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Note

Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?

Kevin J. Saville

The Comprehensive Environmental Response, Compensation, and Liability Act\(^1\) (CERCLA) and the Bankruptcy Reform Act\(^2\) (the Bankruptcy Code) increasingly have come into conflict in recent years.\(^3\) CERCLA seeks to protect public health and the environment by facilitating the cleanup of environmental contamination and imposing the costs on the parties responsible for the pollution.\(^4\) This objective often involves an expensive\(^5\) and protracted process in which the government must investigate environmental contamination, carry out the cleanup, and recoup the costs from various parties.\(^6\) The Bank-
ruptcy Code, on the other hand, tries to facilitate a "fresh start" by providing an expedient and complete process for debtors to obtain relief from their indebtedness.  

The United States Supreme Court held in Ohio v. Kovacs that certain monetary obligations associated with cleaning up environmental contamination represent a "debt" that may be discharged in bankruptcy. Although the Court held that liability for environmental cleanup may be discharged, it did not settle when liability under various environmental statutes, most importantly CERCLA, becomes a bankruptcy "claim." If the liability does not become a "claim" before the potentially responsible party (PRP) enters bankruptcy, the Environmental Protection Agency (EPA) will not participate in the distribution of the debtor's bankruptcy estate, will not have its interest cut off by the debtor's discharge, and may assert its claims for the liability after the conclusion of the debtor's bankruptcy case. PRPs have argued that their cleanup liabilities became

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9. Id. at 280-82. Kovacs was chief executive officer of Chem-Dyne Corporation. Id. at 276. The State of Ohio sued Kovacs and Chem-Dyne for violating various state environmental laws. Id. During the pending litigation, Kovacs agreed to cease further pollution, remove hazardous wastes from Chem-Dyne's property, and pay the State $75,000 in damages for environmental injury. Id. Kovacs failed to comply with the agreement and subsequently filed for bankruptcy. Id. at 276 & n.1.

After appointing a receiver to take possession of Kovacs's assets and enforce the injunction it had ordered, the State sued to determine whether Kovacs's environmental cleanup obligation would be discharged in bankruptcy. Id. at 276-77. The Court noted that because the State had dispossessed Kovacs of his assets through the appointment of a receiver, Ohio's claim was an obligation to pay money and thus was discharged. Id. at 282-83. The Court expressly noted, however, that it was not deciding "what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed." Id. at 284.

10. The Kovacs Court did not need to address the issue of when the debtor's liability to cease further pollution and remove hazardous wastes arose because Kovacs had entered into a prepetition settlement with the State of Ohio. Id. at 276. Consequently, it was clear that the liability under the environmental laws was a prebankruptcy obligation.

11. See 11 U.S.C. §§ 727, 1141 (1988); see also infra notes 52-53 and accompanying text (discussing the Code's discharge provisions). One of the first situations in which the courts were asked to consider when a bankruptcy claim came into existence concerned undetected injuries from exposure to asbestos.
dischargeable claims upon the prebankruptcy release of hazardous substances into the environment.\textsuperscript{12} The government, on the other hand, has tried to prevent PRPs from escaping accountability under CERCLA by asserting that the debtor's liability does not become a bankruptcy claim until the government has detected and cleaned up the hazardous substances.\textsuperscript{13}

This Note examines when liability for environmental cleanup under CERCLA becomes a "claim" capable of discharge under the Bankruptcy Code. Part I summarizes CERCLA and the Bankruptcy Code. Part II reviews the definition of "claim" and considers three approaches courts have adopted to determine when a bankruptcy claim arises. Part III critiques these three approaches and asserts that none of the three adequately balances the objectives of CERCLA with the purposes


\textsuperscript{12} See \textit{Chateaugay}, 944 F.2d at 999; \textit{Jensen}, 127 B.R. at 29; \textit{Union Scrap}, 123 B.R. at 834. Two other areas in which debtors and creditors have confronted the issue of when a bankruptcy claim arises involve: the payment of pension obligations after a divorce decree, \textit{compare} Bush v. Taylor, 912 F.2d 989 (8th Cir. 1990) (en banc) (holding that pension liability to beneficiary arose at time payment became due) and Teichman v. Teichman (\textit{In re Teichman}), 774 F.2d 1395 (9th Cir. 1985) (same) \textit{with} Chandler v. Chandler (\textit{In re Chandler}), 805 F.2d 555 (5th Cir. 1986) (holding that liability arose at time of divorce decree), \textit{cert. denied}, 481 U.S. 1049 (1987); and condominium maintenance assessments, \textit{compare} In re Rosteck, 899 F.2d 694 (7th Cir. 1990) (owner's obligation to pay fees arising after the bankruptcy filing discharged) and In re Elias, 98 B.R. 332 (N.D. Ill. 1989) (same) \textit{with} Horton v. Beaumont Place Homeowners Ass'n (\textit{In re Horton}), 87 B.R. 650 (Bankr. D. Colo. 1987) (fee obligation not discharged) and Alexandria Knolls West Condominium Homes Council v. Streelsky (\textit{In re Streelsky}), 46 B.R. 178 (Bankr. E.D. Va. 1985) (same).
underlying the Bankruptcy Code. This Note recommends that the bankruptcy courts adopt a test that discharges debtors from CERCLA liability only to the extent that environmental contamination was foreseeable prior to the conclusion of the debtor’s bankruptcy case. This proposal stretches the scope of what constitutes a dischargeable bankruptcy claim to its broadest possible limit without offending CERCLA’s cleanup objectives. Using foreseeability as the dividing line between what is and what is not dischargeable should encourage disclosure of toxic waste problems and thus expedite environmental cleanup.

I. CERCLA AND THE BANKRUPTCY CODE

A. CERCLA

Congress enacted CERCLA in 1980 and the Superfund Amendments in 1986 as a response to the growing national problem of pollution from hazardous wastes. CERCLA requires parties handling hazardous substances to notify the EPA of the storage and release of these materials. After it receives notice of or discovers a release of hazardous substances, the EPA formulates a response plan and notifies persons who

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16. 42 U.S.C. § 9603(c) (1988). “Release” is defined as “any spilling, leaking,... emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment.” Id. § 9601(22).

17. Whenever the EPA has reason to believe that a release has occurred or is about to occur it “may undertake such ... investigations as [it] may deem necessary or appropriate.” 42 U.S.C. § 9604(b) (1988). Although courts have construed the EPA’s investigatory powers broadly, see Lewis M. Barr, CERCLA Made Simple: An Analysis of the Cases Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 45 BUS. LAW. 923, 924 (1990); Developments in the Law—Toxic Waste Litigation, 99 HARV. L. REV. 1458, 1487-88 (1986), hazardous substances often are not detected until many years after their release actually occurred.

18. After discovering a hazardous release, the EPA assesses the site’s degree of risk to human health and the environment using a Hazard Ranking System (HRS). See 42 U.S.C. § 9605(c) (1988). Sites with a sufficiently high HRS ranking may be placed on the National Priority List (NPL). See 40
may be held liable for the cleanup.\textsuperscript{19}

Congress provided for unusually broad liability under CERCLA.\textsuperscript{20} Persons\textsuperscript{21} who may be held jointly, severally, and strictly liable\textsuperscript{22} include individuals, business entities, and the officers and employees of the business entities. One of the most severe aspects of CERCLA's liability structure is that a party who is not directly responsible for polluting a site may be held accountable for the cleanup.\textsuperscript{23}

