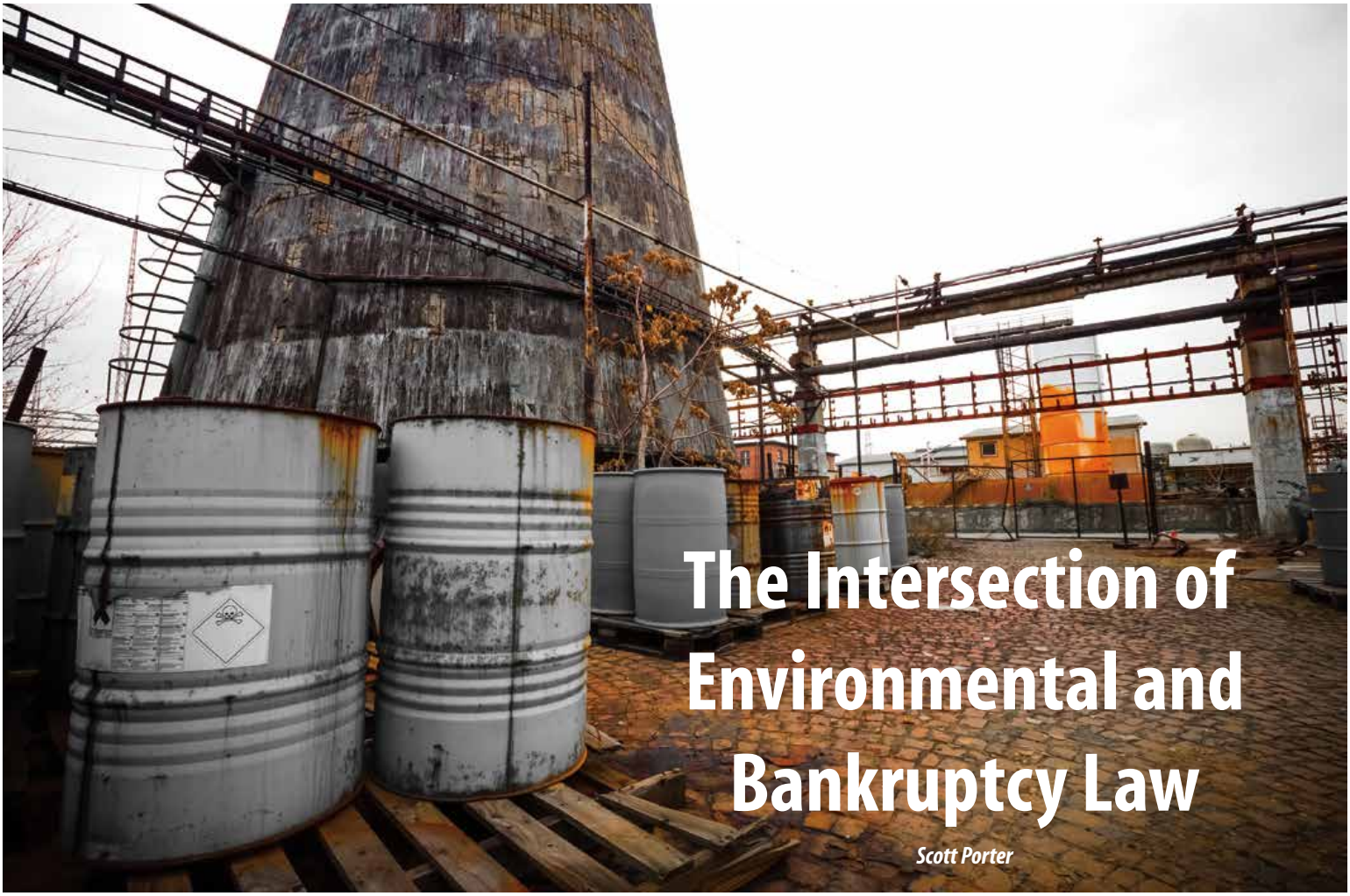

The Intersection of Environmental and Bankruptcy Law

Scott Porter

It may be debatable whether the "war on coal" was caused by overly-broad and too stringent regulations or by improved mechanization and being out competed by the availability of abundant, cheaper and cleaner natural gas. However, what is not debatable is that the coal industry has been in significant economic decline for years, and as evidenced by the bankruptcies of Blackjewel LLC, Revelation Energy and Murray Energy Holdings Co., is not improving.

