemplation” approach to claims is better than the “conduct” approach because the “conduct” test may not fully capture the extent of environmental damage that should be given priority in reorganizations. Environmental harm may not happen at one time based on one act, but instead it may be an ongoing harm, there may be latent dangers, and liability may occur in the future.

Bankruptcy’s abandonment power has been limited in certain environmental cleanup cases, such as *Midatlantic*, and thus the timing analysis also applies in these cases to give post-petition cleanup costs administrative expense priority. The court in *Midatlantic Nat’l Bank* held that a TIB may not abandon property in contravention of state statute or regulation that is reasonably designed to protect the public health or safely from identified hazards and before authorizing abandonment; the court must formulate conditions that will adequately “protect the public health or safety from imminent and identifiable harm.”

An oil waste management company, Quanta Resources Corporation, violated its New Jersey permit by accepting 400,000 gallons of PCB contaminated waste oil for processing (pre-petition) at its New Jersey site. It filed for bankruptcy on October 6, 1981, and on October 7, 1981 was ordered by the government to clean up. Quanta converted to Chapter 7. Quanta had also accepted over 70,000 gallons of waste at a separate New York site. The cost of cleaning up that site was more than its value to estate, so the Chapter 7 trustee sought to abandon the New York site.

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New York City and New York State unsuccessfully objected.\textsuperscript{270} The trustee then tried to abandon the New Jersey site, and this was approved over New Jersey’s objections.\textsuperscript{271} The Supreme Court ruled that the TIB could not abandon the property and his powers were subservient to the state’s health and safety concerns.\textsuperscript{272} The Court did not want bankruptcy’s powers to be used by debtor-companies to get out of environmental liabilities, passing their harms and costs onto communities.

Justice Rehnquist’s dissent (joined by Chief Justice Burger and Justices White and O’Connor) explained that the majority crafted a policy from historic antecedents, not the statutory language of the Bankruptcy Code.\textsuperscript{273} Justice Rehnquist reasoned that the state environmental statute should not apply in liquidation cases and that giving notice to the proposed abandonment should suffice (to obtain authorization).\textsuperscript{274} The dissent found that Congress did not intend this exception to the abandonment power and the public interest in a strong economy needed to be balanced with public health and safety.\textsuperscript{275} Forcing a cleanup would place the debtor’s interest in protecting the public’s right to repayment ahead of that of other creditors.\textsuperscript{276}

\textit{National Gypsum} dealt with environmental costs, both those that arose pre-petition and those that arose post-petition. In \textit{In re National Gypsum} the EPA brought an action for determination of dischargeability of contingent unliquidated claims for future CERCLA response costs and natural resource damages.\textsuperscript{277} The court held that the debtors’ potential liability for such costs gave rise to dischargeable claims to the extent that the claims could be

\textsuperscript{277} In re National Gypsum, 139 B.R. 397 (1992).
“fairly contemplated” by the parties at the time of the commencement of the case. The court also held that response costs incurred post-petition as a result of debtor’s pre-petition activity were entitled to administrative priority. The court utilized the *Midatlantic* “imminent and identifiable harm” test to show that the government’s response costs post-petition were necessary to prevent damage to public health and safety.

In *In re American Coastal Energy Inc.*, the court held that post-petition expenses incurred by state agencies to redress a debtor’s pre-petition environmental liabilities were entitled to administrative expense priority. The state, through the Texas Railroad Commission, had to spend money to plug inactive oil and gas wells for the Chapter 11 DIP post-petition (although these obligations were incurred pre-petition). The court reasoned that “[d]ebtors-in-possession must manage the bankruptcy estate in compliance with state and federal environmental and safety laws…American Coastal’s pre-petition activities led to the necessity of the post-petition remediation [and did] not alter American Coastal’s continuing post-petition obligation to conform with the law.”