To complement its expansive liability provisions, CERCLA provides the EPA with three powerful enforcement mechanisms to respond to the release of hazardous materials. CERCLA authorizes the EPA to obtain a court injunction or issue an administrative order compelling parties responsible for the

\begin{itemize}
  \item [\textsuperscript{19}] See Carter Day Indus., Inc. v. United States EPA (\textit{In re Combustion Equip. Assocs.}), 838 F.2d 35, 36 (2d Cir. 1988).
  \item [\textsuperscript{20}] CERCLA's liability provision provides:
    \begin{enumerate}[\textsuperscript{(3)}]
      \item any person who by contract, agreement, or otherwise arranged for disposal or treatment... of hazardous substances owned or possessed by such person, ... at any facility... owned or operated by another party or entity and containing such hazardous substances, and
      \item any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, ... from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
        \begin{enumerate}
          \item all costs of removal or remedial action incurred by the United States Government or a State ...
          \item any other necessary costs of response incurred by any other person ...
        \end{enumerate}
    \end{enumerate}
  \item [\textsuperscript{22}] Under CERCLA's joint and several liability framework, the EPA can recover a substantial portion of its response cost by suing only a few financially viable parties. See United States v. Monsanto Co., 858 F.2d 160, 171-72 (4th Cir. 1988), cert denied, 490 U.S. 1106 (1989); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 n.13 (2d Cir. 1985). Even though each defendant may be held individually liable for all cleanup costs incurred at a facility, courts have been receptive to allocating response costs among responsible parties if the harm is divisible. See, e.g., \textit{Monsanto}, 858 F.2d at 172; United States v. Stringfellow, 661 F. Supp. 1053, 1060 (C.D. Cal. 1987).
  \item [\textsuperscript{23}] See, e.g., L. De-Wayne Layfield, Note, \textit{CERCLA, Successor Liability and the Federal Common Law: Responding to an Uncertain Legal Standard}, 68 TEX. L. REV. 1237, 1246-50 (1990) (identifying cases where the courts have been willing to interpret CERCLA broadly to find successor property owner's liable for cleanup); Note, \textit{Cleaning up the Debris After Fleet Factors: Lender Liability and CERCLA'S Security Interest Exception}, 104 HARV. L. REV. 1249, 1253-58 (1991) (identifying cases where lenders were held accountable for a borrower's release of hazardous substances).
\end{itemize}
release to complete the cleanup. Alternatively, the EPA may use "Superfund" money to decontaminate the site and then recover its response costs from responsible parties. In some cases, parties who undertake cleanup actions or reimburse the EPA for its cleanup efforts may initiate contribution suits against other responsible parties. Finally, CERCLA authorizes the EPA to enter into settlement agreements which release responsible parties from future liability if they agree to clean up hazardous substances. Except in extraordinary circumstances, however, the EPA cannot release a PRP from future liability arising from conditions that were "unknown" at the time the remedial action was taken.

Along with its unusually broad liability and enforcement mechanisms, CERCLA contains two unique provisions to facilitate the EPA's cleanup efforts. First, the federal courts lack jurisdiction to review EPA actions until after the EPA initiates


28. 42 U.S.C. § 9622(f)(5)(A)-(B) (1988). Given this limitation, the EPA has been reluctant to release responsible parties from subsequent liability without a "reopener" provision allowing it to escape the release covenant if an unforeseen hazard arises. See Balcke, supra note 27, at 140-41.

29. See 42 U.S.C. § 9613(h) (1988). Congress amended CERCLA in 1986 to make clear that it intended to create a system in which the government and private parties would clean up environmental contamination first and litigate liability later. See H.R. REP. NO. 253(I), 99th Cong., 2d Sess. 81 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 2863. In enacting CERCLA, Congress also was concerned that requiring the EPA "to complete cleanups before it has adequately assessed the site or before it knows how to perform a permanent cleanup would make little environmental or economic sense, and would likely
an enforcement action. Second, a party may be held responsible more than once for cleaning up pollution caused by a single hazardous substance release. If the EPA subsequently detects pollution that was unknown at the time of a PRP’s original response, the EPA is authorized to bring a second action against that party.

B. THE BANKRUPTCY CODE

The Bankruptcy Code provides individuals and corporations with a means to obtain immediate relief from their indebtedness. As soon as a debtor petitions for bankruptcy, the Code’s automatic stay provision bars creditors with “claims” that arose prior to the debtor’s bankruptcy petition from seeking repayment outside the bankruptcy proceedings. The bankruptcy court, using a list of “debts” and “creditors” prepared by the debtor, then notifies the identified creditors of produce cleanups that are temporary, requiring further expenditures to correct those mistakes.” Id. at 56 (1986), reprinted in 1986 U.S.C.C.A.N. 2835, 2838.

30. CERCLA states:

No Federal court shall have jurisdiction under Federal law . . . or under State law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs . . . .

(2) An action to enforce an order issued under section 9606(a) of this title . . . .

(3) An action for reimbursement under section 9606(b)(2) of this title.

42 U.S.C. § 9613(h) (1988). Under this section, the courts, finding that pre-enforcement review would lead to considerable delays and increased cleanup costs, have held that the EPA’s action or inaction cannot be challenged prematurely. See, e.g., Schalk v. Reilly, 900 F.2d 1091, 1095 (7th Cir. 1990); Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1387-88 (5th Cir. 1989).

32. 11 U.S.C. § 362(a) (1988). Section 362(a)(6) provides that the filing of a bankruptcy petitions stays “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.” Id. § 362(a)(6) (emphasis added).

33. The Code defines “debt” to include any liability on a “claim.” 11 U.S.C. § 101(12) (1988 & Supp. 1991). “Creditor” is defined as an “entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.” Id. § 101(10)(A) (emphasis added).

34. See 11 U.S.C. § 521(1) (1988) (requiring debtor to “file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities”).

35. See 11 U.S.C. § 342(a) (1988). Section 342(a) provides: “There shall be given such notice as is appropriate, including notice to any holder of a commu-
their right to assert a claim against the debtor’s bankruptcy estate.\textsuperscript{36}

Under the Bankruptcy Act of 1898,\textsuperscript{37} which preceded the Code, creditors could assert only “provable” claims against the bankrupt debtor.\textsuperscript{38} Many types of claims, including contingent and unliquidated claims, often were not provable.\textsuperscript{39} Although

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  \item A proof of claim against the debtor's estate “is deemed allowed” and constitutes “prima facie evidence of the validity and amount of the claim” unless a party in interest objects to the claim. 11 U.S.C. § 502(a) (1988); BANKR. R. 3003(b)(1). If a creditor objects to a filed claim, the dispute will be resolved in an adversary proceeding in which the bankruptcy court determines whether or not to allow the claim. See 11 U.S.C. § 502(b); David Kauffman, Procedures for Estimating Contingent or Unliquidated Claims in Bankruptcy, 35 STAN. L. REV. 153, 158-67 (1982).
  \item The 1898 Bankruptcy Act provided that the debtor's assets be distributed only to “allowed” claims. Bankruptcy Act § 57(d), 11 U.S.C. § 93(d) (1976). Claims were not allowed unless they were provable. \textit{Id.} § 63(d), 11 U.S.C. § 103(d) (1976); see 3 COLLIER ON BANKRUPTCY ¶ 63.01[1], at 1756 (James W. Moore ed., 14th ed. 1975). This language generally resulted in the exclusion of tort and other noncontractual claims. See, e.g., 3A COLLIER ON BANKRUPTCY, supra, ¶ 63.25[1], at 1891; Benjamin Weintraub & Alan N. Resnick, Allowance of Claims and Priorities Under the New Bankruptcy Code, 12 UCC L.J. 291, 291 (1982); Note, Tort Claims and the Bankrupt Corporation, 78 YALE L.J. 475, 479-80 (1969).
  \item Congress expanded the types of claims that were provable by enacting the Chandler Act in 1938. The amended Bankruptcy Act allowed creditors holding “contingent debts” or “contingent contractual liabilities” to participate in the distribution of the debtor’s assets if the creditor had sued upon these claims before the initiation of the debtor’s bankruptcy. See Bankruptcy Act, § 63(a)(7)-(8), 11 U.S.C. § 103(a)(7)-(8) (1976). Consequently, the courts would recognize a tort claim only if the right to recover was based on an action that could be filed prior to and remain pending at the time of the bankruptcy. See 3A COLLIER, supra note 28, ¶ 63.29, at 1906; Timothy B. Matthews, The Scope of Claims Under the Bankruptcy Code, 87 AM. BANKR. L.J. 221, 228-29 (1983).
\end{itemize}
parties holding nonprovable rights were excluded in the distribution of the debtor's assets, these creditors could assert their claims once the debtor's bankruptcy was complete.\textsuperscript{40} Recognizing that the "provability" requirement impaired the debtor's fresh start and treated creditors with similar claims differently, Congress abolished this requirement in the Bankruptcy Code.\textsuperscript{41} In addition, to ensure that the courts would recognize certain claims that the former Bankruptcy Act had not allowed,\textsuperscript{42} Congress directed that the bankruptcy courts estimate all contingent and unliquidated creditor claims.\textsuperscript{43}