When an industrial company closes, it not only has an economic impact on its employees and their communities, but on the environment as well. After an active mining operation shuts down, it not only leaves behind its workforce, but also leaves behind reclamation and environmental obligations which could leave taxpayers on the hook for the clean-up and reclamation costs as well as extensive damage to the landscape and potentially toxic remnants that the local communities will have to bear the brunt of for years.

In this situation, two distinct statutory interests potentially come into conflict. The United States Bankruptcy Code, Title 11 was enacted to allow companies and debtors a "fresh start" by being released from liability from certain debts. By allowing environmental liabilities to survive or evade the otherwise comprehensive Chapter 11 plan, this may destroy a debtor's ability to reorganize. While environmental laws were enacted to require regulated entities to comply with regulatory criteria and standards for the protection of human health, safety and the environment, eliminating environmental claims in bankruptcy cases may allow guilty parties to escape liability, delay or prevent cleanup, require other parties to overpay for their relative contributions to the contamination and unnecessarily impose costs on the government.

The resolution of environmental liabilities in bankruptcy represents a particular challenge. There is a basic tension between the goals of environmental law and bankruptcy law and, until recently, there was a little in the way of legal precedent upon which counsel could rely in developing a bankruptcy strategy for the resolution of environmental liabilities. However, the increased level of activity in the bankruptcy area has resulted in increased precedent and therefore greater guidance in this area. In addition, this volume of work has resulted in the development of more efficient resolution strategies for corporations with environmental liabilities facing bankruptcy. This article discusses the intersection of environmental and bankruptcy law.

Relevant Environmental Law

The Comprehensive Environmental Response Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.,* was enacted in 1980 to respond to sites such as Love Canal which posed a threat to the environment and human health and safety which were created by the disposal of hazardous substances. CERCLA's primary purpose and focus is to promote the cleanup of abandoned or uncontrolled contaminated sites and to ensure that the potentially responsible parties (PRP) bear the cleanup costs for the contamination.

Under CERCLA, a PRP is responsible if (a) a person falls within one of the four categories of responsible parties (present owners or operators; past owners or operators; generators of hazardous substances; or arrangers or transporters of hazardous substances); (b) hazardous substances are disposed of at the facility; (c) there is a release or threatened release of a hazardous substance from the facility into the environment; and (d) the release results in response costs. 42 U.S.C. § 9607. Liability under CERCLA is strict and is generally joint and several limiting the availability of defenses to CERCLA liability. The guiding principle of CERCLA is that the "polluter pays." A responsible party may be held liable for cleanup costs or may be compelled to clean up a contaminated site through a judicial injunction or administrative order.

The Resource Conservation and Recovery Act (RCRA) enacted in 1976 is the principal federal law governing the management and disposal of solid waste and hazardous waste, 42 U.S.C. § 6901 *et seq.* RCRA regulates hazardous wastes from the point of generation through their transportation and treatment, storage and/or disposal. Because RCRA requires controls on hazardous waste generators (i.e., sites that generate hazardous waste), transporters, and treatment, storage and disposal facilities (i.e., facilities that ultimately treat/dispose of or recycle the hazardous waste), the overall regulatory framework has become known as the "cradle to grave" system.

RCRA governs the management of solid and hazardous waste at facilities that are currently in use while CERCLA is focused on the management and remediation of abandoned, non-operating sites that are contaminated with hazardous wastes and substance. Unlike CERCLA, RCRA facilities' owners and operators are known and are currently using, managing, or disposing of hazardous wastes. RCRA also regulates the transport of hazardous waste. RCRA would be more relevant in a reorganization proceeding.

Relevant Bankruptcy Law

Original jurisdiction over environmental law issues rests with state courts or U.S. District Courts. *See* 42 U.S.C. § 9613(b)—vesting District Courts with jurisdiction over CERCLA. Once a bankruptcy case is filed, a party may generally remove a claim or cause of action to the bankruptcy court under 28 U.S.C. § 1452(a). However, § 1452 expressly excepts civil actions "by a governmental unit to enforce such governmental unit's police or regulatory power" from removal which generally excepts environmental claims brought by a governmental entity. *See City & County of San Francisco v. PG&E Corp.,* 433 F.3d 1115, 1123 (9th Cir. 2006) (language in § 1452 practically identical to police power exception from automatic stay in § 362 and should be interpreted consistently).

