The interplay of the Bankruptcy Code and environmental laws has always been complex, and with the country mired in the longest economic downturn since the Great Depression, the Environmental, Energy and Natural Resources Law Committee decided to dedicate this issue to this topic. Because the Great Recession has been so different from other recent recessions, debtors and creditors have had to employ creative uses of the Bankruptcy Code to navigate through the reorganization process. Included in this issue is a series of articles I hope you’ll find helpful in addressing the many environmental issues raised by the use of these innovative tools.

First, Milissa Murray of Bingham McCutcheon discusses two recent nonbankruptcy decisions — Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.1 and Agere Systems, Inc. v. Advanced Environmental Technology Corp.2 — and their effect on the future viability of private party environmental claims in bankruptcy. Then David Johnson and Peckar & Abramson’s David Scriver-Young discuss the status of the case law relating to the discharge of environmental injunctions in light of the recent United States v. Apex Oil Co., Inc.3 decision, while Peter Haley of Nelson Mullins highlights some considerations for practitioners as a result of the Apex Oil holding. Finally, I discuss the importance of reviewing environmental issues as part of the 363 sale process to avoid unexpected environmental liabilities.

Continuing with this theme, our committee will also be participating in a program with the Business Bankruptcy Committee at the Spring Meeting titled “Restructuring Environmental Claims in Bankruptcy After Chrysler and General Motors,” to be held on Friday, April 23rd from 10:30 am to noon. Thanks to the hard work of our program chair, David Roth of Bradley Arant, our committee will be holding a “Hot Environmental Topics: 2010” on April 24th from 2:30 pm to 4:30 pm at the Governor’s Square 15. We will have a committee meeting in the same room from 2:00 pm to 2:30 pm.

As always, please let us know if you would like to contribute to a future edition of this newsletter. We welcome submissions on the wide variety of issues that are present in environmental law.

Featured Articles

Recent Developments Regarding CERCLA Claims and Their Disallowance Under Bankruptcy Code Section 502(e)(1)(B)

Milissa A. Murray, Bingham McCutchen LLP

What the Supreme Court giveth, the Second and Third Circuits taketh away in yet another roller coaster ride through the tunnels of CERCLA.1

Reorganized and reorganizing companies should breathe a sigh of relief (although, given history should not get too comfortable) in the wake of two recent nonbankruptcy decisions that will affect the future viability (or lack thereof) of private party environmental claims in bankruptcy. In Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.2 and Agere Systems, Inc. v. Advanced Environmental Technology Corp.,3 the Second
and Third Circuits, respectively, significantly limit the right of private parties to assert a direct claim against other private parties under CERCLA Section 107(a) for reimbursement of cleanup costs, a right thought to have been resuscitated and expanded by the Supreme Court’s 2007 decision in United States v. Atlantic Research.4 The result will reestablish—to the extent it was ever in doubt—Bankruptcy Code Section 502(e)(1)(B) as an effective tool in reorganizing debtors’ efforts to shed large or unliquidated, contingent environmental liabilities.

CERCLA

CERCLA is a sweeping federal remedial statute designed to encourage the prompt abatement of contamination and cleanup of hazardous waste sites and to assess the costs for doing so against those responsible for the contamination. It is a strict liability statute and provides broad authority to the President (delegated to the Environmental Protection Agency (“EPA”)) to compel responsible parties to conduct cleanup and to collect reimbursement of EPA’s own response costs from the four categories of potentially responsible parties (“PRPs”).5 CERCLA also provides causes of action to nongovernmental entities for the recovery of appropriate response costs.6 A PRP that settles its liability to the government, however, escapes contribution liability for the matters settled.7

Although the nature of contaminated sites certainly varies, it is common for there to be numerous PRPs at a single site as they will include the present owners and operators, prior owners or operators to the extent disposals occurred during their tenure, and generators and transporters of waste—whose numbers can run into the hundreds at former hazardous or industrial waste dump sites to which the generators’ wastes were historically transported. In such cases, often one or more PRPs, voluntarily, or as a result of the issuance by regulators of a CERCLA enforcement order,8 form a working group and agree among themselves and usually in a consent decree with EPA, to fund the cleanup and perform the work in accordance with the consent decree.9 Typically EPA will issue Section 106 administrative orders only to those seemingly liable parties that are the largest contributors of waste and are financially viable.10 The core working group is left to its own devices and at its own expense to seek reimbursement or contribution from the remaining PRPs.

Bankruptcy Code Section 502(e)(1)(B)

Bankruptcy Code Section 502(e)(1)(B) mandates disallowance of claims for reimbursement or contribution of an entity that is co-liable with the debtor to a third party creditor and has long been an obstacle to private party hazardous waste site remediators in their efforts to recover cleanup costs from recalcitrant bankrupt contributors to the contamination.11 Because the identification, assessment, and remedy of contamination; identity and resolution of liability among multiple parties; and cleanup often take years, and because bankruptcy is designed to resolve pre-petition claims in relatively short order, environmental bankruptcy claims are often unliquidated and contingent when filed and when assessed by the bankruptcy court.12 In addition, in recent years, private party PRPs lacked a direct claim under Section 107. Their only remedy against other PRPs under CERCLA has been for contribution under Section 113.13 Thus, Bankruptcy Code Section 502(e)(1)(B) has largely resulted in the disallowance of private party PRP claims for reimbursement of their excess share of yet incurred site cleanup costs.14

United States v. Atlantic Research

A shift was anticipated, however, after the Supreme Court’s 2007 ruling in United States v. Atlantic Research.15 In that case, the Supreme Court held that Section 107 of CERCLA is not reserved solely for the government and innocent parties and can be the basis for a direct claim by even another PRP seeking reimbursement of cleanup costs it has incurred. “[Section] 107(a) permits a PRP to recover only the costs it has ‘incurred’ in cleaning up a site.”16 In addition the Court explained that “[w]hen a party pays to satisfy a settlement agreement or a court judgment, it does not incur its own costs of response. Rather, it reimburses other parties for costs that those parties incurred.”17 Reading Company filed an amicus brief in the Atlantic Research case, admonishing the Court to consider the effect in bankruptcy of renewed CERCLA Section 107 claims. It cautioned that a Section 107 claim would diminish the value to the reorganized debtor of any settlement or discharge of CERCLA liability to the government and by giving rise to direct claims not necessarily covered by the Bankruptcy Code’s discharge provisions or contribution protection under CERCLA Section 113(f)(2).18 Indeed, the logical consequence of expanding a PRP’s remedy beyond contribution, and recognizing a PRP’s potential direct claim under Section 107 for incurred costs, would be to eliminate the Bankruptcy Code’s Section 502(e)(1)(B) bar, at least for PRPs voluntarily cleaning up a site and, thus, without access to contribution under Section 113(f)(1) or 113(f)(3)(B).19 PRPs could now defend their claims against bankrupt PRPs and argue that their CERCLA claims against the debtor include a direct claim under Section 107, the liability on which is not shared and, thus, not barred by the Bankruptcy Code’s Section 502(e)(1)(B) disallowance.