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282 *In re* American Coastal Energy Inc., 399 B.R. 805, 807 (Bankr. S.D. Tex. 2009). There is no administrative expense priority for property not owned by the debtor, since such expenses do not benefit the debtor’s estate. Strochak, Adam P., Wine, Jennifer L., Yates, Erin K., § 6[5][b] Administrative Expense Priority, *Environmental Issues in Bankruptcy Cases*, a Collier Monograph (Matthew Bender & Co. 2009) at 65. The government can argue that where their cleanup increases the value of the estate, they should be entitled to administrative expense priority, but although courts recognize that debtors are obligated to comply with environmental laws on an ongoing basis, neither CERCLA nor other federal laws impose an independent duty upon a company to clean up contamination which it caused in the past absent an administrative or judicial order to that effect. Strochak, Adam P., Wine, Jennifer L., Yates, Erin K., § 6[5][a] Administrative Expense Priority, *Environmental Issues in Bankruptcy Cases*, a Collier Monograph (Matthew Bender & Co. 2009) at 65. However, an obligation to clean up may exist for companies seeking certain permits under RCRA because such facilities actively treat, store, or dispose of hazardous
The court in *American Coastal* performed the proper analysis, utilizing *National Gypsum* and expanding it to read *Midatlantic’s* holding to mean the court must determine whether the debtor is violating a statute reasonably designed to protect the public health or safety from identified hazards (without only looking at conduct that imposes actual and imminent threats). When the claim arises from a state law designed to protect the public from an identified hazard, the court does not need analyze the harm, but should make sure that environmental cleanup costs are getting repaid. Thus future environmental claims that arise using the “fair contemplation” approach should be pre-petition contingent claims. Post-petition environmental claims for pre-petition pollution that poses continued health risks (where cleanup increases the value of the estate) should be repaid as § 503(b) administrative expenses of the estate.

III. TOWARD A SOLUTION: GIVING PRE-PETITION ENVIRONMENTAL CLAIMS PRIORITY UNDER § 507(b)

A. Justifications for Taking Action

Environmental claims can be a significant hurdle to reorganization. If reorganizing companies cannot clean up their own environmental degradation, then others may have to do it for them. It would be better to incentivize governments and third parties to clean up hazardous waste sites and other pollution by giving them the certainty that they will be repaid as priority claimants. Otherwise, these claimants will have little to no leverage when they come to the table

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285 *In re American Coastal Energy Inc.*, 399 B.R. 805, 813 (Bankr. S.D. Tex. 2009). “The conservation and development of all the natural resources of this state are declared to be a public right and duty. It is also declared that the protection of water and land of the state against pollution or the escape of oil or gas is in the public interest.”

286 *See In re American Coastal Energy Inc.*, 399 B.R. 805, 807 (Bankr. S.D. Tex. 2009). If there is danger to public health and safety, it will be more likely that the government can use the police powers exception to the automatic stay and bring a claim against the estate for pre-petition pollution that continues to cause harm. 11 U.S.C. § 362 (2009).
during reorganization, because they would only be general unsecured creditors (who are the last in line to get paid). The lack of uniformity and certainty from not knowing how environmental costs will be classified has led to inefficiencies and increased litigation, which are also detrimental to reorganizations.

B. Potential Solutions

There are five potential solutions to the inequitable and inefficient treatment of environmental cleanup costs in bankruptcy. The first is Judge Posner’s solution, which is to make RCRA injunctive relief non-dischargeable. The second is the use of state superlien statutes that give environmental cleanup costs an effective superpriority. The third alternative is to raise the priority of environmental cleanup costs to a priority under § 507 between § 507(a)(4) and § 507(a)(5). The fourth possibility is to raise the priority of environmental cleanup costs to make them payable eleventh in the order of § 507 priority unsecured claims.

This comment proposes a fifth solution in Part C. This solution is classifying injunctions that are reducible to money damages, regardless of whether statutes provide an alternative right to payment, and money judgments as “claims,” and providing a federal priority for environmental claims. Also, courts should use the “fairly contemplated” test when allowing contingent claims for future environmental harm so that these claims can also be treated in the reorganization plan. This comment’s solution will improve the treatment of environmental cleanup costs in bankruptcy while also promoting the bankruptcy goal of increasing the likelihood of reorganization.

1. Problems with Judge Posner’s Solution

There is an inconsistency in the dischargeability of environmental claims because, although some courts have held that if an injunctive claim requires money to be spent to clean
up, that is a “right to payment” claim, the Seventh Circuit has said that injunctive claims are not reducible to money damages, so such claims are only “right to an equitable remedy” non-dischargeable claims. Apex has led to the unintended result that RCRA actions are favored over CERCLA actions in bankruptcy and these RCRA claims will survive the bankruptcy proceeding.\textsuperscript{287} This will be harmful for the reorganized company. Since the goal of Chapter 11 is to preserve going concern, interests that can be treated as claims payable with priority status should be dealt with in the bankruptcy proceeding.\textsuperscript{288}

This solution does not treat creditors fairly, because every act to comply with an environmental injunction still requires spending some money, and bankruptcy does not disallow claims that are unliquidated, contingent, or disputed.\textsuperscript{289} Under the Kovacs “spend money” test, equitable remedies such as RCRA injunctions do require money to be spent, and thus these environmental claims should be “right to payment” dischargeable claims.\textsuperscript{290}