The Bankruptcy Code "discharges the debtor from all debts that arose before the date of the order of relief." 11 U.S.C. § 727(b). A "debt" is defined as a "liability on a claim." 11

U.S.C. § 101(12), while a "claim" is defined very broadly. 11 U.S.C. § 101(5). If a debtor is discharged through bankruptcy proceedings, they will be entitled to two critical things: (a) a release from liability on all claims subject to the discharge; and (b) an injunction preventing others from taking action against the debtor to enforce the claims that have bene discharged. The scope of the discharge is very broad and binds all creditors who received either actual or constructive notice, even if the creditor did not file a proof of claim with the bankruptcy court. 11 U.S.C. § 1141.

Because some environmental obligations do survive bankruptcy or are an ongoing operational requirement, an analysis regarding which environmental law is applicable is an important consideration when deciding whether to proceed under a Chapter 11 reorganization or Chapter 7 liquidation. As a general rule, only pre-petition (for Chapter 7 cases) and pre-confirmation (for Chapter 11 cases) claims can be discharged in bankruptcy. Courts addressing whether environmental obligations are dischargeable must first determine whether the environmental obligations constitute a "claim" under the Code.

When Is an Environmental Claim Dischargeable in Bankruptcy?

One of the most significant issues relating to environmental liabilities is whether they can be discharged in bankruptcy. Dischargeable means a legal release or elimination of debt so that the debtor is no longer liable. 11 U.S.C. § 727(b). Environmental claims usually fall into one of three categories:

(a) An obligation to pay money;
(b) An obligation to perform a cleanup; or
(c) An obligation to refrain from polluting in the future.

Generally, environmental claims that consists of an obligation to pay money are dischargeable in bankruptcy. *In re Chateaugay Corp.,* 112 B.R. 513 (S.D. NY 1990), *aff'd* 944 F.2d 997 (2nd Cir. 1991). An obligation to clean up a site is dischargeable to the extent that the creditor could perform the cleanup itself and sue for response costs, because it is an equitable claim that can be discharged through the payment of money. Because of the threat to human health and safety, an obligation to refrain from or cease polluting in the future is not dischargeable since payment cannot be made in lieu of stopping continued pollution.

Three initial questions drive the analysis of whether an environmental claim is discharged. First, is the particular obligation a "claim?" Second, if so, when did the claim arise? Third, was there sufficient enough notice?

(a) What is a Claim?

Per 11 U.S.C. § 101(5), a claim includes a:

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

(b) a 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.

Legal rights for money damages are covered under (5)(a) while equitable remedies giving rise to money damages are under 5(b). The holder of a claim generally may participate in the bankruptcy case, vote on the plan, and is entitled to a distribution. Claims are generally subject to discharge.

Is this "cleanup order" by a government agency a "claim?" In determining whether an environmental obligation will constitute a claim, the second part of this definition is usually the measuring stick. For instance, when a debtor is subject to a regulatory cleanup order directing it to clean up contamination on property it owns or on property owned by others that was entered prior to the bankruptcy petition.

This was the situation reviewed by the Supreme Court in *Ohio v. Kovacs,* 569 U.S. 274 (1985). In that case, the debtor was responsible for remediating a waste handling site. The state had issued an injunctive order requiring the debtor to conduct a cleanup. However, the debtor was no longer in possession of the site. Therefore, the debtor could comply only by monetarily reimbursing the state. Because the injunctive order could only be satisfied by the payment of money, the court held that the debtor's obligation to clean up environmental damage at a site the debtor did not own was a claim dischargeable in bankruptcy because the obligation had been effectively reduced to a money judgment.

However, the facts in *Kovacs* were unique. Prior to filing for bankruptcy, the state had obtained the appointment of a receiver who took possession of the site and the defendants' assets in order to implement the cleanup; thus, the only performance the state effectively wanted was the payment of money. *Id* at 282-83. *Kovacs* also established that a debtor cannot keep property and avoid liabilities.

Importantly, there are a number of issues in this holding that the Supreme Court did not specifically address. For example, the court did not address what would have happened if the debtor's cleanup obligation was for the debtor's own site; criminal prosecution; penalties imposed prior to bankruptcy; legal consequences if the debtor had been in bankruptcy before the appointment of a receiver and trustee; noting that the decision only addresses "the affirmative duty to clean up the site and the duty to pay money to that end." *Id* at 284-85.

Following *Kovacs*, the various circuits have been fine tuning this decision. The Second Circuit, in *In re Chateaugay Corp.,* 944 F.2d 997, 1008 (2d Cir. 1991), held that orders for injunctive relief are dischargeable if they do no more than impose an obligation entirely as an alternative to a payment duty. However, if the injunctive relief requires the debtor to cease ongoing pollution, then the order is not deemed a claim and is not dischargeable.