In the first case after Atlantic Research to recognize its potential effect on bankruptcy cleanup cost claims held by PRPs, the Bankruptcy Court sitting in Delaware recognized, albeit in dicta, that a PRP’s direct claim under Section 107 would take the claim out of the disallowance provision of Section 502(e)(1)(B) of the Bank-
ruptcy Code.\textsuperscript{20} Indeed, in subsequent environmental bankruptcy cases, PRP creditors argued, in response to continued debtor claim objections, that Atlantic Research changed the law and private party PRP claims are no longer subject to a summary objection as a statutorily disallowed contingent contribution claim.\textsuperscript{21}

As recognized by Reading in its Amicus brief, the ramifications in bankruptcy of Atlantic Research went beyond the mere allowance of claims, and posed other obstacles to debtors’ reorganization in environmental bankruptcy cases: direct Section 107 claims of PRPs arguably are not barred by the contribution protection debtors typically obtain in a governmental settlement of environmental liabilities.\textsuperscript{22} Thus, PRP claims once summarily ignored as barred contingent contribution claims under Section 502(e)(1)(B) or as barred by contribution protection under CERCLA Section 113(f)(2), would now have to be considered and possibly liquidated or estimated if their unliquidated amount could pose feasibility issues in connection with confirmation of a plan. Moreover, to the extent direct Section 107 claims may arise post-petition or post-confirmation, they may not constitute dischargeable claims, and debtors must attempt to deal with this contingency in the plan. The uncertainty of the impact of the PRP claims affirmed by Atlantic Research in turn would enhance PRP creditors’ bargaining power, enabling them to negotiate a reasonable resolution of their claims.


Thus, all seemed well in the world for private party PRP creditors (at least compared to their lot before Atlantic Research), that is until Niagara Mohawk Power Corp. \textit{v. Chevron U.S.A., Inc.}\textsuperscript{23} and Agere Systems, Inc. \textit{v. Advanced Environmental Technology Corp.}\textsuperscript{24} Both circuits have taken the wind out of the proverbial sails of remediating PRPs by holding that PRPs who have a viable claim for contribution under Section 113(f)(1) or Section 113(f)(3)(B), or who are entitled to contribution protection under Section 113(f)(2), do not have a direct claim under Section 107.\textsuperscript{25} Although the Supreme Court in Atlantic Research suggested that there could be an overlap between Section 107 and Section 113 and that a PRP might have the opportunity to elect the more generous Section 107 as its claim of choice, the Second Circuit nevertheless found it compelling that Niagara Mohawk’s procedural situation, that is, its consent order with the State of New York that resolved its liability at the site, fell squarely within the more specific requirements of Section 113(f)(3)(B). “Congress recognized the need to add a contribution remedy for PRPs similarly situated to NiMo. To allow NiMo to proceed under § 107(a) would in effect nullify the SARA amendment and abrogate the requirements Congress placed on contribution claims under § 113.”\textsuperscript{26} Niagara Mohawk thus confirms, at least in the Second Circuit, that a PRP does not have an election of remedies or access to both a direct Section 107 claim and a Section 113 contribution claim where it clearly falls within the scope of Section 113(f)(1) or Section 113(f)(3)(B).

In Agere Systems, the Third Circuit found on the facts of that case that if the PRPs’ Section 107 claims were permitted, the defendant PRP would not be able to “blunt” the inequitable results by filing a contribution counterclaim and thereby convert the action to one in contribution as suggested by the Supreme Court in its Atlantic Research decision. The plaintiffs there were protected by contribution protection for the matters addressed in their settlement, and thus, the aggrieved PRP defendant could not file a counterclaim and would be subject to joint and several liability, including for the plaintiffs’ own shares. The court found this to be a “perverse result” and held that “plaintiffs in the position of Cytec, Ford, SPS, and TI, who if permitted to bring a § 107(a) claim would be shielded from contribution counterclaims under § 113(f)(2), do not have any § 107(a) claims for costs incurred pursuant to consent decrees in a CERCLA suit.”\textsuperscript{27}

\textbf{Conclusion}

Thus, PRPs who have a viable Section 113(f)(1) contribution claim, or who are cleaning up pursuant to a settlement in which they have resolved their liability to a state or EPA within the meaning of Section 113(f)(3) (B), will not have a Section 107 direct claim against a co-liable bankrupt PRP, and their contribution claims once more will be subject to disallowance under Section 502(e)(1)(B) of the Bankruptcy Code to the extent the contribution claim meets the other disallowance criteria. Pursuant to the law in the Second and Third Circuits, it would appear that the only PRPs who could conceivably maintain a Section 107 direct action would be those that are conducting a completely voluntary cleanup without any consent order or judicial settlement in place. This likely excludes most working group PRPs.

Solvent PRPs and PRP working groups left holding the bag with inflated shares at hazardous waste sites had reason to rejoice after the Supreme Court resurrected CERCLA Section 107 direct claims as a remedy for innocent and liable private parties alike. The elation was short-lived, however, as a result of the recent Second Circuit decision in \textit{Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.}, and the Third Circuit decision in \textit{Agere Systems, Inc. v. Advanced Environmental Technology Corp.}, each of which has largely and once again eliminated direct claims for PRPs thought to have been acknowledged—indeed supported—by the Supreme Court in Atlantic Research.
The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675, was enacted almost 30 years ago.

596 F.3d 112 (2d Cir. 2010).

See W.R. Grace & Co.-Conn. v. Zotos Int'l, Inc., 559 F.3d 85, 90 (2d Cir. 2009) (“In light of Atlantic Research, we now confirm that Bedford Affiliates’ holding limiting recoveries by PRPs to actions brought under section 113(f) is no longer valid.”) (citations omitted).

42 U.S.C. § 9607. PRPs include the present owner or operator of the contaminated facility; former owners and operators of the facility, if there was a disposal of hazardous substances at the facility during such ownership or operation; arrangers for the disposal of hazardous substances; and transporters of such materials. Id. § 9607(a)(1)-(4).