The type of bankruptcy relief that the debtor seeks will control the disposition of its assets. In a Chapter 7 bankruptcy, a trustee collects the debtor's property, converts the property to cash,\textsuperscript{44} and uses the liquidation proceeds to pay the debtor's creditors\textsuperscript{45} and the costs of administering the bankruptcy.\textsuperscript{46}

\begin{footnotes}
\item[40] See Bankruptcy Act § 17(a), 11 U.S.C. § 35(a) (1976) (discharge released a debtor from provable debts only); WEINTRAUB & RESNICK, supra note 38, § 5.01; Matthews, supra note 39, at 224. In cases where the debtor was a liquidating corporation, however, the creditor's claim became worthless because all that remained was an empty shell without assets. See id. at 229.
\item[41] The 1978 Bankruptcy Code's legislative history explains:
H.R. 8200 abolishes the concept of provability in bankruptcy cases. All claims against the debtor, whether or not contingent or unliquidated, will be dealt with in the bankruptcy case. . . . [Under the prior Act] certain creditors [were] not permitted to share in the estate because of the non-provable nature of their claims, and the debtor [was] not discharged from those claims. Thus, relief for the debtor [was] incomplete, and those creditors [were] not given an opportunity to collect in the case on their claims. The proposed law will permit a complete settlement of the affairs of a bankrupt debtor, and a complete discharge and fresh start.
\item[42] Prior to 1978, the court's ability to liquidate or estimate a claim was a prerequisite to the claim's allowability. See Bankruptcy Act § 57(d), 11 U.S.C. § 93(d) (1976). If the obstacles to an expeditious liquidation or reasonable estimation were insuperable, courts were justified in excluding otherwise contingent or unliquidated claims. See 3 COLLIER, supra note 39, § 57.15[2], at 250-51.
\item[45] 11 U.S.C. § 726(a) (1988). Both Chapter 7 and Chapter 11 provide for the distribution of assets to senior claimholders in full before any distribution is made to more junior claimholders. See id. §§ 726(a), 1129(b).
\item[46] Under both Chapter 7 and Chapter 11, "debts" which are "the actual,
Unlike a Chapter 7 liquidation, a Chapter 11 reorganization contemplates that the debtor will continue to operate its business after the bankruptcy. The Chapter 11 debtor proposes a reorganization plan, which the creditors must approve and the bankruptcy court must confirm, specifying how it will repay its prebankruptcy debts.

Once the Chapter 7 liquidation or the Chapter 11 confirmation is complete, the debtor is given a fresh start. The Chapter 7 debtor is “discharged” of all liability on prebankruptcy “claims.” Similarly, except for the prebankruptcy obligations reaffirmed in the debtor’s reorganization plan, the Chapter 11 debtor is discharged from all “claims” that arose before the bankruptcy confirmation. Notwithstanding a discharge, the debtor is fully liable for all “claims” arising after the Chapter 7

necesary costs and expenses of preserving the estate” are considered “administrative expenses.” See 11 U.S.C. § 503(b)(1)(A) (1988); 3 COLLIER, supra note 38, ¶ 503.04(1)[a][i]. Administrative expenses represent first priority claims in the distribution of the debtor’s assets. See 11 U.S.C. § 507(a). Several courts have classified the EPA’s cleanup claims as administrative expenses. See Daniel Klerman, Earth First? CERCLA Reimbursement Claims and Bankruptcy, 58 U. CHI. L. REV. 795, 796 n.8 (1991) (identifying several cases where courts have classified cleanup claims as administrative expenses).

Chapter 11’s reorganization scheme exemplifies Congress’s belief that preserving a business entity that provides jobs, products, and services to the community is preferable to liquidating it. See H.R. REP. No. 595, supra note 35, at 220, reprinted in 1978 U.S.C.A.N. at 6179-80.

Before it can confirm a reorganization plan, the bankruptcy court must determine that the plan provides equal treatment for creditors in the same class, 11 U.S.C. § 1123(a)(4) (1988), and that the proposed reorganization is feasible. Id. § 1129(a)(11). Feasibility requires that the debtor’s reorganization plan “present a workable scheme of organization and operation from which there may be a reasonable expectation of success.” 6A COLLIER, supra note 39, ¶ 11.07, at 235.

Under the proposed reorganization plan, the debtor may continue to operate the business to generate postbankruptcy income and pay off its prebankruptcy debts. See 11 U.S.C. § 1123(a)(5) (1988).

Section 1141 provides that “the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation.” Id. (emphasis added).
II. DETERMINING WHEN A BANKRUPTCY CLAIM ARISES

Before considering when liability under CERCLA becomes a bankruptcy claim, courts must determine whether the EPA's rights qualify as a "claim." If the EPA eliminates environmental contamination and then seeks reimbursement for its efforts, the EPA's rights clearly represent a "right to payment" that can be discharged in bankruptcy under Bankruptcy Code Section 101(5)(A). A question arises, however, when the EPA instead orders a PRP to clean up environmental contamination it has caused. A PRP's duty to clean up hazardous substances under an EPA injunctive order will qualify as a claim if the

54. Creditors may not want to file a proof of claim in order to avoid the suggestion that they have waived their right to assert that no claim existed or that the claim has not yet arisen. See Arlene E. Mirsky et al., The Interface Between Bankruptcy and Environmental Laws, 46 BUS. LAW. 523, 671 (1991). However, if a creditor fails to file a proof of claim and its rights are determined to constitute a bankruptcy claim, the creditor's rights may be discharged. See supra notes 52-53 and accompanying text. Consequently, some creditors have chosen to file a "protective" proof of claim in which they reserve the right to argue that no claim exists. See, e.g., American Tel. & Tel. Co. v. Chateaugay Corp., 88 B.R. 581, 582 (S.D.N.Y. 1988).

55. Section 101(5) of the Code defines "claim" as either 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) 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.


56. See Ohio v. Kovacs, 469 U.S. 274, 283 (1985). The Kovacs Court hinted, however, that a debtor may not always be discharged from the responsibility to clean up environmental contamination: "[W]e 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 bankruptcy." Id. at 284-85.

57. United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988), was the first major decision directly to consider whether an injunctive order, issued pursuant to an environmental regulation and requiring a debtor in bankruptcy to take action, was dischargeable in bankruptcy. Focusing on the Kovacs Court's emphasis on the fact that the debtor in that case could not effectuate the cleanup, the Whizco court held that if the debtor would be forced to spend money to reclaim a coal mine it had previously abandoned, the obligation was a dischargeable bankruptcy claim. Id. at 150-51. The Whizco court's expenditure of money approach has been criticized. See, e.g., United States v. Hubler, 117 B.R. 160, 164 n.1 (W.D. Pa. 1991); Linda Johannsen, Note, United States v.
EPA has an alternative right to payment under Section 101(5)(B). If the EPA's rights qualify as a claim, a court will have to consider when the claim arose to determine if the debtor's CERCLA liability is discharged. In making this determination, courts have adopted three inconsistent approaches.