In August 2009, the Seventh Circuit issued an opinion in *United States v. Apex Oil Company, Inc.,* 579 F.3d 734 (7th Cir. 2009). In that case, Apex Oil was appealing the grant of an injunction under the RCRA requiring Apex Oil to clean up a contaminated site. The issue decided by the court was whether the government's claim for an injunction was discharged in bankruptcy. The court held that because RCRA does not entitle a plaintiff to demand, in lieu of an actual cleanup, the payment of money damages, the injunction was not discharged.

The clearest outline of a test was set forth in *In re Mark IV Industries, Inc.,* 439 B.R. 460, 468 S.D. N.Y. 2010). The *Mark IV* court distilled the following three factors as a test for determining whether a cleanup obligation is dischargeable:

(1) Is the debtor capable of executing the equitable decree or can it only comply only by paying someone else to do it?

(2) Is the pollution ongoing?

(3) If not, does the environmental agency have the option under the statute giving rise to the equitable obligation to remove the waste and seek reimbursement from the debtor?

The first prong addresses the Supreme Court's holding in *Kovacs*, and examines whether the debtor is in possession of or has access to the site such that it physically could undertake the remediation. The second factor is intended to make certain that the equitable obligation is not a "repackaging of a forfeited claim for damages," but is instead intended to address current, ongoing contamination that continues to impact the environment, and the third examines whether the environmental agency has the "option" under the relevant statute to accept payment in lieu of performance. In 2017, utilizing this test, the United States Bankruptcy Court for the Eastern District of North Carolina held that allegations of violations of the Clean Water Act and RCRA are not "debts" and were not dischargeable. *See In re Taylor,* 572 B.R. 592, 601 (E.D. N.C. 2017).

What these cases illustrate is that issues concerning what is a claim triggering environmental obligations in bankruptcy can be fact specific and vary based on the jurisdiction of the bankruptcy filing. Once something is determined to be a claim, the next factor to analyze in determining whether it is dischargeable is when the claim occurred or originated.

(b) When did a Claim Originate?

Does a claim arise when a debtor contaminates a site, when contamination is discovered, when scope of contamination is understood, or when cleanup is complete, and costs are fully liquidated? For an environmental claim to be dischargeable in a Chapter 7 bankruptcy, it must have arisen pre-petition; that is, before the debtor files its petition for bankruptcy. A debtor remains liable for all claims arising after the bankruptcy plan has been confirmed. (11 U.S.C §727); while in Chapter 11, preconfirmation claims are subject to discharge (11 U.S.C. § 1141(d)). Therefore, determining when the claim arises is often key.

There is conflict among the circuits as to when a claim "arises." Following the Ninth Circuit's ruling in *In re Jensen*, 995 F.2d 925 (9th Cir. 1993), the Sixth Circuit held that an environmental claim arises pre-petition, and thus may be discharged, only if it is based upon pre-petition conduct that can fairly be contemplated by parties at time of debtors' bankruptcy. *Signature Combs, Inc. v. U.S.,* 253 F. Supp. 2d 1028 ,1040 (E.D. Tenn., 2003). See also *In re City of Detroit, Michigan,* 548 B.R. 748, 763 (E.D. Mich. 2016). This approach slightly favors CERCLA's public health and safety goals over bankruptcy's fresh start goal in determining when a claim should arise for purposes of bankruptcy discharge.

(c) Notice Must be Given

Just as a debtor is obligated to provide their creditors with notice, a company with environmental issues may need to provide notice to potential claimants in order to have its obligations discharged. Hence the question, did the creditor holding the claim have sufficient notice of the case and the debtor's liability to participate in the bankruptcy case? Courts have held that environmental claims were not discharged when adequate notice to potential environmental claimants was not given. Notice satisfies due process if it is "reasonably calculated, under the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950).

In *AM Int'l Inc. v. Datacard Corp.,* 106 F.3d 1342 (7th Cir. 1997), environmental liabilities arising out of a debtor's contaminated property were not discharged when the acquiring company lacked sufficient information to tie the debtor to the contamination prior to discharge. *United States v. Union Scrap Metal,* 123 B.R. 831 (D. Minn. 1990), held that the EPA's claim survived because it did not know or have reason to know of its environmental claims against the debtor and did not incur any response costs until after the plan of reorganization was confirmed.