42 U.S.C. § 9607(a)(4)(B). The Superfund Amendments and Reauthorization Act (“SARA”), enacted in 1986 and amending CERCLA, expressly provided for contribution actions among those with (x) shared liability in the event a “civil action” under Sections 106 or 107 has been filed and (y) who have resolved their liability to the United States or a State “in an administrative or judicially approved settlement.” 42 U.S.C. §§ 9613(f)(1), (f)(3)(B). Equitable factors are to be considered in determining cost allocation among liable parties. Id.


See Environmental Law Handbook, ch. 9, § 4.7.1.

11 U.S.C. § 502(e)(1)(B). See Gary E. Claar, The Case for a Bankruptcy Code Priority for Environmental Cleanup Claims, 18 Wm. Mitchell L. Rev. 29, 50 (1992). Reportedly, the purpose of the provision was to prevent double payouts, once to the assured primary creditor and again to the surety or guarantor. See 124 Cong. Rec. H 11,094 (Sept. 28, 1978); 124 Cong. Rec. S 17,410-11 (Oct. 6, 1978). The legislative history talks of the surety or codebtor having a choice to pay the assured and obtain an allowed claim or not, depending on what would be most advantageous. For a claim to be disallowed under Section 502(e)(1)(B) of the Bankruptcy Code, the claimant must assert a (i) contingent claim (ii) for reimbursement of a debt (iii) for which the debtors and the claimant are co-liable. All three elements must be satisfied for the claim to be disallowed. In re Pinnacle Brands, Inc., 259 B.R. 46, 55 (Bankr. D. Del. 2001). Governmental entities are not typically subject to Section 502(e)(1)(B) because they are rarely co-liable with the debtor on the CERCLA claim.

Contingency is determined as of the date the claim is allowed or disallowed, as the case may be. 11 U.S.C § 502(e)(1)(B). This is typically at the time the court rules on the debtor’s objection to the claim or estimates the claim pursuant to 11 U.S.C § 502(e). Because only the contingent portion of the claim is subject to disallowance, a claim for recoverable response costs actually incurred by the claimant will not be barred. The disallowances under Section 502(e)(1)(B) typically involve the disallowance of a claim for future response costs to be incurred at the site. Norpak v. Eagle–Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.), 131 F.3d 1185, 1190 (6th Cir. 1997). See also In re APCO Liquidation Trust, 370 B.R. 625 (Bankr. D. Del. 2007).

See United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 98-103 (1st Cir. 1994); Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 349-56 (6th Cir. 1998); Pneumo Abex Corp. v. High Point, T. & D.R. Co., 142 F.3d 769, 776 (4th Cir. 1998); Pinal Creek Group v. Newport Mining Corp., 118 F.3d 1298, 1301-06 (9th Cir. 1997); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1120-24 (3d Cir. 1997); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496, and n.7 (11th Cir. 1996); United States v. Colo. & E.R.R. Co., 50 F.3d 1530, 1534-36 (10th Cir. 1995); Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 169 (2004) (citing numerous decisions of the Courts of Appeals holding that a private party that is itself a PRP may not pursue a Section 107(a) claim against other PRPs). In Atlantic Research, however, the Supreme Court held that the plain language of Section 107(a) authorizes cost recovery claims by any private party, including PRPs. See United States v. Atlantic Research Corp., 551 U.S. 128 (2007).


In an earlier ruling the Court overruled the widely followed practice nationwide to permit contribution actions under Section 113(f)(1) in the absence of any CERCLA Section 106 or 107 action. In Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, the Court held that a Section 113(f)(1) contribution action cannot be sustained unless and until the plaintiff has been sued under Section 107 or Section 106 administrative order. Aviall did not decide whether an administrative order under Section 106 would qualify as a “civil action under section 9606 . . . or under section 9607(a)” of CERCLA. Id. at 168 n.5 (quoting 42 U.S.C. § 9613(f)(1)). The ruling deprived private party PRPs who voluntarily engage in cleanup of the statutory contribution remedy they had been uniformly using in the wake of United Technologies Corp. v. Browning-Ferris Industries, 33 F.3d 96, 98-103 (1st Cir. 1994), and its progeny. See supra note 13.
United States v. Apex Oil Co., Inc.: State of the Law Regarding Discharge of Environmental Injunctions

David A. Johnson, Jr.¹
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In August 2009, the Seventh Circuit issued its opinion in United States v. Apex Oil Co., Inc.³ that sent a ripple through the bankruptcy and environmental world. The court ruled that an injunction to clean up a contaminated property is not dischargeable, contrary to a prior ruling by the Sixth Circuit. This ruling highlights the competing policy objectives of environmental regulations and the Bankruptcy Code.

Bankruptcy, which is specifically discussed in the United States Constitution,⁴ was created to give a person a fresh start and encourage the risk-taking that has contributed to this nation’s growth. On the other hand, environmental regulations were created to protect the environment and the health and safety of the individual. Both of these objectives are important; however, problems arise when you try to reconcile the two. Put simply, “[b]ankruptcy does not insulate a debtor from environmental regulatory statutes.”⁵ Furthermore, the filing of a bankruptcy petition does not operate as a stay against “the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit’s . . . police and regulatory power.”⁶ However, in application this rule has become more complicated. The Apex Oil ruling thrusts this complicated topic back into the spotlight and creates a circuit split. Thus, the treatment of environmental injunctions in bankruptcy is an issue that may end up before the Supreme Court.