\textbf{2. Why Federal Regulation is Preferable Over State Superliens}

The alternate solution of allowing states to prime secured creditors and ensuring full payment of environmental claims should be rejected.\textsuperscript{291} Simply because one state gives a higher priority to environmental creditors through a superlien statute does not mean that it will make that state more free from toxic pollution.\textsuperscript{292} Since pollution can be a transboundary problem,\textsuperscript{293}

\textsuperscript{287} The government or third parties may go after the bankruptcy company only if it is the only available PRP. Bankruptcy Discharge for Environmental Cleanup Obligations? The Impact of U.S. v. Apex Oil, ABA CLE (event code RP0RAP) by Section of Real Property, Trust, & Estate Law, 1:00-2:30pm February 17, 2010. Judge Posner’s solution could dis-incentivize bad environmental behavior by forcing debtors to be saddled by environmental obligations post-bankruptcy. But Apex’s holding is limited to RCRA injunctions, and debtors will likely not be influenced by the non-dischargeability of remedies for potential waste management problems because they are so remote. See http://www.epa.gov/lawsregs/laws/rcra.html.

\textsuperscript{288} Bankruptcy Discharge for Environmental Cleanup Obligations? The Impact of U.S. v. Apex Oil, ABA CLE (event code RP0RAP) by Section of Real Property, Trust, & Estate Law, 1:00-2:30pm February 17, 2010.


\textsuperscript{290} Ohio v. Kovacs, 469 U.S. 274 (1985).

\textsuperscript{291} In re 229 Main Street Ltd. Partnership, 262 F.3d 1 (Mass. 2001).

\textsuperscript{292} See Kirstin Engel, “State Environmental Standard-Setting: Is there a “race” and is it “to the bottom?” 48 HSTLJ 271, January 1997.
states that have environmental superlien statutes are not necessarily going to be cleaner than their counterparts who are not raising standards.\textsuperscript{294} Therefore, the best solution is to address the problem of pollution on the federal level.\textsuperscript{295}

Although some scholars argue that federal regulation does not create the most efficient or best environmental regulation, it would be better in terms of certainty and feasibility for reorganizations. Some states have enacted superlien statutes, but there is evidence that that creates an unhealthy competition to attract business away from those states.\textsuperscript{296} Therefore, setting a § 507(a) priority for the recovery of pre-petition environmental claims, or the amount that it would cost to pay for compliance with an injunction, would eliminate the need for state superlien statutes.\textsuperscript{297} This also protects secured creditors, which is another critical task in bankruptcy.\textsuperscript{298}

Secured creditors’ positions are special in bankruptcy because these are often the creditors that actually own the company’s assets. They also often provide post-petition financing, which is critical to reorganizations.\textsuperscript{299} If environmental superliens can prime secured creditors, then perhaps lenders will think twice before investing in companies that are likely to

\begin{footnotes}
\footnotetext{293}{This term is often used in the international context, as in pollution that runs between the U.S. and Canada, but it is relevant to the problem of interstate pollution as well. See “Air Pollution Standards for Stationary Sources-Next Moves.” 40 Envtl. L. Rep. News & Analysis 10012, January 2010.}
\footnotetext{294}{See Kirstin Engel, “State Environmental Standard-Setting: Is there a “race” and is it “to the bottom?” 48 HSTLJ 271, January 1997.}
\footnotetext{295}{Superliens also create difficulties in companies because they may be unsure how the law will treat them in bankruptcy, and this will increase transactions costs and thus the costs of obtaining credit. For example, if Company A incorporated in State 1 that does have a superlien statute does business with Company B incorporated in State 2 that does not have an environmental superlien statute, they may have to communicate more regularly because of the difficulties in predicting their positions in bankruptcy based on where the business is done.}
\footnotetext{296}{Kirstin Engel, “State Environmental Standard-Setting: Is there a “race” and is it “to the bottom?” 48 HSTLJ 271, January 1997.}
\footnotetext{297}{See Kirstin Engel, “State Environmental Standard-Setting: Is there a “race” and is it “to the bottom?” 48 HSTLJ 271, January 1997.}
\footnotetext{298}{See Thomas H. Jackson, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 139 (1986) (explaining that bankruptcy should respect the relative value of entitlements fixed before the transition to bankruptcy because the common pool problem is unrelated to the allocation of the original entitlements). In the context of adequate protection, preference law, and other areas, secured creditors are always treated well, meaning their original entitlement should not be reduced. Thomas H. Jackson, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 139 (1986).}
\footnotetext{299}{11 U.S.C. § 364 (2009).}
\end{footnotes}
pollute. That may be good because it will be harder for polluting companies to get startup financing. However, it may also be harmful because many sectors of the economy, such as energy and farming, require polluting companies to be in business. Priming secured creditors may be harmful to the lending industry and the economy and therefore environmental superliens are not a strong solution.