The *Signature Combs* Court, *supra* at 1037-38, determined that this standard allows a claim to accrue earlier than the right to payment standard because the potential claimant need not incur response costs (the fourth CERCLA element) for a contingent claim to arise under this standard. At the same time, the standard requires more awareness of a potential CERCLA claim by a potential creditor than do the underlying act or debtor-creditor relationship standards, both of which allow claims to accrue even if the potential creditor had no idea that it might have a CERCLA claim against the debtor.

In so doing, this standard attempts to reconcile the goals of both the bankruptcy courts and CERCLA. *See In re Chicago*, 974 F.2d 775, 786 (7th Cir. 1992) (holding, for discharge purposes, that a CERCLA claim arises when the claimant can "tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs."); *NCL Corp. v. Lone Star Bldg. Ctrs., Inc.,* 144 B.R. 170 (S.D.Fla.1992); *Sylvester Bros. Dev. Co. v. Burlington Northern R.R.,* 133 B.R. 648, 653 (D.Minn.1991) (in which the *Union Scrap* judge applied a fair contemplation standard instead of its prior right to payment approach).

In dealing with environmental claims, the key notice issues turn on whether the creditor had sufficient knowledge or notice about the bankruptcy proceeding and its claims so that the claim or debt can be discharged. Bankruptcy law differentiates between "known" and "unknown" creditors. The type of notice is dependent on whether the creditor is a "known" or "unknown" creditor. Actual

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notice must be given to all known creditors, which includes creditors actually known to the debtor as well as creditors whose identities are "reasonably ascertainable." *Matter of Crystal Oil Co.,* 158 F. 3d 291 (5th Cir. 1998). "Reasonably ascertainable" means that the creditor could be identified through reasonably diligent efforts. *Id.*

In contrast, formal notice of the bankruptcy proceeding is not necessary to satisfy due process if the creditor is unknown. Constructive notice, where the creditor is unknown, is sufficient. *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.,* 195 B.R. 716 (N.D. Ind. 1996). Notice to unknown creditors by publication is generally sufficient, as long as the noticing party acted reasonably in selecting the means to inform the persons affected. *In re Nortel Networks, Inc.,* 531 B.R. 53, 62-63 (Bankr. Del. 2015).

For a contingent claim to be discharged, the claimant must have had sufficient knowledge of the release or threatened release so that it could have effectively asserted its right in the bankruptcy proceedings in a timely manner. *In re Chicago, supra* at 787. The claimant must also have had sufficient knowledge or notice that the debtor was a potentially responsible party. *Id.*

Debtors who believe they may be liable for an environmental claim should consider providing broad notice to all potentially affected parties so that the environmental obligation will be dischargeable. However, there are certainly circumstances where a debtor may not want to provide information about a potential environmental liability, so notice and timing must be weighed and evaluated. It should be emphasized that failure to provide adequate notice may lead to the debtor not having its environmental debts and liabilities discharged.

An important consideration when deciding whether to give broad notice is that often reorganized companies face environmental claims years or even decades after the bankruptcy proceedings have concluded and having a claim discharged can be an affirmative defense or entitle a reorganized company to an injunction. Debtors should maximize the scope of the discharge by conducting a reasonable search into potential environmental claimants and providing notice of the bankruptcy case to such claimants. Regulatory agencies or other parties potentially liable with the debtor under environmental laws should take action upon receiving notice of bankruptcy case, because their rights could be adversely affected.

Are Future Response Costs Recoverable?

Often there are multiple PRPs who could have caused or contributed to the contamination, especially co-investors and predecessors in title who may have rights against the debtor in possession. This leads to a situation where PRPs seek cost recovery. If a debtor's cleanup obligations have been determined to be claims because they can be satisfied by the payment of money, under what circumstances can other PRPs recover at least some of the future cleanup costs from the debtor who would have been responsible for under environmental remediation statutes

11 U.S.C. § 502(e)(1) provides for the disallowance of contingent claims for reimbursement or contribution where the claimant is co-liable with the bankrupt debtor. This section disallows contingent pre-petition claims by co-liable parties, such as speculative contribution claims. Claims for cleanup expenses actually incurred by a co-liable party post-petition, with respect to assets possessed by the debtor, may be entitled to administrative expense status

Courts interpreting § 502(e)(1)(B) have consistently applied a three-part test to determine whether a private party's claim is subject to disallowance. Each part of the test must be satisfied for a claim to be disallowed:

(1) *Contingency.* The claim must be contingent at the time of allowance or disallowance; and

(2) *Co-liability.* The party asserting the claim must be liable with the debtor on the claim of a third party; and

(3) *Reimbursement or contribution.* The claim must be for reimbursement or contribution. Two policies underlie the application of this section: (1) preventing double recovery on the same claim and furthering equitable distribution among creditors; and (2) enabling bankruptcy case to proceed with distribution to unsecured creditors without awaiting resolution of contingency. *In re Fuel Barons, Inc.,* 488 B.R. 783, 787 (Bankr. N.D. Ga. 2013).