“Under the Bankruptcy Code, . . . except for debts saved from dischargeability under the Code, specifically, 11 U.S.C.S. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy.”⁷ A debt, under the Bankruptcy Code, is a “liability on a claim.”⁸ A claim is

(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.⁹

¹ Atlantic Research, 551 U.S. at 139 (quoting 42 U.S.C. § 9607(a)(4)(B)).
² See Brief of Reading Co. as Amicus Curiae in Support of Petitioner, No. 06-562, 2007 WL 697587, at 8-9 (hereafter “Reading Brief”).
³ The Court left open the issue of whether there was an overlap of remedies between Section 107 and Section 113, but implied that it would not necessarily rule out use of Section 107 by a private party PRP electing to use its more generous remedy including joint and several liability. The Court said any such concern is mitigated by the ability of the aggrieved Section 107 defendant to convert the Section 107 action to one in contribution by bringing a contribution counterclaim. Atlantic Research, 551 U.S. at 140-41.
⁶ 596 F.3d 112 (2d Cir. 2010).
⁷ In re APCO, 370 B.R. 625.
⁹ 2010 WL 1427582, at *19. Cf. Niagara Mohawk, 596 F.3d at 127 (holding that a PRP who had settled its CERCLA liability by consent order with a state environmental agency had a Section 113(f)(3)(B) claim but not a Section 107(a) claim, and saying, “[c]learly, the two sections have differing restrictions and different purposes.”).
Therefore, the key for determining whether an environmental obligation is dischargeable in bankruptcy is whether the obligation is a liability on a claim. Courts take different approaches to assess whether an injunction meets this standard. Various environmental statutes authorize courts to issue mandatory injunctions requiring specific performance. This type of situation typically occurs when a property owner has violated an environmental regulation and the government obtains an order for the property owner to clean the property. The other typical situation occurs when a property owner is ordered not to partake in an activity that would cause environmental damage. The law is well settled in this second scenario that bankruptcy does not relieve a debtor of a prohibitive injunction.

Any analysis regarding the discharge of environmental injunctions must start with the U.S. Supreme Court case Ohio v. Kovacs. In Kovacs, the defendant was the CEO of a chemical corporation. The state of Ohio obtained an injunction against the defendant requiring him to clean up a hazardous waste site. The defendant failed to comply with the injunction causing an Ohio state court to appoint a receiver to take possession of all of the defendant’s property and comply with the order. After the court appointed the receiver, but before the cleanup began, the defendant filed for bankruptcy protection. The Supreme Court held that the appointment of the receiver divested the defendant of the assets or ability to clean up the property, which left the defendant with a financial requirement under the injunction. The Court noted that Ohio’s counsel admitted that the only remedy sought was a monetary payment by the defendant. As a result, the Court held the monetary payment that Ohio was seeking to be a claim under Section 101(4) of the Bankruptcy Code and was dischargeable. As part of a list of caveats, the Court stated that “we do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State’s waters is dischargeable.”

In Penn Terra, Ltd. v. Department of Environmental Resources, a Pennsylvania mine company was found to have been operating in violation of state environmental laws. The Third Circuit held that the automatic stay did not apply stating, “the suit . . . to compel Penn Terra to remedy environmental hazards was properly brought as an equitable action to prevent future harm, and did not constitute an action to enforce a money judgment.” Although Penn Terra was decided before Kovacs, the Supreme Court in Kovacs stated in a footnote that “[t]he automatic stay provision does not apply to suits to enforce the regulatory statutes of the State, but the enforcement of such a judgment by seeking money from the bankrupt . . . is another matter.”

Kovacs and Penn Terra set the stage for the Sixth Circuit’s decision in United States v. Whizco. In Whizco, the defendant was the owner of a bankrupt coal company that mined portions of Tennessee. Under the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), the government obtained an injunction requiring the defendant to “perform specific acts of reclamation which would abate the environmental damage at the defendants’ surface mining site.” Despite the fact that the SMCRA does not allow for the payment of money in lieu of performance, the court made special note that the defendant was elderly and without the means to personally perform under the injunction. Therefore, the defendant would be required to spend money to hire others to reclaim the mine. As a result, the court held that the circumstances indicated that the government was essentially seeking the payment of money, which was a dischargeable claim under the Bankruptcy Code.

In Apex Oil, the government obtained an injunction under the Resource Conservation and Recovery Act (“RCRA”) requiring Apex to clean contaminated property in Illinois that was contaminating groundwater. Similar to Whizco, Apex no longer had the ability to perform the cleanup itself and would have to spend a substantial sum of money to do so. Additionally, RCRA, like the SMCRA, does not allow for the payment of money in lieu of performance. However, the Seventh Circuit expressly rejected the holding in Whizco. The court held that “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 imposing a cost on the defendant, as virtually all equitable decrees do.” The Seventh Circuit reconciled this with the Kovacs decision by stating that “[t]he plaintiff in our case (the government) is not seeking a payment of money and the injunction that it has obtained does not entitle it to payment.” Thus, the Seventh Circuit implemented a more objective approach than the expenditure-based analysis that the Whizco court employed.

Despite the attention that Apex Oil is receiving, it is not the first case to conclude that environmental injunctions are not dischargeable. Notably, the Third Circuit in In re Torwico Electronics, which is cited in Apex Oil, dealt with a very similar situation. Mirroring the holding in Apex Oil, the Third Circuit analyzed whether a right to payment was allowed by a New Jersey environmental statute. The Court concluded that because the statute did not contain a provision allowing for the state to obtain a money judgment, the injunction was not a claim within the definition of Section 101 of the Bankruptcy Code.

The result of the split between the Sixth and Seventh Circuits sets the stage for a Supreme Court battle that will determine the fate of the treatment of environmental injunctions in bankruptcy. For now, it seems that the vast majority of cases align with the Seventh Circuit.
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1 579 F.3d 734 (7th Cir. 2009).
2 U.S. Const. art. I, § 8, cl. 4.
7 Id. at § 101(5).
9 Id. at 285.
10 733 F.2d 267, 278 (3d Cir. 1984).
11 Id. at 278.
12 Kovacs, 469 U.S. at 283 n.11.
13 841 F.2d 147 (6th Cir. 1988).
14 Id. at 148.
15 579 F.3d 734 (7th Cir. 2009).
16 Id. at 738.
17 Id. at 737.
18 8 F.3d 146, 149 (3d Cir. 1993).

Despite the stack of authority cited by the Seventh Circuit, other cases have found an environmental injunction to be a claim under the Bankruptcy Code. For example, in In re Goodwin, 163 B.R. 825 (Bankr. D. Idaho 1994), superseded on other grounds as stated in In re Basinger, No. 01-02386, 2002 Bankr. LEXIS 1925 (Bankr. D. Idaho Jan. 31, 2002), a debtor was being sued in an Idaho state court for leaking underground storage tanks. When the debtor filed for bankruptcy protection, the state court stopped the proceedings and sought guidance from the bankruptcy court on whether the automatic stay prevented the state court proceedings from continuing. As part of its opinion, the bankruptcy court stated that the “permanent mandatory injunction” to force the debtor to clean the contaminated property constituted a claim under Section 101(5)(B) of the Bankruptcy Code. An Idaho Bankruptcy Court found part of the Goodwin analysis superseded by a change to the Bankruptcy Code in In re Basinger. However, the court acknowledged that “[u]nder Goodwin, however, [Idaho Department of Environmental Quality] cannot pursue and enforce the State’s police powers through relief which is injunctive in name only, and requires Debtors to fund (or reimburse the State for) the cleanup of this property which they no longer control or use.” In re Basinger, 2002 Bankr. LEXIS 1925, at *29. Although Goodwin is an automatic stay case, its classification of the injunction as a claim is significant to the discharge analysis and is contrary to the Seventh Circuit’s classification.