3. Under § 507: the Alternate Solution of Raising the Priority of Environmental Claims Higher Than Wage Claims, etc.

The third alternative is to raise the priority of environmental cleanup costs to a priority under § 507 between § 507(a)(4) and § 507(a)(5). Some might argue that environmental cleanup costs should not be payable as generally unsecured claims. One can argue these costs are more important than general unsecured claims because of their implications on workers in areas where pollution occurs, and so they should be paid earlier because of the greater harm they cause. Latent pollution may cause illnesses and death at many points in the future, and under the “fairly contemplated” test, the estate should be liable for many these future claims. These environmental claims should take precedence over wages and salaries, employee benefit plans, claims for unpaid services and undelivered goods, and property and income taxes.

300. The secured creditor exemption to CERCLA liability comes from § 101(20)(A) that says the owner or operator of a facility does not include a person who is not participating in the management of the facility and holds indicia of ownership primarily to protect his security interest in the facility. § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1980) (courts have interpreted the secured creditor exemption broadly, See U.S. v. Marvin Pesses, No. 90-0654, 1998 U.S. Dist. LEXIS 7902 (W.D. Pa.) (finding that lender was exempt from liability under CERCLA and could not be responsible for contribution).


302. See James Salzman & Barton H. Thompson Jr. ENVIRONMENTAL LAW AND POLICY 36-39 (2003) (discussing the importance of environmental justice and the federal government’s role in ensuring a safe environment for all people). Specifically regarding industrial and waste facilities, environmental equity requires that the burden of this pollution should not be placed in only low income or minority areas. See James Salzman & Barton H. Thompson Jr. ENVIRONMENTAL LAW AND POLICY 38 (2003).


because not paying environmental claims early in the reorganization can be harmful to bankrupt estates and communities. Harming the land, property, and public health can have very expensive consequences for reorganizing companies.

4. Under § 507: the Alternate Solution of Raising the Priority of Environmental Claims but Keeping it Lower Than Tax Claims

The fourth possibility is to raise the priority of environmental cleanup costs to make them payable eleventh in the order of § 507 priority unsecured claims. This would still protect environmental claims from being paid with other unsecured claims but it would protect the priority scheme that Congress set up in § 507. Death or personal injury resulting from driving motor vehicles while under the influence under § 507(a)(10) has greater value than environmental claims because Congress decided that deterring driving while intoxicated would be good for society. Therefore, one could argue that environmental protection, which will benefit society, will not result in lives saved as soon as preventing drunk driving, and therefore environmental claims can be paid later in bankruptcy.

C. A Better Solution

This comment proposes a solution to treating pre-petition environmental cleanup costs in bankruptcy: Congress should pass an amendment to the Code raising the priority of pre-petition environmental claims. This will limit the dischargeability of environmental claims. Pre-petition cleanup costs cannot qualify as administrative expenses because they are not “actual, necessary costs and expenses of preserving the estate,” but they should be priority claims because of the importance of protecting the environment and the idea that debtor and unsecured creditors are in a better position to pay for the cleanup than secured creditors and taxpayers.

If the cleanup occurs pre-petition and the government or third party brings a claim against

the estate, it must be treated, classified, and repaid like all other pre-petition claims.\textsuperscript{310} Claims are by definition pre-petition interests and creditors are by definition pre-petition claim-holders. Courts should then be clear about the fact that reimbursement for cleanup-costs is a bankruptcy claim, and courts should treat equitable claims and right to payment claims in the same fashion. Both should be dischargeable claims, but one can limit their dischargeability by giving these environmental claims § 507(a) priority status.\textsuperscript{311} Thus in the plan of reorganization, environmental claims will get paid after secured claims and administrative expenses but before general unsecured claims.