In applying these criteria, courts in the circuits have been split. *In re Lyondell Chem. Co,* 442 B.R. 236 (Bankr. S.D. N.Y. 2011); *In re Chemtura Corp.,* 443 B.R. 601 (Bankr. S.D. N.Y. 2011) and *Route 21 Associates of Belleville, Inc. v. MHC, Inc.* 486 B.R. 75 (S.D.N.Y. 2012), *aff'd, In re Lyondell Chem. Co.,* 542 Fed. Appx. 41 (2d Cir. 2013) adopted broad interpretations of each of the above elements and disallowed essentially all claims seeking recovery of future remediation costs.

In these cases, all of the PRPs' claims for future costs were disallowed, as the courts found that: (1) claims remain contingent until liability has been established and amounts are actually paid; (2) the PRPs' claims were ultimately premised on co-liability to the government; and (3) the claims were for contribution or reimbursement. *Lyondell, supra* at 248. Thus, these decisions severely limit the types of claims a creditor PRP can assert against a debtor and preclude claims based on future costs and expenses.

A PRP's ability to withstand a §502(e)(1)(B) challenge to its cost recovery claims for future costs has gotten far different treatment in the First, Third and Sixth Circuits. In the Third Circuit, in *In re Allegheny Int'l, Inc.,* 126 B.R. 919 (W.D. Pa. 1991) *aff'd without opinion* 950 F.2d 721 (3d Cir. 1991), the court affirmed a Western District of Pennsylvania case that allowed a PRP's CERCLA Section 107 claim for future response costs after finding the co-liability element to be unsatisfied. The claimant sought to recover its own past and future response costs for a cleanup that lacked any governmental involvement. The *Allegheny* bankruptcy court concluded that "the distinction between a cleanup performed by [a claimant] and a cleanup performed by the EPA is crucial." 126 B.R. at 923.

Both the First and Sixth Circuits have concluded that a co-PRP's claim may not be disallowed under Section 502(e)(1)(B) where the government is barred from filing or has waived its right to file a claim. In *In re Hemingway Transport, Inc.,* 993 F.2d 915, 928 (1st Cir. 1993) the First Circuit vacated a bankruptcy court's order disallowing a PRP's claims, instructing the bankruptcy judge to either allow the bankruptcy trustee or the claimant to file a surrogate claim on EPA's behalf, or allow and estimate the PRP's claim pursuant to normal claim allowance procedures.

In a case that originated in the Sixth Circuit, a claimant argued that it should not be considered co-liable with the debtor because the governmental agencies had not filed a claim before the bar date, which had passed several years earlier. *In re Eagle-Picher Industries, Inc.,* 131 F.3d 1185 (6th Cir. 1997) and 235 B.R. 876 (6th Cir. 1999). The Sixth Circuit found that if the agencies were absolutely barred from filing a claim, there would no longer be co-liability between the claimant and debtor, and thus its claim should be allowed.

In remanding the case back to the bankruptcy court, Sixth Circuit suggested that the bankruptcy court give "fresh consideration" to the Allegheny approach regarding placement of distributions on claims into a trust to be expended on the remediation of a site, in order to guard against double liability or double recover. *Id.* at 1189 & 879. Based on the holding in *Eagle-Picher,* it appears that a PRP has the basis and ability to withstand a Section 502(e)(1)(B) challenge to its cost recovery.

Debtor's Protection against Government Environmental Claims

(a) Policy and Regulatory Exception to the Automatic Stay

The automatic stay is one of the greatest protections conferred upon debtors in bankruptcy. Once a bankruptcy petition has been filed, parties are enjoined from taking any actions to collect, assess, or recover pre-petition claims against the debtor or debtor's property pursuant to 11 U.S.C. § 362(a). In general, the automatic stay is designed to halt all pending legal actions against the debtor and to require any party seeking to continue a legal proceeding to obtain leave of the bankruptcy court.