United States v. Apex Oil Co., Inc.: Practical Considerations

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As the current economy forces more companies to seek some form of bankruptcy relief, the interplay of environmental law and the finality of the bankruptcy court process have become more important to those companies their creditors, investors, and ultimate purchasers. The recent decision of the United States Court of Appeals for the Seventh Circuit, United States v. Apex Oil Co., Inc., highlights the importance of focusing on the details of specific environmental claims in the bankruptcy court process and the disparate treatment that may result depending on the nature of the claim.

Much of the bankruptcy court jurisprudence relating to environmental claims has focused on claims arising under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). To the extent that CERCLA claims create a statutory right to
payment for the EPA or private parties, those claims can be in many circumstances effectively discharged in bankruptcy. In Ohio v. Kovacs, the Supreme Court affirmed a decision of the Sixth Circuit holding that the obligations of a debtor to comply with a state court injunction ordering the cleanup of a hazardous site could be effectively discharged in bankruptcy. In Kovacs, the Court expressly noted that as a result of the fact that the individual defendant corporate officer had been removed from any control of the site through the appointment of a receiver for the corporation, the cleanup obligation had been reduced to a monetary obligation.

In Apex Oil, the Seventh Circuit reviewed an order of the district court imposing liability on the corporate defendant for the cleanup of accumulated subsurface petroleum hydrocarbons contaminating soil and ground water beneath Hartford, Illinois. The liability imposed on the defendant Apex Oil Co., Inc. (“Apex”) arose out of the operation of a refinery acquired by its predecessor in 1967. In 1987, the then owner of the refinery was part of a chapter 11 bankruptcy proceeding. In the bankruptcy case, the refinery was sold by the debtor pursuant to 11 USC § 363, in bankruptcy parlance, a “363 sale.” The then newly formed Apex was the purchaser at the 363 sale. The predecessor operator and debtor, identified as Clark Oil-Apex, was then merged into Apex.

The district court granted injunctive relief against Apex mandating the cleanup of the site pursuant to the Resource Conservation and Recovery Act (“RCRA”). Apex, no longer in the refining business and without the necessary in-house capability, estimated the cost of compliance through outside contractors at $150 million. On appeal, Apex argued that the liability imposed by the district court had been discharged by a confirmation order entered by the bankruptcy court in the 1987 bankruptcy proceedings.

In an opinion by Judge Richard Posner, the Seventh Circuit commenced its analysis with a review of 11 USC § 101(5), a provision defining “claim” in the bankruptcy code and ultimately the determining factor as to what can and cannot be discharged by the provisions of an order confirming a plan of reorganization. The court noted that Section 101(5)(B) provides that a claim includes the 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.” The court observed that despite their labeling, equitable remedies are often orders for payment.

In reviewing the statutory basis for the relief granted against Apex, however, the court observed that RCRA does not entitle a plaintiff to demand the hiring of an outside firm to perform cleanup work or authorize any form of monetary relief. The only thing that the Act does authorize the government to do is to require the defendant to clean up the site. The court noted that in Meghrig v. KFC Western, Inc. the provisions of 42 USC § 6972(a) had been interpreted so as to preclude any private cause of action for monetary relief as well. In response, Apex was left only with the argument that despite the lack of authority for a monetary award, the practical impact of the relief granted by the district court was to require Apex to expend money to comply. The court rejected this argument, noting that any equitable award imposes some cost on a defendant and to construct the statutory definition of claim in this manner would be inconsistent with the obvious intent of the Bankruptcy Code to limit the discharge of equitable claims to certain types of claims.

The court distinguished the decision in Ohio v. Kovacs by noting its stated reliance on the fact that the claim in that case had been reduced to a monetary judgment. The court acknowledged, but declined to follow, the contrary Sixth Circuit precedent in United States v. Whizco. In Whizco, the Sixth Circuit, relying on Kovacs, held that certain claims requiring the restoration of land disturbed by surface area mining were dischargeable. The Seventh Circuit noted a Third Circuit decision, In re Torwico Electronics, Inc., holding that certain New Jersey state law remedies requiring the cleanup of a site owned by the debtor were not claims that could be discharged in bankruptcy.

The court’s decision in Apex Oil highlights the need to evaluate the specific nature of environmental claims and the different treatment that may result from any insolvency of the responsible party. While absent insolvency, the prospect of an agreement for remedial relief that does not require a monetary payment may be preferable, such choices, depending on the statutory basis for the claim, may have an adverse effect on the ability of a company to ultimately discharge such obligations. Investors considering the acquisition of companies with potential claims should consider the ability of enforcement agencies to bring federal or state law claims that may not allow for monetary relief, but may, in a manner similar to the facts in Apex Oil, create claims that cannot be successfully discharged by the bankruptcy proceedings of the seller.

1 579 F.3d 734 (7th Cir. 2009).
3 42 USC §§ 9607, 9613.
4 In re Chateaugay, 944 F.2d 997 (2d Cir. 1991).
The interplay between environmental law and bankruptcy is complex. The laws have different purposes. The Bankruptcy Code is designed to give companies a “fresh start” while environmental laws often look backwards under their “polluter must pay” approach. Thus, if environmental issues are not adequately addressed in bankruptcy so that environmental claims are not discharged, a purchaser of corporate assets or the new company that has emerged from bankruptcy might be considered a successor to the debtor and find itself saddled with unexpected environmental liabilities.

Traditional Chapter 11 Reorganization Process

In past recessions, companies facing economic difficulties would file for chapter 11 reorganization. In most chapter 11 cases, the debtor’s current management usually will continue to operate the business and will have a fiduciary obligation to protect the interests of the creditors. Under this arrangement, the debtor is known as a “Debtor in Possession” (DIP). In some chapter 11 cases, a private trustee will be appointed and wrest control of the business from the debtor’s management. Chapter 11 trustees are only appointed in extraordinary circumstances such as fraud, incompetence, gross mismanagement, or when it is in the best interests of the creditors and equity holders.