Congress should elevate the priority of environmental claims to make them payable directly after § 507(a)(7) claims.\textsuperscript{312} § 507(a)(8) taxes that are incurred post-petition are given § 503(b)(1)(B) priority and are first priority administrative expenses.\textsuperscript{313} Similarly, courts are treating post-petition environmental costs as administrative expenses.\textsuperscript{314} The temporal element is critical in § 507(a)(8) claims, just as it should be for environmental pre-petition claims.\textsuperscript{315} If the government or third party has already cleaned up the estate pre-petition and is suing for reimbursement, that cost should get a priority between § 507(a)(7) and § 507(a)(8).\textsuperscript{316} Congress should pass an amendment to the Bankruptcy Code that adds an environmental priority in §

\textsuperscript{310} However, if the post-petition cleanup involves pre-petition pollution that is a danger to public health and safety, then these cost may be given administrative expense priority. In re Wall Tube & Metal Prods. Co., 831 F.2d 118 (6th Cir. 1987). If such cleanup adds value to the estate, it is beneficial to public health and the debtor’s creditors.


\textsuperscript{314} These are incurred after the filing of the bankruptcy.


507(a) after § 507(a)(7) and before § 507(a)(8).\textsuperscript{317}

\textbf{1. Justification of Raising Environmental Claims’ Priority}

There are many reasons that environmental cleanup costs are passed onto communities and taxpayers during bankruptcies.\textsuperscript{318} The automatic stay and the abandonment powers enable debtors to get out of paying environmental cleanup costs.\textsuperscript{319} Raising the priority of pre-petition environmental cleanup costs by making them payable between § 507(a)(7) and § 507(a)(8) would be the best compromise to get the costs paid off to the extent the estate is able, while still preserving the rights of secured creditors.\textsuperscript{320} This must be done by the legislature.\textsuperscript{321} Thus, under § 507, pre-petition environmental cleanup costs would be paid after § 507(a)(1) claims which include (in order) Chapter 7 trustee and attorneys fees (if the case is so converted), § 503(b) claims of post-petition financers with superliens under § 364, inadequate adequate protection under § 361, and the Chapter 11 trustee and attorneys fees.\textsuperscript{322} The environmental claims as classified under § 507(a) would also be paid after the sellers right to reclamation under § 507(a)(2).\textsuperscript{323} Prepetition environmental claims would be payable after § 507(a)(3) claims, wage claims up to $10,950 each under § 507(a)(4), employee benefit plans under § 507(a)(5), § 507(a)(6) claims of persons engaged in production or raising of grain or fisherman, and § 507(a)(7) claims of individuals up to $2,425 for services not delivered or provided.\textsuperscript{324} But the environmental costs would be paid before income taxes and property taxes under § 507(a)(8).\textsuperscript{325}

\textsuperscript{319} 11 USC §§ 362, 554 (2009).
Cleanup costs are at least as deserving as prioritized tax claims and they are similar to other affirmative statutory obligations, which are unavoidable in bankruptcy.\textsuperscript{326} Thus Congress should elevate pre-petition environmental costs to ensure that these obligations are not paid as general unsecured claims (that are repaid in “tiny bankruptcy dollars”).\textsuperscript{327} There is a continuing post-petition compliance duty that renders expenditures for pre-petition cleanup necessary to conform to environmental laws.\textsuperscript{328} Giving pre-petition environmental cleanup costs priority in bankruptcy squares with priority setting in the U.S. regulatory scheme.\textsuperscript{329} “Priority setting for regulation involves an integration of benefits, cost, and equity concerns,”\textsuperscript{330} and environmental regulation under CERCLA and RCRA is a federal priority because of the importance of protecting public health and safety. Therefore pre-petition environmental claims should be given special status in bankruptcy.

\textit{a. Equity Considerations}

From an environmental health and safety standpoint, companies’ ability to discharge environmental costs is harmful. CERCLA and other environmental statutes have taken on a public health dimension in the last few years.\textsuperscript{331} People living near hazardous waste sites are


\textsuperscript{327} This is the current state of the law in most circuits. Ohio v. Kovacs, 469 U.S. 274.


\textsuperscript{330} But see Richard Posner ECONOMIC ANALYSIS OF LAW 389 (6th ed. 2003) (arguing that regulation of activities that cause death is necessary, but other health and safety regulations may not provide efficient means to save lives).