A. ACCRUAL OF THE CREDITOR'S "RIGHT TO PAYMENT"

One approach for determining when a bankruptcy claim arises focuses on when the creditor's "right to payment" comes into existence. Recognizing that nonbankruptcy law determines whether the creditor's right represents a bankruptcy


59. The district court in United States v. Chateaugay Corp. (In re Chateaugay Corp.), 112 B.R. 513 (S.D.N.Y. 1990), aff'd sub nom. United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997 (2d Cir. 1991), was the first court to consider directly whether responsibility for undertaking environmental cleanup pursuant to an EPA injunctive order would be discharged in bankruptcy. The court, focusing on whether the creditor had the option of converting an injunction into a right to monetary compensation in the event the debtor failed to comply with the order, stated: "[W]here a creditor has the option of converting an injunction into a right to monetary compensation, as the EPA can do here if it performs the cleanup because of a PRP's failure to do so, such an obligation must be regarded as a dischargeable claim." Id. at 523 (emphasis added).

The Second Circuit, clarifying the district court's decision, reasoned that an order directing the debtor to clean up wastes not "currently causing pollution" would qualify as a bankruptcy "claim" if the EPA had the option of doing cleanup work itself and subsequently suing for the cleanup costs. United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1008 (2d Cir. 1991). The court stated:

[I]f EPA directs LTV to remove some wastes that are not currently causing pollution, and if EPA could have itself incurred the costs of removing such wastes and then sued LTV to recover the response costs, such an order is a "claim" under the Code. On the other hand, if the order, no matter how phrased, requires LTV to take any action that ends or ameliorates current pollution, such an order is not a "claim."

... Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a "claim."

Id. Finding that CERCLA provided the EPA with an option to perform an immediate cleanup and that the hazardous substance at issue in the case was not causing additional pollution, the Second Circuit held that the debtor's liability under the EPA's cleanup order represented a "claim" and would be discharged in the debtor's bankruptcy. Id. at 1008-09.
CERCLA CLAIMS

claim, courts following the right to payment approach reason that nonbankruptcy law also should control when a bankruptcy claim arises. Under this approach, the creditor’s right does not represent a claim subject to the Bankruptcy Code’s automatic stay or discharge provisions until the creditor’s “right to payment” has accrued under the applicable nonbankruptcy law.

60. See Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161 (1946) (holding that nonbankruptcy law dictates whether a right to payment is cognizable for bankruptcy purposes); see also Vern Countryman, The Use of State Law in Bankruptcy Cases (Part I), 47 N.Y.U. L. REV. 407, 412 & n.29 (1972) (explaining that the bankruptcy court must determine the debtor’s liability using nonbankruptcy law).

61. Outside the bankruptcy context, the issue of when a cause of action arises or accrues occurs most frequently in determining the date from which a statute of limitations begins to run. In cases in which injury is latent for some time, the courts have taken two different approaches to determine when a cause of action first accrues: exposure to the agent causing the injury, and discovery of the injury. Under the exposure rule, the statute of limitations begins to run at the point in time when the victim is exposed to the injury causing agent. The absence of any manifestation of injury under this rule is irrelevant. Conversely, the discovery rule, which has been adopted by a majority of the states, provides that the statute of limitations begins to run once the claimant knew or should have known of the injury caused by the defendant. See Gregory A. Bibler, The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings, 61 AM. BANKR. L.J. 145, 164-68 (1987); Jennifer R. Clarke, Note, Denial of a Remedy: Former Residents of Hazardous Waste Sites and New York’s Statute of Limitations, 8 COLUM. J. ENVTL. L. 161, 170 n.55 (1982) (identifying 36 jurisdictions that have adopted the discovery rule).

Staying the running of the statute of limitations until the plaintiff discovers the injury ensures that the plaintiff’s rights do not expire before the plaintiff has an opportunity to assert them. Bibler, supra, at 164. Looking to substantive nonbankruptcy law to determine when a bankruptcy claim arises would have the same effect; creditors’ rights would not be discharged before creditors could assert them. Id. at 168.

62. One of the most recognized cases following the “right to payment” approach is Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.), 744 F.2d 332 (3d Cir. 1984), cert. denied, 469 U.S. 1160 (1985). In Frenville, a group of banks that had made prebankruptcy loans to the Chapter 11 debtor sued the debtor's certified public accountants, asserting negligent preparation of the debtor's prebankruptcy financial statements. Id. at 333. The accounting firm subsequently brought an indemnity suit against the debtor, alleging that the debtor fraudulently provided incorrect financial information to the firm prior to petitioning for bankruptcy. Id. at 337. In determining that the accounting firm did not have a prepetition claim subject to the automatic stay, the Third Circuit noted that under New York law the firm's right to payment for indemnification did not arise with the debtor's commission of the underlying fraudulent act. Id. at 337-38. Under New York law, the accounting firm's “right to payment” against its client did not arise until it was sued by the bank. Since the bank did not sue until after the debtor's bankruptcy petition, the Frenville court reasoned that a bankruptcy claim did not arise until postpetition. Id. at 337. The Third Circuit has continued to employ its Frenville "right to pay-
The federal district court in *United States v. Union Scrap Iron & Metal*[^63] employed the "right to payment" approach to determine when the debtor's CERCLA liability became a dischargeable bankruptcy claim. The debtor, Taracorp Industries, Inc., petitioned for bankruptcy in 1982.[^64] In 1983, the State of Minnesota detected hazardous wastes at a site at which Taracorp had processed automobile batteries.[^65] Four years after Taracorp's reorganization plan was confirmed, the EPA identified the company as a PRP.[^66] Taracorp sought an order establishing that its CERCLA liability previously was discharged.[^67]

The *Union Scrap* court rejected Taracorp's assertion that the EPA's claim was discharged through bankruptcy because the claim arose when the hazardous substances were released.[^68] Instead, the court looked to CERCLA's statutory language to determine when a claim arises. See *Lugo v. Paulsen*, 886 F.2d 602, 607 (3rd Cir. 1989); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 941-44 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). But see *Kilbarr Corp. v. General Servs. Admin. (In re Remington Rand Corp.*), 836 F.2d 825, 832 (3d Cir. 1988) ("[A] party may have a bankruptcy claim and not possess a cause of action on that claim.").


[^64]: Id. at 833.
[^65]: Id. Prior to entering bankruptcy, Taracorp contracted with Union Scrap Iron & Metal to process used automobile batteries. Id. From 1979 to 1982, Union Scrap processed batteries for Taracorp. As of January 1983, approximately one year after Taracorp petitioned for bankruptcy, Union Scrap still possessed batteries owned by Taracorp. Id.
[^66]: The bankruptcy court had set a July 5, 1983 deadline for the filing of claims against Taracorp; it confirmed Taracorp's reorganization plan in July 1985. Id. Although the Minnesota Pollution Control Agency detected contamination at the Union Scrap site in 1983, the EPA did not begin its assessment of the site until 1985 and its emergency removal action until 1988. Id. In 1990, the EPA concluded that the site required no further cleanup action. It then sought to recover approximately $1,200,000 for the response costs it had incurred. Id. at 832.
[^67]: Id. at 834. Taracorp did not acknowledge its potential CERCLA liability at the Union Scrap site in its disclosure statement or plan of reorganization. Id. The EPA stated that it did not know that Taracorp had any relation to the Union Scrap site until August 1989 and thus it did not "know of its potential CERCLA claim against Taracorp until some years after Taracorp filed for bankruptcy." Id.
[^68]: Id. at 838. Taracorp had argued that the EPA should have brought its CERCLA claim before its reorganization plan was confirmed. The govern-
determine when the debtor's obligation to clean up the contamination arose. After identifying four elements that must be satisfied before a CERCLA cause of action accrues, the court held that the EPA did not have a dischargeable "right to payment" until it had expended funds in cleaning up the pollution caused by the debtor. Because the EPA had not expended funds before the conclusion of Taracorp's bankruptcy case, the discharge did not relieve Taracorp of its CERCLA liability.71

B. WHEN DID THE UNDERLYING ACTS OCCUR?

A majority of courts have criticized the right to payment approach. These courts assert that substantive nonbankruptcy law should determine only whether a creditor's rights are cognizable in bankruptcy—not when a bankruptcy claim arises. Rather than looking to the substantive nonbankruptcy law, the court countered that Taracorp's CERCLA liability arose after its reorganization plan had been confirmed. Id. at 834.