As part of its chapter 11 petition, a debtor must prepare Official Form 7 formally known as the Statement of Financial Affairs. Item 17 of this form called “Environmental Information” requires the debtor to list every site where it has been notified by the government of a release of hazardous substances. Finally, the debtor must list all judicial and administrative proceedings, including settlements, related to environmental laws in which it is a party.

The bankruptcy court will also set a “bar date” that will be the deadline for creditors to file their proofs of claims. A creditor is required to file a proof of claim only if its claim is not listed on the schedule of liabilities filed by the debtor or if the claim is disputed, unliquidated, or contingent. In the proof of claim, the creditor must indicate the basis of its claims, classify the claims (i.e., secured or unsecured priority, or unsecured nonpriority), as well as the amount of its claims. If a creditor who is required to file a proof of claim fails to do so by the bar date, it will be deemed to have waived its rights, it will be precluded from participation in the distribution of the debtor’s assets, and its claim will be discharged. Generally, a known creditor (even one holding a disputed, contingent, or unliquidated claim) will not be deemed to have waived its claims if it was not listed as a creditor in the debtor’s schedules or did not receive actual notice of the bar date. Contingent or unknown creditors need only receive constructive notice of the bar date, such as notice by publication in newspapers or other appropriate periodicals. EPA will review the disclosure of Environmental Information to determine if it will file a notice of claim. Generally, the bar date for the federal government will be the later of 180 days from the filing of the petition or the bar date.

Upon the issuance of the chapter 11 order of relief, the debtor will have an exclusive right to file a reorganization plan for 120 days. As soon as practicable after the chapter 11 order of relief, the United States trustee will appoint a committee of creditors holding unsecured claims.
Before a reorganization plan can be disseminated to the debtor’s creditors for a vote, the debtor (or other plan proponent) must file a written disclosure statement in connection with the proposed plan. The disclosure statement is akin to a prospectus and must contain sufficient information to allow a hypothetical investor typical of the class being solicited to make an informed judgment about the plan. The disclosure statement must provide creditors with “adequate information” regarding the debtor’s historical, current, and future affairs to enable creditors to make informed decisions regarding the plan.6

The discussion of environmental liabilities can be one of the more overlooked topics in the disclosure statement. As a result, environmental lawyers and consultants can play an important role in ensuring that the disclosure statement adequately discusses environmental issues. It is not unusual for the federal government to object to a disclosure statement if it does not provide adequate information about how the proposed plan will address environmental liabilities.

Following a confirmation hearing, the bankruptcy court will issue an order confirming the plan of reorganization. Entry of the confirming order will discharge all debts that arose prior to the plan in accordance with the terms of the confirmation plan. The confirming order has the effect of a final judgment and will serve as res judicata. Creditors will be limited to the rights provided by the plan and will be barred from taking actions to collect debts that are inconsistent with the plan. The order will often contain what is known as a confirmation injunction that will enjoin filing of claims against the reorganized entity for prepetition and preconfirmation liabilities released pursuant to the plan. Bankruptcy courts will often retain jurisdiction to hear all matters arising out of or related to the chapter 11 case and the confirmation plan. Once the plan is confirmed, the only cause for relief from the stay that may be validly asserted is the debtor’s material failure to comply with the plan. One exception is Section 1141(d), which provides that a discharge may not apply to a creditor where it is not given notice of the case and the creditor’s claim is not scheduled or the claim was scheduled as disputed, contingent, or unliquidated as to amount if due process dictates that the claim not be discharged. This section has been used on occasion by PRPs seeking to bring contribution or cost recovery actions. Corporate debtors also do not receive a discharge if the plan provides for their liquidation and they do not engage in business after confirmation.7

Section 1141 provides that property of the debtor’s estate addressed by the plan shall be free and clear of all claims and interests of creditors, equity holders, and general partners of the debtor. This provision is more likely to cut off successor liability for preconfirmation conduct of the debtor. Some courts have argued that state laws imposing successor liability frustrate the purposes of the Bankruptcy Code and therefore are preempted when the underlying liability has been discharged under a plan of reorganization.8 Parties have argued that if a court is allowed to disregard a condition in a sale agreement, a purchaser would be buying “a pig in a poke” because it would never know when its seller’s customers or creditors could come out of the woodwork and bring suit against it under some theory of successor liability. As a result, this could have the effect of depressing the price of the bankrupt’s assets to the prejudice of creditors. Others have suggested that while the price of an asset is important, bankruptcy courts do not have blanket power to immunize buyers from all state and federal laws that might reduce the value of assets purchased through bankruptcy or to extinguish the rights of third parties such as future tort claimants without some notice to those claimants or some consideration of their rights.9

363(f) Sale Process

However, because of tight credit markets it has been very difficult to obtain DIP financing during this recession. As a result, many debtors are turning to Section 363 sales to raise cash, shed unwanted assets or lines of business, or to reduce debt. At the same time, buyers may be able to acquire assets at an extremely attractive price that would not otherwise be available outside the bankruptcy process. Section 363 sales can provide an attractive opportunity for corporations to acquire assets at a bargain price or to acquire discrete assets of a business or even a competitor without incurring all of the liability associated with that business. Purchasers can acquire the assets as a going-concern, which enhances the value of the assets.

Under Section 363 of the Bankruptcy Code, a trustee or DIP may sell property of the debtor’s estate free and clear of a third party’s interests or liens. In many cases, the buyer may be able to acquire assets without also incurring environmental liabilities associated with those assets. In the past, courts have traditionally authorized expedited sales under Section 363 only in extraordinary or exigent circumstances. Usually, courts have required debtors to show that such a sale was needed to preserve rapidly declining asset values and avoid what has been called the “melting ice cube” effect. In some cases, courts might want to see that the sale was a condition of DIP financing agreement.

In the wake of the Great Recession, though, judges have shown an increased willingness to approve 363 sales since the assets can be sold for going-concern value and avoid the asset-destroying process of piecemeal liquidation sales. As illustrated by the recent GM and Chrysler bankruptcy cases, 363 sales can be accomplished on an expedited basis.

To obtain court approval of a 363 sale, the debtor must demonstrate to the court one of the following:
applicable state law authorizes the sale (i.e. no one objects);
- the debtor’s creditors consent to the sale;
- the sale price for the property exceeds the value of all creditor liens attached to such property;
- alleged creditors’ interests in the debtor’s assets are disputed; or
- the creditors are compelled by court order to accept money from the sale proceeds as satisfaction of their interests in the debtor’s assets.