\textsuperscript{331} Michael B. Gerrard and Sheila R. Foster, eds, THE LAW OF ENVIRONMENTAL JUSTICE, THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, ABA Section of Environment, Energy, and Resources, 570 (2d ed. 2008).
known to develop increased risks for diabetes, birth defects, as well as other serious diseases.\textsuperscript{332}

In terms of environmental justice, one in four Americans live within three miles of a Superfund site and people of color and low-income populations are likely to live among concentrations of contaminated properties.\textsuperscript{333} When a company does not have the assets to pay for such remediation costs, for example, others such as local, state, or federal government environmental agencies may step in and not get paid back, especially for CERCLA costs (that occur in emergency response post-spill situations). Environmental costs get passed onto communities, both in terms of cleanup and latent pollution and health hazards.\textsuperscript{334} However, if the polluter-company has assets and is attempting to reorganize, they should take their legal obligations to clean up their facilities seriously. The fear of causing latent harms in the environment that affect human beings should be greater than a company’s fear of the inability to reorganize.\textsuperscript{335}

Congressional intent to protect public health may outweigh its desire to see companies reorganizing in bankruptcy at the expense of communities’ environments. If the company simply tries to discharge environmental obligations, it may be passing the costs onto the community where their polluted facilities are located.\textsuperscript{336} If companies contaminate groundwater or pollute neighborhoods in such a way that latent harms cause unforeseeable problems, there


\textsuperscript{333} Michael B. Gerrard and Sheila R. Foster, eds, THE LAW OF ENVIRONMENTAL JUSTICE, THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, ABA Section of Environment, Energy, and Resources, 569 (2d ed. 2008).


may be litigation paralleling the asbestos phenomenon. The polluter-company may be the cheapest or best cost avoider, because they do not have to do the same kind of due diligence that outsiders would have to do in finding out what and where to clean. Companies should use the precautionary principle in calculating risks for pollution. It would be cheaper for companies to clean up hazardous waste sites as needed as opposed to paying large settlement sums for tort claims caused by environmental harm in the future.

If a debtor corporation files a petition for bankruptcy because of the environmental cleanup costs that they cannot afford to pay, it may make sense to discharge some of these costs. If debtor corporations are insolvent, then they cannot clean up hazardous waste sites. If buyers of these corporations or new management (often the pre-bankruptcy unsecured creditors) are forced to take on these cleanup costs, they may not have the incentive to run the business at its optimal level (knowing they that pre-petition environmental costs must be subtracted from revenues). However, the goal of rehabilitation should include cleaning up land that is part of property of the estate. During reorganization, the land where the company performs its work is presumably a valuable asset of the estate. Companies need a consistent rule in order to maximize their growth and accountability, especially when operating in interstate commerce.

339 See Jonathan B. Wiener, "Precaution in a Multi-Risk World" (2002). Where there are threats of great risk of harm, lack of full certainty should not justify postponing or preventing the use of cost-effective measures, according the precautionary principle. Rio Declaration on Environment and Development, Principle 15. Professor Wiener defines three versions of the precautionary principle: (1) uncertainty does not justify inaction, (2) uncertain risk justifies action, and (3) the shifting burden of proof the person who advocates taking action. Jonathan B. Wiener, "Precaution in a Multi-Risk World" (2002).
341 For example, if Company A has $200,000 in assets and owes $250,000, including $100,000 in environmental claims, and the secured creditors are owed more than $200,000, Company A will not have enough money to pay anyone but the secured creditors. Therefore the insolvency will cause the environmental claims to go unpaid. Or, if there are no claims but there is simply damage that costs $100,000 to remediate, the debtor will not be able to afford the remediation costs.
342 Conversation with Professor Alexander Volokh, Emory University School of Law, Saturday March 27, 12pm.
b. Efficiency Considerations

Sustainable growth and development are key goals for corporations in the twenty-first century, and therefore companies should be encouraged not to pollute. Bankruptcy is supposed to free companies from expensive obligations, but depending on the nature and level of the pollution, companies should bear the costs of pre-petition CERCLA remediation (cleanup cost) claims in the form of giving the claims priority. This is a compromise between the polluter pays principle, which would only call for the polluting reorganizing company to pay the full cost of CERCLA claims, and the approach that would free reorganizing companies from any pre-petition environmental liabilities.

Environmental concerns are as important as other priority expenses in § 507 of the Bankruptcy Code. The reason that wage claims, employee benefits, and undelivered services are priority claims is that public policy dictates in the interests of fairness that such claimants should not get repaid last in line during reorganizations or liquidations. Setting priorities for repayment also creates an incentive for workers and buyers of services. Environmental protection must be incentivized. Federal and state environmental statutes have been in place for roughly thirty years, but there has been a lag in compliance. Many companies still pollute instead of taking precautionary measures to prevent harm to communities because it is cheaper in

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345 Zgymut J.B. Plater, “Environmental Law and the Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in which Everything is Connected to Everything Else.” 23 Harv. Envtl. L. Rev. 359 (1999) (arguing that law and economics is critical to conceptualizing environmental law and the functional civic role and political tensions that shape environmental law).