69. Id. at 835. According to the court, the four elements are:

(1) there must be a facility; (2) there must be a release or threatened release of a hazardous substance at the facility; (3) there must be a responsible person (as defined by the statute); and (4) the United States must have incurred necessary costs in responding to the release at the facility.

Id. The court stated: "Because the EPA had incurred no response costs at the time of Taracorp's confirmation, the EPA could have no claim in the bankruptcy proceedings—there was no legal obligation under CERCLA." Id. at 836.


The Union Scrap court also based its decision on Taracorp's failure to disclose its potential CERCLA liability during its previous bankruptcy reorganization proceedings and the EPA's lack of knowledge of the debtor's potential CERCLA liability. See Union Scrap, 123 B.R. at 833, 835-36.

71. Union Scrap, 123 B.R. at 835.

courts following this approach focus on when the "underlying act" giving rise to the claim occurred.\textsuperscript{73} If the acts resulting in the creditor’s claim precede the debtor’s bankruptcy, these courts have held that the creditor’s right represents a prebankruptcy "claim" subject to the Code’s automatic stay and discharge provisions.\textsuperscript{74}

\textit{In re Jensen}\textsuperscript{75} illustrates how courts have applied the "underlying act" approach to determine when CERCLA liability becomes a dischargeable bankruptcy claim. The debtors, Mr. and Mrs. Jensen, owned and operated a lumber company which released toxins into the groundwater before they petitioned for bankruptcy.\textsuperscript{76} Two years after their bankruptcy case was closed, the State of California informed the Jensens that they were potentially liable for the cleanup on the lumber company site.\textsuperscript{77} The Jensens filed an action to determine whether their CERCLA liability had been discharged previously.\textsuperscript{78}

The Ninth Circuit’s Bankruptcy Appellate Panel rejected the California pollution agency’s argument that it did not have

\begin{footnotesize}
\begin{enumerate}
\item Under this approach, the "triggering act which constitutes the \textit{basis} for the cause of action must have occurred \textit{prior} to filing the petition in bankruptcy." \textit{In re Grynberg}, 113 B.R. at 713.
\item Grady v. A.H. Robins Co., 839 F.2d 198, 203 (4th Cir.), \textit{cert dismissed sub nom.} Joynes v. A.H. Robins Co., 487 U.S. 1260 (1988), was one of the first federal appellate decisions to expressly reject the \textit{Frenville} “right to payment” approach. It is also the case most often cited for the proposition that the timing of the underlying acts giving rise to a cause of action controls when a bankruptcy claim arises. In \textit{Grady}, the claimant used a Dalkon Shield contraceptive device, manufactured and marketed by the debtor, prior to the debtor’s bankruptcy. \textit{Id.} at 199. The plaintiff did not discover her injuries until after the debtor filed for bankruptcy. \textit{Id.} A.H. Robins asserted that the bankruptcy claim arose with the use of the contraceptive; the plaintiff, however, argued that her claim did not arise until she detected her injuries. \textit{Id.} at 201. Rejecting the plaintiff’s argument, the Fourth Circuit focused on the underlying acts that gave rise to her claim. \textit{Id.} at 203. The court held that the plaintiff’s right to recover became a claim subject to the Bankruptcy Code’s automatic stay provision when the intrauterine device was inserted. \textit{Id.}
\item Jensen, 114 B.R. at 701. On February 2, 1984, the California Regulatory Water Quality Control Board discovered hazardous substances on the lumber site property. \textit{Id.} On February 13, 1984, the Jensens filed a Chapter 7 petition. \textit{Id.}
\item \textit{Id.} Their debts were discharged and their bankruptcy case closed in February 1985. In March of 1987, California informed the Jensens that they were considered PRPs and might be held personally liable for the cleanup costs at the lumber site they formerly owned. \textit{Id.}
\item \textit{Id.} at 702.
\end{enumerate}
\end{footnotesize}
a claim capable of discharge until it expended response costs.\textsuperscript{79} Noting that the substance release occurred prior to the debtor's petition for bankruptcy, the court held that the cleanup liability arose prepetition and therefore was discharged.\textsuperscript{80}

C. WHEN DID THE "DEBTOR-CREDITOR RELATIONSHIP" ARISE?

The third approach courts have adopted to determine when a bankruptcy claim arises, the "debtor-creditor relationship" approach, is functionally an offshoot of the "underlying acts" approach. Courts following this approach, like the courts employing the underlying acts approach,\textsuperscript{81} consider when the acts resulting in the claim occurred. If the acts giving rise to the right to payment occurred prepetition, these courts consider whether a prebankruptcy relationship existed between the debtor and the party asserting the claim.\textsuperscript{82} Any liability arising after the parties began a relationship is discharged.\textsuperscript{83}

\textsuperscript{79} 127 B.R. at 33. This was the bankruptcy court's holding. 114 B.R. at 706.

\textsuperscript{80} The court, in effect, followed the district court's holding in United States v. Chateaugay Corp. (\textit{In re Chateaugay Corp.}), 112 B.R. 513, 521 (S.D.N.Y. 1990), \textit{aff'd} \textit{sub nom.} United States v. LTV Corp. (\textit{In re Chateaugay Corp.}), 944 F.2d 997 (2d Cir. 1991), that for purposes of discharge a bankruptcy claim arises upon the debtor's release of hazardous substances into the environment. \textit{Jensen}, 127 B.R. at 32-33. The court believed that this result carried out the fresh start goal of bankruptcy and effectively discouraged manipulation of the bankruptcy process. \textit{Id.} at 33.

\textsuperscript{81} \textit{See supra} part II.B; \textit{infra} note 124.

\textsuperscript{82} The rationale behind this approach is that a creditor should not be forced to anticipate its potential claims against the debtor in bankruptcy before a relationship exists. \textit{See Pettibone Corp. v. Ramirez (\textit{In re Pettibone Corp.})}, 90 B.R. 918, 931-33 (Bankr. N.D. Ill. 1988). This standard may shield claims from discharge which have their genesis in prepetition activity if no prebankruptcy relationship existed. \textit{Id.} at 933-34.

\textsuperscript{83} Roach v. Edge (\textit{In re Edge}), 60 B.R. 690 (Bankr. M.D. Tenn. 1986), is the case most often cited by courts applying the debtor-creditor relationship approach. In \textit{Edge}, two dentists negligently treated a patient. \textit{Id.} at 691. The creditor-patient did not discover her injuries until after the dentists had entered bankruptcy. \textit{Id.} The creditor-patient, attempting to avoid the Bankruptcy Code's automatic stay and recover for the negligent treatment, sought a court declaration that her claim did not arise until she discovered her injury. \textit{Id.} The federal district court denied the patient's request and held that, for the purposes of the automatic stay, a bankruptcy claim arose at the earliest point in the relationship between the victim and the wrongdoer, in this case when the patient-creditor visited the dentist and the dentist performed the negligent act. \textit{Id.} at 699.

Other courts have required the existence of a relationship before declaring that a bankruptcy claim exists. \textit{See, e.g.}, Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 943 (3d Cir.) (To a have contingent claim, "one must have a legal relationship relevant to the purported interest from which that interest
The Second Circuit's decision in *In re Chateaugay* exemplifies the use of the relationship approach in the CERCLA setting. The government detected hazardous substances on the debtor's property while the debtor was in the midst of negotiating a reorganization plan. The EPA sought a declaratory judgment that the debtor's liability for future cleanup costs would not be discharged with the confirmation of the debtor's reorganization plan.