The sales are usually done pursuant to an auction to maximize value. Some purchasers do not wait for assets to be put up for auction but instead try to negotiate a deal upfront in what is known as a “stalking horse bidder.” The parties will then execute an agreement and the seller will file bankruptcy for the sole purpose of conducting a court-approved 363 sale. In many cases, the auction will be a mere formality.

The stalking horse bidder does its own due diligence on its own timetable. It then negotiates the terms of the sale including any necessary representations or warranties contained in the purchase agreement. Any subsequent bidders must accept the terms contained in the initial purchase agreement negotiated between the stalking horse bidder and the DIP. Subsequent bidders frequently rely on the due diligence performed by the stalking horse because of the time constraints associated with the bidding process.

After the stalking horse and the DIP reach an agreement regarding the sale terms and the bidding procedures, the parties will submit the deal to the court for approval. As part of this process, the stalking horse can negotiate provisions that will protect its bid and enhance its chances of being the successful bidder by disqualifying or discouraging other bidders. For example, other bidders may be subject to various prequalification requirements before they can even submit a bid. The stalking horse bidder can often negotiate for a shortened auction notice period, thereby reducing the time other bidders may have to conduct their own due diligence or meet any prequalification requirements.

The stalking horse bidder will submit the initial bid to establish the base price for the assets and facilitate the sale process. The stalking horse will also receive “bid protection,” meaning that other potential bidders will have to offer an amount in excess of the stalking horse’s bid. The bid protection will vary but usually ranges from 2% to 5% of the stalking horse’s purchase price.

The stalking horse bidder will receive a break-up fee if it is outbid. The break-up fee is intended to compensate the stalking horse bidder for the expenses incurred in doing its due diligence. In contrast, other potential bidders will have to pay for their own diligence even if they are not the successful bidder.

Once the court approves, a notice will be sent to all of the debtor’s creditors announcing the auction and the auction rules. Often no bids are submitted by qualified bidders, in which case an auction is not necessary. If an auction is conducted, the debtor is required to accept the best bid, which is then subject to approval by the bankruptcy court. The winning bid may not be limited to the best price but could be based on contractual terms such as the existence of an environmental indemnity. The bankruptcy court must approve the winning bid. Once the court approves the winning bid, the parties may proceed to the closing. Often, the closing may occur on the same day.

Because the specific conditions of these sales will vary, it is important for environmental consultants who are retained by stalking horses or other bidders to understand the terms of the sales and what liabilities, if any, will be potentially assumed by the prospective client. The consultant will then need to develop diligence that will address these liability concerns as well as the often truncated timing for preparing a bid.

### 363 Sales and Successor Liability

The ability of a bankruptcy court to approve a sale free and clear is particularly important to a purchaser acquiring an ongoing business from the debtor since the purchaser could face possible liability as a successor corporation. While protection of asset purchasers is not an express goal of the Code, some commentators have argued that insulating asset purchasers from successor liability is an essential part of the Code’s framework because it will maximize the value of the debtor’s assets, thereby making more resources available for distribution to creditors. Others, though, assert that a bankruptcy court is limited by its power to discharge claims and cannot disclaim future claims that do not arise until after the time of the bankruptcy proceeding.

A critical question is what is meant by “interest.” Many courts have held that Section 363(f) only provides bankruptcy courts with the power to convey assets free and clear of in rem interests or interests that run with the property such as liens and encumbrances. However, other courts have held that Section 363(f) applies to preconveyance claims that are not property interests but are in personam liabilities of the transferor. Other courts have found that the Code does empower bankruptcy courts to approve sales “free and clear” but that the origin of this authority is in a court’s equitable power pursuant to Section 105.

Not surprisingly, the federal courts are divided on whether a sale of assets free and clear pursuant to Section 363(f) can insulate the asset purchaser from environmental liabilities associated with those assets. The easier question involves whether purchasers of real estate may assert a third party or innocent purchaser...
defense. Given this uncertainty, some real estate purchasers have entered into Prospective Purchaser Agreements. Of course, the bona fide prospective purchaser defense allows purchasers to knowingly acquire contaminated property without incurring CERCLA liability.

Because of this confusion, many purchasers request that 363 orders contain express language cutting off successor liability for prepetition environmental conditions. Section 363(f) orders may become a more viable tool in brownfield development. Some developers of brownfield sites believe they can use Section 363(f) to avoid liabilities associated with contaminated properties where they might not qualify for an innocent purchaser or prospective purchaser defense and then use the bona fide prospective purchaser defense to eliminate their liability as a current owner of contaminated property.

An early example of the use of Section 363 to cut off environmental liability was in In re Heldor Industries, Inc. In this case, the debtor sold substantially all of its assets pursuant to a sale agreement that permitted the debtor to sell “free and clear” and without setting aside proceeds to comply with state environmental cleanup laws. In particular, the sale agreement contained no terms requiring that the debtor comply with the environmental laws and specifically allowed the purchaser to take title to the assets free and clear of any obligations to comply with environmental laws. The New Jersey Department of Environmental Protection (“NJDEP”) received notice of the impending sale and had an opportunity to object to the sale, but failed to do so until after the sale order became final. Nevertheless, the NJDEP argued that the sale order could be voided because a debtor must comply with environmental cleanup laws. The court disagreed and held that the order became final after the NJDEP failed to object in a timely manner, having received sufficient notice, citing the need for finality of bankruptcy court orders.

A more recent example of the usefulness of 363(f) sales to cut off successor liability is illustrated in In re Cone Mills Corporation. In this case, Cone Mills had operated a dye and chemical manufacturing facility at a property located in Newark, New Jersey. Cone Mills sold the business line to Ciba Geigy in the 1970s and sold the site in 1980 to Crompton and Knowles, a predecessor of Crompton Colors Corporation and Crompton Colors, Inc. (collectively “Crompton”). Shortly before ceasing operations at the Newark property, Crompton entered into a voluntary cleanup agreement with the NJDEP and estimated the cleanup costs at approximately $6 million.

In 2003, Cone Mills filed a voluntary petition for bankruptcy under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Thereafter, Cone Mills filed a motion for an order under Section 363(f) authorizing the sale of substantially all of its assets free and clear of liens, claims, encumbrances, and interests. After a hearing on the proposed sale, the court issued the order authorizing the sale to International Textile Group (“ITG”) for approximately $40 million. The order included a provision incorporating a finding of fact that the buyers would not have agreed to the Asset Purchase Agreement if the sale was not “free and clear of all Interests of any kind or nature whatsoever,” or if the buyers “would, or in the future could, be liable for any of the Interests.” In addition, the order further provided that those interest-holders who had not objected to the sale were deemed to have consented to the sale, and that the buyers were not the successor to Cone Mills “by reason of any theory of law or equity” and shall not be responsible for any of its liabilities or obligations, including environmental claims.