346 Whether or not companies are using bankruptcy to discharge environmental liabilities, these liabilities are real costs and must be taken into account, either by the company’s management or its in house counsel and other attorneys.


348 http://www.epa.gov/superfund/community/today/pdfs/whopays.pdf


the short term for the companies’ survival and operations. Superfund monies should be spent when PRPs are unidentified, but not so that PRP companies can shift the cost environmental cleanup and compliance onto taxpayers.

Prioritizing environmental liabilities may deter companies from incurring such liabilities and then discharging all or part of them as part of a limited discharge in Chapter 11. This may be ex ante inefficient but ex post efficient because deterring companies from polluting may stop them from polluting, but when they do pollute, there is a set priority for the environmental liability. The tradeoff is that some companies may be forced into liquidation because they cannot pay their environmental liabilities as priority expenses. Also, it will hurt the general unsecured creditors to have such expenses paid ahead of them. If companies internalize the cleanup costs, then the cost of their manufacturing will reflect the true cost of operating.

The idea of “making the polluter pay” is difficult to conceptualize in the bankruptcy context because “the polluter” is the bankrupt company, which consists of equity shareholders and the current management team. Also, secured and unsecured creditors have stakes in the

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351 See James Salzman & Barton H. Thompson Jr. ENVIRONMENTAL LAW AND POLICY 17 (2003) (it is easier, meaning cheaper, to free-ride than it is to internalize the externality of pollution, in part because of the high transaction costs of collective action solutions to pollution).
352 The government or third parties may go after debtor-polluters when they alone are the PRP, because otherwise other solvent PRPs are still on the hook for cleanup costs under CERCLA’s joint and several liability scheme.
353 In a Chapter 11 plan, the general unsecureds will not get anything if there is not enough money to repay creditors classified above them. This is because of the absolute priority rule. 11 U.S.C. § 1129(b)(2)(B) (2009). If the overall payout is the same, meaning there is only a distributional change in terms of which creditors get the assets, three groups will still be deterred in terms of business operations. These three groups are: general unsecured creditors, management acting in its own interest, and communities who do not want Brownfields and other pollution that never gets cleaned up in their area. They will thus be dis-incentivized from working with polluting companies. Conversation with Professor Alexander Volokh, Emory University School of Law, Saturday March 27, 12pm.
355 Emilee Mooney Scott, “Bona Fide Protection: Fulfilling CERCLA’s Legislative Purpose by Applying Differing Definitions of ‘Disposal.’” 42 Conn. L. Rev. 957, 966-67 (2010) (citing Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990)) (explaining that the “polluter pays principle’s” goal is to
success of the rehabilitation. Consumers of the company’s products and services also have a
stake in ensuring low prices. So which group of stakeholders should pay for environmental
damage? In principle, the debtor-polluter should be held accountable, but if they do not have
enough assets, how can they repay the government or a third party for cleaning up their
pollution? Should secured creditors bear the cost by getting primed by environmental
superliens? Secured creditors are a necessary party to corporate financing-lenders’ return rates
are fixed in advance and have low monitoring and information costs. If their cost of
monitoring and information gathering goes up because they have to monitor environmental risks, they may charge higher interest rates. Then it will be more difficult to borrow money. This
may affect the economy because when the cost of financing increases, the cost of products and
services would be spread onto consumers. Therefore, to prevent the economic harm to
secured creditors and consumers, someone else should bear the cost.

The general unsecured creditors, such as trade creditors, are in a better position to receive
less from the reorganization plan. General unsecured creditors (GUCs) who are paid last, before
subrogated creditors are often creditors whose security interests, mortgages, or other liens
have been avoided by the trustee because they were not perfected, preferential, or the collateral

358 Emilee Mooney Scott, “Bona Fide Protection: Fulfilling CERCLA’s Legislative Purpose by Applying Differing Definitions of ‘Disposal.’” 42 Conn. L. Rev. 957, 966-67 (2010) (citing Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990)) (explaining that the “polluter pays principle’s” goal is to place the ultimate responsibility for the cleanup of hazardous waste on those responsible for the problems caused by disposal of toxic chemicals).
was insufficient to repay the creditor in full.\textsuperscript{364} These creditors have the least to lose, and usually get nothing in a liquidation, so prioritizing environmental claims above the GUCs will not have dire consequences. In terms of equity shareholders, they are residual risk bearers of corporate default, meaning that if the company dissolves, they usually lose money.\textsuperscript{365} Therefore, raising the priority of environmental claims will give shareholders less incentive to invest in corporations that have a high level of environmental risk.\textsuperscript{366} Corporations who seek to minimize the risk of becoming an involuntary environmental creditor can take out insurance.\textsuperscript{367} Shareholders, boards of directors, and CEOs can also likely predict when insurance is necessary to cover costs of damage and will be more likely to be responsible knowing with certainty that pre-petition environmental claims will be considered priority expenses.