The automatic stay, however, is not absolute. There are several exceptions, including the 'police and regulatory exception,' which applies to the "commencement or continuation of an action or proceeding by a governmental unit… to enforce [its]…regulatory power, including the enforcement of a judgment other than a money judgment. 11 U.S.C. § 362(b)(4). Debtors should be aware that governmental agencies are likely to assert this exception when seeking to continue any pre-petition legal actions based on alleged violations of various environmental laws, including, but not limited to, claims regarding environmental site remediation.

The case of *Bickford v. Lodestar Energy, Inc.,* 310 B.R. 70 (E.D. KY 2004) illustrates this. Under KRS Chapter 350, a surface mine is required to maintain reclamation bonds. Lodestar had 68 permits and bonds issued through Frontier Insurance Company (Frontier), incorporated in the state of New York. On August 24, 2001, the New York Superintendent of Insurance and Frontier jointly petitioned the New York Courts for an order placing Frontier in rehabilitation under New York's Rehabilitation and Liquidation Act.

Because of this, the Kentucky Department of Insurance suspended Frontier's certificate of authority to do business in the Commonwealth of Kentucky and the Energy and Environment Cabinet notified Lodestar that they were now operating without the required bonds in violation of statute. The Bankruptcy Court issued two orders, the first in the main bankruptcy case determining that those certain threatened actions by the Cabinet would violate the automatic stay and a second order in the adversary proceeding, granting Lodestar's Motion for Temporary Restraining Order and/or Preliminary Injunction. At the foundation of each of these orders was the Cabinet's continuing enforcement of the statutory bonding requirement.

On appeal, the court reversed relying on the "police power" exception to the automatic stay. In order to evaluate whether governmental action comes within the "police power" exception to automatic stay, the court determined that it must apply the "pecuniary purpose" test and analyzed whether the intended action was to give effect to public policy or to protect government's or third party's pecuniary interest.

The court was not convinced that proceedings pursuant to the reclamation bond requirement represented a protection of the government's pecuniary interest in the debtor's property rather than a concern with matters of public safety. The bond requirements were meant to protect against the dangers posed by land that was not reclaimed and came within the "police power" exception to automatic stay. *Id.* at 76-77. This opinion confirmed that when there is a need to protect human health, safety and the environment, bankruptcy is not intended to be a safe haven from compliance with regulatory requirements generally applicable to ongoing operations of debtor. *Id.* at 76.

Although this exception to the automatic stay generally does not apply where a governmental unit is seeking to enforce a monetary judgment, courts have usually read the exception broadly, in favor of allowing a government to continue its environmental actions against a debtor, even where the government is effectively seeking some pecuniary relief. *Penn Terra, Ltd. v Pa. Dep't of Envtl. Res.,* 733 F.2d 267 (3d Cir. 1984).

This exception will often allow a governmental entity to continue a pre-petition environmental action against the debtor, even one involving monetary obligations, until entry of the bankruptcy court monetary judgment. However, the government is stayed from enforcing the judgments outside of the bankruptcy proceeding. *See, New Jersey v. W.R. Grace & Co. (In re W.R. Grace & Co.),* 412 B.R. 657, 663 (D. Del. 2009); *U.S. v. LTV Steel Co., Inc.,* 269 B.R. 576, 582 (W.D. Pa. 2001).

Debtors may find some relief in that some bankruptcy courts will apply the 'pecuniary interest/public policy test' to determine whether an action by a government falls under the police and regulatory exception. *Berg v. Good Samaritan Hospital,* 230 F.3d 1165, 1167 (9th Cir. 2000). If the proceeding relates principally to the protection of a pecuniary interest in the debtor's property, rather than to its public policy interest in general safety and welfare, the action is subject to the automatic

stay. *W.R. Grace & Co., supra* at 665.

(b) Dischargeability of Claims Pursued by the Government

As noted earlier, as a general rule, only pre-petition (for Chapter 7 cases) and pre-confirmation (for Chapter 11 cases) claims can be discharged in bankruptcy. Any pre-bankruptcy right to payment of money pursued by a governmental unit constitutes a claim and is subject to discharge. With certain exceptions, governmental entity creditors asserting these claims are required to file proofs of claim in the bankruptcy case and are treated as general unsecured creditors, often receiving cents on the dollars owed.

Conclusion

Companies considering bankruptcy must fully evaluate their potential environmental liabilities prior to filing for bankruptcy and critically analyze which liabilities may be discharged and which may survive. Similarly, companies considering bankruptcy also should be aware that once a bankruptcy filing is initiated, state and federal environmental agencies might be forced into action to address known environmental pollution conditions that may otherwise have been a lower priority to try to prevent potential cleanup obligations of the debtor from being discharged. Potential claimants must also be vigilant to protect their interests in the event a claim is looming or actually is filed.