The court first determined that the debtor released hazardous substances into the environment prior to entering bankruptcy. Next, the Second Circuit considered the relationship between the debtor and the EPA to assess whether the EPA reasonably could anticipate future CERCLA claims against the debtor. Although it acknowledged that the EPA did not know the location of all the contaminated sites owned by the debtor or the extent of the removal action that would be required at each site, the court explained: "The relationship between environmental regulating agencies and those subject to regulation provides sufficient 'contemplation' of contingencies to bring most ultimately maturing payment obligations based
on prepetition conduct within the definition of ‘claims.’”90 The Second Circuit affirmed the lower court’s decision that all liability associated with prepetition releases of hazardous substances would be discharged in the debtor’s bankruptcy.91

III. UNSATISFACTORY RESULTS UNDER THE EXISTING APPROACHES

A. UNDERMINING THE CODE’S LANGUAGE AND PURPOSES VIA THE “RIGHT TO PAYMENT” APPROACH

The “right to payment” approach used by the court in United States v. Union Scrap Iron & Metal92 disregards the Bankruptcy Code’s language and purposes. Prior to Congress’s repeal of the provability requirement, courts were required to consider nonbankruptcy law to determine when a claim arose. Unless the creditor possessing a tort or other noncontractual claim could obtain a judgment under the applicable nonbankruptcy law, the creditor did not have a provable bankruptcy claim.93 Requiring the courts to look at CERCLA’s language to ascertain whether the EPA has a bankruptcy claim would, in effect, reinstate provability.94 Abolition of the provability requirement strongly suggests that nonbankruptcy law should no longer be dispositive of when a bankruptcy claim arises.95

90. Id.
91. Id. at 1006. In reaching its conclusion, the Second Circuit noted that its holding, though focusing on prepetition conduct, “did not go so far as to include CERCLA response costs attributable to any action of the debtor that occurred prepetition” within the definition of a bankruptcy claim. Id. at 1005. The court stated that the prepetition “construction of a storage facility” that leaked hazardous substances would not suffice as the prepetition conduct needed for a claim to exist. Id. If the court had applied the pure “underlying acts” approach the debtor would have been discharged of CERCLA liability to the extent that its prebankruptcy conduct or acts resulted in either a pre- or postbankruptcy release of hazardous substances. See supra part II.B.
93. See supra note 39.
94. See, e.g., In re Johns-Manville Corp., 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) (“Adherence to [the Frenville “right to payment” approach] would reinstate the provability concept of claims, which the drafters of the Code specifically intended to abolish.”).
95. See supra note 41 and accompanying text. Section 157(d) requires that the district court, on timely motion from a party, withdraw all or part of a case from a bankruptcy court “if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States . . . affecting interstate commerce.” 28 U.S.C. § 157(d) (1988). Several district courts, considering a motion to withdraw reference, have held that withdrawal is mandatory when the bankruptcy court is asked to consider when a CERCLA claim arises. These courts have found that a determination
The Bankruptcy Code's broad definition of "claim" also implies that nonbankruptcy law, like CERCLA, should not control when a bankruptcy claim arises. "Claim" encompasses any right to payment, no matter how remote or contingent. The terms "unliquidated," "unmatured," and "contingent" in the Code's definition of "claim" broaden the scope of the term "right to payment." By using this language, Congress intended to expand, not qualify, the scope of "claim" beyond a right to payment under nonbankruptcy law. Thus, even of when a CERCLA bankruptcy claim arises would require the bankruptcy court to consider and interpret CERCLA. See American Tel. & Tel. Co. v. Chateaugay Corp., 88 B.R. 581, 584-88 (S.D.N.Y. 1988) (because the issue of when CERCLA claim arose would require analysis of competing policies of CERCLA and the Bankruptcy Code, mandatory withdrawal is required); United States v. Johns-Manville Corp. (In re Johns-Manville Corp.), 63 B.R. 600, 602 (S.D.N.Y. 1986) (a determination of whether claims against debtor occurred before or after debtor entered bankruptcy would require interpretation of CERCLA); Carter Day Indus., Inc. v. United States EPA (In re Combustion Equip. Assocs.), 67 B.R. 709, 712-14 (S.D.N.Y. 1986) (same), aff'd on other grounds, 838 F.2d 35 (2d Cir. 1988). Looking to CERCLA's language to determine when a CERCLA bankruptcy claim arises is inconsistent with the position taken by a majority of the courts outside the "withdrawal of reference" context. Courts following the underlying acts approach consistently have held that substantive nonbankruptcy law does not control when a bankruptcy claim arises. See supra part II.B. 96. The Bankruptcy Code does not define "right to payment." The House and Senate reports, however, discussing the Code's expanded definition of "claim," indicate that the Code adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters. . . . By this broadest possible definition, and by the use of the term throughout title 11, . . . the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court. H.R. Rep. No. 595, supra note 35, at 309, reprinted in 1978 U.S.C.C.A.N. at 6266 (emphasis added); S. Rep. No. 989, supra note 35, at 21-22, reprinted in 1978 U.S.C.C.A.N. at 5807-08 (emphasis added). 97. See supra note 55; see also Johnson v. Home State Bank, 111 S. Ct. 2150, 2155-56 (1991) (after reviewing the Bankruptcy Code, legislative history, and case law, the Court reiterated that "claim" is defined extremely broadly); Pennsylvania Dep't of Pub. Welfare v. Davenport, 110 S. Ct. 2126, 2130 (1990) (noting that Congress intended to create a "broad rather than restrictive view of the class of obligations that qualify as a 'claim' giving rise to a 'debt' "); Ohio v. Kovacs, 469 U.S. 274, 279 (1985) (indicating that the term "claim" should be construed broadly). Collier's editors predict that after Davenport and Johnson the courts will "rebuff virtually all attempts to characterize obligations as outside the scope of the definition [of "claim"] due to 'special' or unique characteristics of those obligations." 2 COLLIER, supra note 38, ¶ 101.05, at 101-30. 98. Several courts have found that a bankruptcy claim may exist before a cause of action under the applicable substantive nonbankruptcy law. See, e.g., Danzig Claimants v. Grynberg (In re Grynberg), 113 B.R. 709, 713 (Bankr. D. Colo. 1990); Shipwrights, Joiners & Caulkers Local 2071 v. Uniflite, Inc. (In re
though a court rationally could find that no "right to payment" exists under CERCLA until the EPA has detected the substance release, expended funds, or completed cleanup, the Code's expansive definition of "claim" suggests that CERCLA liability may become a bankruptcy claim much earlier.

The idea that a bankruptcy claim may arise before a right to payment exists under CERCLA also comports with the Bankruptcy Code's requirement that bankruptcy courts estimate and discharge unliquidated and contingent claims. Although Congress did not define "contingent" in the Code, courts generally have found that a contingency for bankruptcy purposes exists when the liability-triggering event was "reasonably contemplated by the debtor and creditor at the time the event giving rise to the claim occurred." This definition indicates that a right to payment must be foreseeable before it can be considered a contingent claim. Although liability under CERCLA may become foreseeable much earlier, a debtor's future cleanup obligation unquestionably is foreseeable once the EPA detects contamination and identifies the debtor as a PRP. Once the debtor's obligation is foreseeable, it represents a contingent debt that the bankruptcy courts should estimate and discharge, regardless of when a right to payment accrues under CERCLA.

Murray Indus., Inc.), 110 Bankr. 585, 588 (Bankr. M.D. Fla. 1990); see also supra part II.B. (collecting cases criticizing the "right to payment" approach).

99. See supra note 43 and accompanying text.

100. In re All Media Properties, Inc., 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980) (emphasis added), aff'd per curiam sub nom. All Media Properties, Inc. v. Best (In re All Media Properties, Inc.), 646 F.2d 193 (5th Cir. 1981). The All Media court explained: "A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created." Id. (emphasis added).

101. See supra note 43 and accompanying text. The definition of "claim" is the same in both Chapter 7 and Chapter 11 cases. See supra note 55 (providing the definition of "claim" that applies to the entire Code). In a Chapter 7 liquidation, all liabilities based upon the debtor's prepetition conduct would need to be treated as prepetition claims. If claims resulting from prebankruptcy acts were treated as postbankruptcy claims, those claimants would receive nothing, no matter what their legal priority. See United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1002 (2d. Cir. 1991); Grady v. A.H. Robins Co., 839 F.2d 198, 203 (4th Cir.), cert dismissed sub nom. Joynes v. A.H. Robins Co., 487 U.S. 1260 (1988); Roach v. Edge (In re Edge), 60 B.R. 690, 699-700 n.8 (Bankr. M.D. Tenn. 1986). Consequently, if the debtor is a liquidating corporation, the EPA must assert that it has a prepetition claim if it is to receive compensation from the PRP's estate, because the entity effectively will cease to exist and the EPA would receive nothing after the PRP's bankruptcy.
Another fundamental weakness in the right to payment approach is that it may undermine the debtor's fresh start. A cause of action under CERCLA may not accrue until the EPA detects the release of hazardous substances, expends cleanup funds, or completes the entire cleanup. These events may not transpire until years after the debtor's bankruptcy case concludes, even though the EPA could foresee, and the court could estimate, the debtor's liability much earlier. Delaying a debtor's discharge for prepetition pollution until a cause of action under CERCLA accrues will inhibit both a Chapter 7 debtor's ability to start anew and the Chapter 11 debtor's ability to reorganize.