Approximately six months after the entry of the order approving the sale to ITG, the NJDEP filed a claim for cost recovery action and natural resources damages against Cone Mills, Crompton, and ITG. Crompton, in turn, filed a proof of claim of $4.2 million asserting that ITG was liable as a successor to Cone Mills. ITG filed a motion with the bankruptcy court to direct the NJDEP and Crompton to comply with the sale order, arguing that these successor liability claims violated the terms of that order. Alternatively, ITG asked the court to set aside the sale on grounds that the debtors had not conveyed the assets “free and clear.”

Relying on In re Savage Industries, Inc., Crompton responded that the provisions of the sale order cutting off successor liability of ITG should not be enforced because Cone Mills failed to provide it with notice that its environmental/successor liability claims would be eliminated because of the asset sale. The bankruptcy court found that Crompton had been provided sufficient notice. The district court and Court of Appeals for the Third Circuit affirmed, agreeing that the bankruptcy court properly held that Crompton was bound by the sale order relieving ITG of any successor liability for claims.

The more difficult question involves CERCLA generator liability associated with the purchased assets. Some federal courts have held that environmental liability does not fall within the meaning of “liens and interests” or that the bankruptcy court does not have the jurisdiction to alter the CERCLA liability scheme or cut off the rights of parties under federal environmental laws.

For example, in Ninth Avenue Remedial Group v. Allis-Chalmers Corp., the defendant had acquired assets pursuant to Section 363(f). In addition, the asset purchaser agreement specifically provided that the defendant was not assuming any environmental liabilities and that the debtor remained liable except

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for claims disallowed or discharged by the confirmed plan. Moreover, the bankruptcy court order approving the sale provided that the rights of the creditors and other parties asserting liens or interests against the purchased assets would attach to the sales proceeds. The plaintiffs sought contribution from the defendant as a successor corporation and the defendant filed a summary judgment motion, arguing, *inter alia*, that the bankruptcy order precluded any successor liability. The federal district court denied the defendant's summary judgment motion because there was a question whether the plaintiffs' claims had been discharged by the bankruptcy proceeding because it was unclear that the plaintiffs had received adequate notice of the bankruptcy filing. However, other courts have suggested that sales pursuant to Section 363(f) can apply to future environmental liability. As a result, purchasers often request the bankruptcy court order approving the sale provide that the purchaser is a bona fide purchaser under Section 363(m) and shall not be deemed to be a successor of the seller under a variety of successor liability theories.

**Examples of 363 Sale Orders Providing Protection Against Environmental Liability**

The bankruptcy cases of Chrysler and General Motors are examples of the growing trend toward “fast-track restructuring” through the use of Section 363 to sell the debtors' assets free and clear of liens, claims, and interests, including environmental claims. In the Chrysler case, the bankruptcy court authorized the sale of substantially all of the debtors' operating assets free and clear of all claims and interests not expressly assumed by the purchaser, whether arising before or after the chapter 11 filing. For purposes of the sale, “claims and interests” included, among other things, all claims or rights based on successor, environmental, and products liability, with all such claims to attach to the proceeds of the sale. The sale order explicitly enjoined third parties from asserting against the purchaser any and all claims and interests related to the sold assets, though it did provide a carve-out for governmental entities seeking to enforce environmental claims to which the purchaser would be subject as the post-closing owner or operator of property. Indeed, the sale order expressly provided that it not be interpreted in any way to deem the purchaser liable under a successor liability theory for violations of environmental laws or liabilities relating to any off-site waste disposal prior to entry of the sale order.

A group of Indiana state pension funds and a coalition of consumer groups, which argued that the Chrysler sale discriminated against secured lenders and abrogated key liabilities, appealed, challenging the sweeping relief contained in the bankruptcy court’s sale order, but the Second Circuit Court of Appeals upheld the order.

Perhaps the most important precedent for fast-track Section 363 sales was the General Motors’ chapter 11 case, which authorized a Section 363 sale for substantially all of General Motors' operating assets on substantially similar terms. The federal government may object to proposed sales of substantially all of the assets of a debtor if they do not provide adequate assurances that environmental liabilities will be addressed or if the proposed order purports to cut off potential successor liability of the purchaser for presale penalties, presale response costs, or presale off-site disposal by the debtor. An example of language that has been acceptable to the federal government is the following:

> “Nothing in this Order or the Asset Purchase Agreement releases or nullifies any liability to a government entity under police and regulatory statutes or regulations that any entity would be subject to as the owner or operator of property after the date of entry of this Order.”

Like conventional reorganization plans, disclosure is of paramount importance in a 363 sale as courts need to be shown that the sale is providing fair value and has been done in good faith. Material information needs to be developed and disclosed. Thus, it is important for debtors, purchasers and their counsel to carefully review environmental issues as part of the 363 sale process to avoid unexpected environmental liabilities down the road.

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9 Zerand-Bernal Group v. Cox, 23 F.3d 159 (7th Cir. 1994).
12 Griffin v. Bonapfel, 805 F.2d 1515 (11th Cir. 1986).
14 In re CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992); U.S. v. LTV Corp., 944 F.2d 997 (2d Cir. 1991).
16 Id. at 580.
17 Id. (“The bankruptcy system would be severely damaged if parties could not rely on the finality of court orders entered after notice and opportunity for hearing. This is particularly true in relation to orders authorizing sale of property of the estate.”) (citations omitted). The court also noted that since the sale order had become final, any objections by the NJDEP were barred by the doctrine of res judicata.
18 313 F. App’x 538 (3d Cir. 2009).
19 Id. at 539.
20 Id. at 539-40.
21 43 F.3d 714 (1st Cir. 1994).
22 Among the allegations, Crompton alleged that it was not served with the “auction and sale notice,” or the many other forms of notice it claimed it should have received, and alleged that it was “left off of all service lists related to the notice of sale, the motion to approve the sale, the proposed order, and the Sale Agreement.” Cone Mills, 313 F. App’x at 540.
24 For an example where a purchaser pursuant to a 363 sale expressly assumed environmental liabilities, see In Re Safety Kleen, 331 B.R. 605 (D. Del. 2005) (court denied motion for sanctions for violating injunction against filing claims against reorganized company).
26 Id.

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