Despite the growing body of law clarifying procedures and process, the conflicting goals of environmental law (i.e., to impose the costs of environmental cleanup on responsible parties) and bankruptcy law (i.e., to allow distressed entities to obtain a fresh start free from their past financial problems) continue to exist. Regardless whether you are representing a debtor, PRP or claimant, the continuing battle over money and the conflict between the goals of environmental law and bankruptcy demand innovative strategies to expeditiously and cost-effectively manage environmental risks and liabilities.

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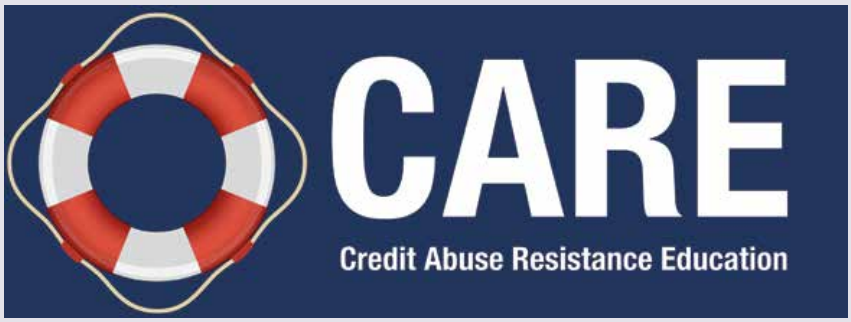

CARE

Teaching Students Smart Spending Since 2008

Nick Maraman & Chris Madden

While the fundamentals of the U.S. economy are performing well, there are pockets of weakness and areas of concern for many across the country and in Kentucky, especially in regard to household debt and consumer credit. A few statistics bear this out:

- In February 2020, the Federal Reserve Bank of New York reported that total household debt balances in the U.S. topped more than $14 trillion—a record high.
- Student loan debt increased by $10 billion in the fourth quarter of 2019 alone, raising total outstanding student loan debt to $1.51 trillion. More than one in ten student loan borrowers across the country are more than 90 days behind on their payments.
- A 2014 report from Standard & Poor's Rating Service found that more than 50 percent of American adults are considered financially illiterate.
- Kentucky is regularly included in the top 10 states in the nation for per capita personal bankruptcy filings. According to data compiled by the American Bankruptcy Institute, in 2019 Kentuckians filed some 14,882 personal bankruptcy cases, which placed it 10th per capita among all states.

Although the factors for these sobering consumer credit statistics are multiple, ensuring better education about financial products and responsible use of credit is key to reversing these trends. Strong financial literacy allows people to make better financial decisions, limit debt, save for retirement and plan for the unexpected.

This is where the Credit Abuse Resistance Education (CARE) program steps in. CARE is a volunteer-driven organization of attorneys, judges and others who work to educate high school students about personal finance and smart financial decisions. Locally, these efforts take the form of 45-minute presentations to high school juniors and seniors throughout Jefferson County Public Schools.

The CARE program was created in 2002 by Judge John C. Ninfo II of the United States Bankruptcy Court for the Western District of New York. Judge Ninfo had a particular interest in educating young people about the responsible use of credit cards. His program has now grown to nearly every state in the union, with thousands of volunteers educating tens of thousands of students each year.

Ted King of Frost Brown Todd has organized the annual Jefferson County CARE program since 2008. Through his efforts and the Louisville CARE Leadership Committee, volunteer attorneys have taught vital financial literacy skills to thousands of students across Jefferson County. CARE receives support and volunteers from Jefferson County Public Schools, all the major law firms in town, bankruptcy attorneys, the Legal Aid Society, the United States Trustee's office and the Bankruptcy Court for the Western District of Kentucky.

Annual financial support from the Kentucky Bar Foundation has been crucial to the program's long-term success. With the introduction of a financial literacy curriculum throughout JCPS schools beginning next year, our local CARE program aims to work alongside JCPS and throughout the community to continue its mission of promoting financial literacy in Kentucky.

This year, CARE presentations to JCPS students will take place on April 14 and April 15.

If you are interested in volunteering for the CARE program in April, please contact Chris Madden (chris.madden@dentons.com) or Bryan Sisto (bsisto@fbtlaw.com) for additional information and orientation.

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