Giving pre-petition environmental claims priority status would help companies, communities, and the government. This cleanup money will come from creditors’ pockets and they will be made worse off. However, in the long term, it will be better for creditors to work with debtors who take precautions not to pollute and create better incentives to operate polluting businesses in a sound fashion.

\textbf{CONCLUSION}

The federal bankruptcy laws should not allow environmental compliance to be undone. In \textit{U.S. v. Apex Oil}, the Seventh Circuit Court of Appeals held that the equitable remedy of a cleanup order, or injunction under the RCRA, was not reducible to a right to payment so it is not

\textsuperscript{364} Jeff Ferriell & Edward J. Janger, UNDERSTANDING BANKRUPTCY § 10.04 at 367 (2d ed. 2007).
\textsuperscript{365} See Richard Posner, ECONOMIC ANALYSIS OF LAW 429-30 (7th ed. 2007).
\textsuperscript{366} See LeRoy C. Paddock, “Green Governance: Building the Competencies Necessary for Effective Environmental Management.” 38 Envtl. L. Rep. News & Analysis 10609, 10637, September 2008. (finding that stakeholders such as banks and insurance companies are putting pressure on companies who seek to do business in the marketplace to pay attention to environmental issues).
\textsuperscript{367} See Richard Posner, ECONOMIC ANALYSIS OF LAW 427 (7th ed. 2007).
a claim that would be dischargeable in bankruptcy. This non-dischargeability is only limited to equitable injunctions under RCRA. The purpose of all of the CWA, CAA, CERCLA, and statues providing money judgments against bankruptcy estates is still subrogated when statutory claims are treated as unsecured and last payable in bankruptcy. Therefore treating various environmental claims fairly, by looking at function, and limiting the dischargeability of these claims is the only way to promote the goals of environmental law and bankruptcy law.

*Apex’s* distinction between “equitable remedy” claims that cannot be reduced to rights to payment and “right to payment” claims is fictional. “Equitable remedy” claims and “legal” claims should be treated equally when they are equivalent remedies to pay for remediation costs arising from harm that was “fairly contemplated” at the time of filing the bankruptcy petition. The Code provides for equal treatment of similarly arising under RCRA should not be more dischargeable than right to payment claims arising under CERCLA when they are functionally equivalent. If the harm was “fairly contemplated” by the parties, then the environmental cleanup cost or injunctive cleanup order should be a claim. These pre-petition environmental claims should be given § 507(a) priority in bankruptcy. Congress should amend 11 U.S.C. to add a category for environmental expenses in between § 507(a)(7) and § 507(a)(8).

Environmental cleanup is critical to improving business operations and community health and safety. Enforcement of environmental laws is critically important, and greater clarity of the laws will ensure that companies understand their compliance obligations.

Companies that cannot operate sustainably, or at least behave responsibly once pollution has occurred, are not ones that will last and keep the economy and the environment healthy. Although limiting dischargeability may be helpful for the government because it can force companies to clean up pollution without having the ability to discharge the liability for cleanup,

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368 U.S. v. Apex Oil, 579 F.3d 734 (7th Cir. 2009).
it may have negative consequences for creditors (because cleanup costs may come out of their pockets), debtors in possession (because they may not be able to reorganize and may be forced into liquidation), and new management or buyers of the company (because they may be stuck with the cleanup costs). Adding an environmental priority will protect the interests of secured creditors while ensuring that repaying environmental costs is a hurdle for reorganizing companies. Although the cleanup money will be coming from general unsecured creditors’ pockets and they will be made worse off, it will be better in the long term for these creditors to work with debtors who take precautions not to pollute and create better incentives to operate polluting businesses in a sound and sustainable fashion.

Legislative action is needed to provide clarity in bankruptcy law because judicial practice in the treatment of environmental cleanup costs is inconsistent. Adding an environmental priority to the bankruptcy Code will deter companies from polluting by forcing them to take enforcement and compliance costs seriously. Raising the priority of environmental claims in bankruptcy is the best solution to the problems that arise when polluting companies get into bankruptcy. Knowing how environmental costs will be treated in Chapter 11 estate will help to provide certainty in bankruptcy law. This is the best compromise between environmental law and bankruptcy law to ensure that the goals of both field are protected in an equitable fashion.