102. CERCLA's language is contradictory on exactly when a right to payment for environmental cleanup first arises. The EPA is empowered to take action as soon as there is a release or threatened release of hazardous substances. See 42 U.S.C. § 9604(a)(1) (1988). This suggests that a cause of action arises at that time. Notwithstanding this provision, the word "incurred" in § 9607(a) suggests that a right to payment may not arise until the government or a private party has undertaken a cleanup action. Id. § 9607(a). Similarly, CERCLA's statute of limitations begins to run at the "completion of the removal action," id. § 9613(g)(2)(A), suggesting that cleanup efforts trigger a cause of action under CERCLA.

103. Moreover, a delay in the debtor's liquidation risks the deterioration of the value of the debtor and thus, a concomitant decrease in the value of payments to claimants. See Kauffman, supra note 36, at 159.

104. Professor Roe has summarized the potential ramifications of the delayed reorganization of a bankrupt debtor plagued by contingent liabilities:

Access to capital markets will be reduced. The enterprise will shrink.... Worthwhile projects will be foregone. Stockholders will be motivated to march the firm down risky paths. Customers and suppliers will flee. Mergers will be barred; management, no longer fearful of ouster by merger, might slacken its performance. To the extent it performs, it must donate its time and energy to the resolution of the firm's financial troubles, not to operations. Mark J. Roe, Bankruptcy and Mass Tort, 84 COLUM. L. REV. 846, 855 (1984); see also Thomas H. Jackson, The Fresh-Start Policy in Bankruptcy Law, 98 HARV. L. REV. 1393, 1420-21 (1985) (arguing that owners and managers of an enterprise unable to escape or ascertain their future liability may reduce their productive contribution).

These problems undoubtedly will exist and most likely be more severe when a bankrupt debtor is subjected to protracted CERCLA liability. If the uncertainty surrounding the debtor's CERCLA liability has not dissipated, purchasers, equity investors and lenders may fear being held personally liable for the debtor's preexisting CERCLA obligations. See supra notes 20-23 and accompanying text.
B. Disregarding the Code's Discharge Limitations and CERCLA's Objectives Via the "Underlying Acts" Approach

The "underlying acts" approach adopted in In re Jensen fails to address adequately the Bankruptcy Code's limitations and CERCLA's objectives. Many of the courts that have employed the "underlying acts" approach have addressed the issue of when a bankruptcy claim arises in the context of applying the Bankruptcy Code's "automatic stay" provision. This provision will not be an issue unless the creditor is aware of its rights against the debtor prior to the completion of the debtor's bankruptcy proceedings. Thus, courts employing the underlying acts analysis in the automatic stay context have no reason to consider whether the creditor was aware of or could anticipate its future claim. In a discharge action, however, the debtor may commence and complete its bankruptcy proceedings before the EPA, as a creditor, is aware of its claim. Despite Congress's repeal of the "provability" requirement and its broad definition of "claim," nothing in the legislative history or the Code suggests that Congress intended to discharge a creditor's rights before the creditor knew or should have known that its rights existed.


106. The automatic stay continues until the debtor's bankruptcy case is closed or dismissed or until the court grants the debtor a discharge. 11 U.S.C. § 362(c) (1988); see 2 COLLIER, supra note 38, § 362.06, at 362-54 to 362-55. Consequently, a creditor's claims will not be affected by the automatic stay after the debtor's bankruptcy is complete.

107. Moreover, when courts apply the automatic stay provision broadly and bar a creditor from pursuing its rights against a bankrupt debtor, the creditor is only temporarily deprived of its rights because once it has filed a claim, the creditor will be entitled to recover in the debtor's bankruptcy proceedings. See WEINTRAUB & RESNICK, supra note 38, ¶ 1.09[1]. Application of the Code's discharge provisions, on the other hand, permanently and completely affects the creditor's ability to collect its claim. See supra notes 52-53 and accompanying text.

108. Although Congress intended to define "claim" broadly, see supra note 96, the legislative history accompanying the enactment of the Code states: "Creditor" . . . encompasses certain holders of claims that are deemed to arise before the date of the filing of the petition, such as those injured by the rejection of an executory contract or unexpired lease . . . . A guarantor of or a surety for a claim against the debtor will also be a creditor, because he will hold a contingent claim against the
The EPA's right to notice under the Fifth Amendment also may limit the bankruptcy court's ability to discharge CERCLA liability.\footnote{109} The bankruptcy court uses a list of creditors prepared by the debtor to notify creditors of their right to assert claims against the debtor's estate.\footnote{110} The debtor is unlikely to identify the government as a creditor if it is not aware of its liability for the release of hazardous substances.\footnote{111} Even if the EPA is given notice, the notice may not be constitutionally sufficient if the government is not made aware of the details of its potential claim.\footnote{112}

debtor that will become fixed when he pays the creditor whose claim he has guaranteed or insured.


\footnote{109} In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), the Supreme Court considered whether certain state law notice provisions satisfied the due process requirements of the Fourteenth Amendment. \textit{Id.} at 314. The Court first applied its \textit{Mullane} analysis in the bankruptcy context in \textit{City of New York v. New York, N.H. & H.R.R.}, 344 U.S. 293 (1953). The Court held that notice by publication was inadequate to inform a creditor who was aware of the debtor's bankruptcy. \textit{Id.} at 296. The Court stated that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred." \textit{Id.} at 297; \textit{see also} 11 U.S.C. § 523(a)(3) (1988) (debts "neither listed nor scheduled" are not discharged "unless such creditor had notice or actual knowledge of the case in time" to file a proof of claim); 5 COLLIER, supra note 38, ¶ 1141.01[b], at 1141-13 to 1141-14 (discussing due process constraints under Chapter 11). Several courts, relying on \textit{Mullane} and \textit{City of New York}, have held that actual notice to creditors is required in cases where the debtor had actual knowledge of the creditor's claim. \textit{See, e.g., Broomall Indus., Inc. v. Data Design Logic Sys., Inc.}, 786 F.2d 401, 403 (Fed. Cir. 1986); \textit{In re Chicago, R.I. & P.R.R. Co.}, 788 F.2d 1280, 1282 (7th Cir. 1986).

\footnote{110} \textit{See supra} notes 33-36 and accompanying text.

\footnote{111} Similarly, if creditors have no idea that they have a claim against the debtor, they will not file a proof of claim with the bankruptcy court.

\footnote{112} "[R]easonable notice is that which is reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response." Oppenheim, Appel, Dixon & Co. v. Bullock (\textit{In re Robintech}, Inc.), 883 F.2d 393, 396 (5th Cir.) (citing \textit{Mullane}, 339 U.S. at 314), \textit{cert. denied}, 493 U.S. 811 (1989). In United States v. LTV Corp. (\textit{In re Chateaugay Corp.}), 944 F.2d 997 (2d Cir. 1991), the court noted: "The debtor's schedule of liabilities included 24 pages of claims, labeled 'contingent,' that were held by EPA and the environmental enforcement officers of all fifty states and the District of Columbia. The schedule provided no details concerning these claims." \textit{Id.} at 999. Given this limited information, it is unrealistic to expect the EPA, when it has had no prebankruptcy contact...
Notwithstanding the sufficiency of notice, discharging liabil-
ity solely because a release of hazardous substances occurred
pre-petition may conflict with CERCLA's goal of cleaning up
the environment quickly.\(^\text{113}\) Even if the EPA detects the re-
lease of hazardous substances prior to the completion of the
debtor's bankruptcy, under the underlying acts approach it
would need to determine prematurely whether the debtor is a
responsible party and file a proof of claim to participate in the
debtor's bankruptcy. This could require the EPA to divert its
energies from, and thus delay, the cleaning up of the most se-
verely polluted sites. In addition, if the amount or allowability
of the EPA's claim is challenged by other creditors, the bank-
ruptcy court will be required to conduct an adversary proceed-
ing to resolve these issues.\(^\text{114}\) CERCLA, however, deprives the
federal courts, including bankruptcy courts, of jurisdiction to
review the EPA's pre-enforcement actions.\(^\text{115}\) Allowing the
courts to control the priority of the EPA's response as well as
the scope and magnitude of the debtor's CERCLA liability
could undermine CERCLA's goal of expeditiously and effec-
tively cleaning up the environment.\(^\text{116}\)

with the debtor, to assess the value of its claim effectively and completely. In
addition, the more times the EPA is identified as a contingent creditor, the
more it will need detailed information about the debtor's prebankruptcy activi-
ties and use of hazardous substances to avoid expending its limited resources
and time investigating companies and individuals entering bankruptcy rather
than pursuing cleanup and enforcement actions.

113. See supra notes 29-30.
114. See supra note 36 and accompanying text.
115. See supra notes 29-30 and accompanying text.
116. The Second Circuit rejected this argument in Chateaugay. The EPA
had argued that "it would be forced to litigate in the bankruptcy proceedings
to liquidate and fix any claims it might conceivably have against [LTV] for
post-confirmation response costs' at numerous sites'' and that the "estimation
process would 'embroil the parties and the bankruptcy court in disputes over
the wisdom and scope of possible remedies.'" Chateaugay, 944 F.2d at 1006
(quotting Brief for United States at 42). Finding that estimation would not of-
fend CERCLA's objectives, the Second Circuit stated that the court could
make a "speedy and rough estimation of CERCLA claims for purposes of de-
termining EPA's voice in the Chapter 11 proceedings, with ultimate liquida-
tion of the claims to await the outcome of normal CERCLA enforcement
proceedings in which EPA will be entitled to collect its allowable share." Id.
The Second Circuit's reasoning undermines CERCLA's goals of quick and ef-
fective cleanup because it would force the EPA "to respond to countless bank-
ruptcy proceedings involving yet unknown environmental dangers and liabil-
ities" whenever "a conceivable PRP entered bankruptcy." See United
States v. Union Scrap Iron & Metal, 123 B.R. 831, 834 (D. Minn. 1990); see also
supra notes 29-30 (discussing Congress's rationale for denying courts pre-en-
forcement review of EPA actions).
Allowing debtors to escape their CERCLA liability solely on the basis of when contamination occurred also may hinder the EPA's ability to negotiate a settlement agreement in which the debtor agrees to complete hazardous waste cleanup. Because delays in entering bankruptcy could saddle the debtor with more responsibility to pay for cleanup out of its prebankruptcy assets and postbankruptcy earnings, the debtor will have an incentive to enter bankruptcy immediately after it is identified as a responsible party. The sooner the debtor enters bankruptcy after a release has occurred, the less likely the EPA is to detect the contamination, identify the debtor as a PRP, and negotiate a settlement agreement. Moreover, EPA settlement agreements typically release parties only from liability that is known at the time the parties entered into the agreement.\textsuperscript{117} If the debtor can escape both known and unknown liability by entering into bankruptcy, it has no incentive to settle with the EPA. This, along with a PRP's immediate entry into bankruptcy, may delay cleanup.\textsuperscript{118}

Along with delaying cleanup, requiring the bankruptcy court to estimate all liabilities associated with an entity's prebankruptcy activities solely on the basis of a prepetition release represents a formidable if not insurmountable task.\textsuperscript{119} Without evidence that the debtor is directly responsible for a hazardous substance release or that the debtor has engaged in activities that may expose it to liability under CERCLA, a court may be unwilling to give any value to the EPA's claim.\textsuperscript{120} Even courts

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\textsuperscript{117} See supra note 28 and accompanying text.
\textsuperscript{118} See 131 CONG. REC. S12,021 (daily ed. Sept. 24, 1985) (statement of Sen. Specter) ("[E]ncouraging settlement ... will expedite environmental cleanup."); Balcke, supra note 27, at 134 (observing that settlements may expedite cleanups because the private sector is better equipped to take action quickly and inexpensively).
\textsuperscript{119} Collier's editors explain the burden the Bankruptcy Code places on the courts:

The problem of contingent claims in bankruptcy is ... the question whether or not the bankruptcy court will deem liquidation or estimation of the claim reasonably feasible, a question ... whose solution will ultimately rest upon the exercise of judicial discretion in light of the circumstances of the case, particularly the probable duration of the process of liquidation as compared with the period of future uncertainty due to the contingency in question.
3A COLLIER, supra note 39, \S 63.30, at 1912.
\textsuperscript{120} See Maynard v. Elliott, 283 U.S. 273, 278 (1931) (stating that a contingent bankruptcy claim may be so speculative that valuation is impossible; in such cases, the claim will be rejected); Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 941-43 (3d Cir.) ("Proof of damages absent manifest injury would be highly speculative."); cert. denied, 474 U.S. 864 (1985); cf. Braswell v.
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that are willing to value contingent CERCLA claims are likely to undervalue the claims until the debtor’s liability is foreseeable. Undervaluing the amount the EPA is allowed to recover on its CERCLA claims will decrease the agency’s resources and may delay or even prevent environmental cleanup.

C. PROBLEMS WITH THE “RELATIONSHIP” APPROACH

The Second Circuit in In re Chateaugay determined that the EPA’s authority to regulate and police environmental matters was sufficient to establish a relationship from which the EPA should be able to anticipate its future cleanup claims against the debtor. By broadly defining the relationship, the court undermined the rationale for considering whether or not a relationship exists—that a creditor with a relationship may anticipate its potential claim. All claims arising after this debtor-creditor relationship is known to exist, even those that are not within the creditor’s contemplation, will be discharged. When courts fail to limit the scope of the relationship to situations where some prepetition interaction between the PRP and the EPA existed, this expansive relationship approach takes on the characteristics of and thus suffers from the same infirmities as the “underlying acts” approach.
IV. WHEN SHOULD CERCLA LIABILITY BECOME A BANKRUPTCY CLAIM?

A. FORESEEABILITY AS A SOLUTION

There are two contexts in which courts will be required to determine when CERCLA liability becomes a dischargeable bankruptcy "claim." In some situations, courts will be asked to determine the dischargeability of the debtor's liability before the completion of the debtor's bankruptcy proceedings. In other situations, however, the EPA will not detect contamination until the conclusion of the debtor's bankruptcy case. These courts may be required to make this determination years after the conclusion of the debtor's bankruptcy case. In both of these contexts, courts should discharge only the CERCLA liability which is or was foreseeable at the conclusion of the debtor's bankruptcy case.

S.D.N.Y. 1986) (injured creditors purchased debtor's product containing asbestos before the commencement of bankruptcy).

125. See supra parts II.B. and II.C. (discussing Jensen v. California Dep't of Health Servs. (In re Jensen), 127 B.R. 27 (Bankr. 9th Cir. 1991) and United States v. LTV (In re Chateaugay Corp.), 944 F.2d 997 (2d Cir. 1991)).

126. See supra part II.A. (discussing United States v. Union Scrap Iron & Metal, 123 B.R. 831 (D. Minn. 1990)).

127. Much like the asbestos cases of the 1980s, the conflicts associated with determining when a CERCLA claim first arises are deep enough that no perfect solution is available. In 1989, the National Bankruptcy Conference, a private group of lawyers and practitioners who were instrumental in the drafting of the 1978 Bankruptcy Code, considered proposing an amendment to the Code's definition of "claim." The revised definition would have read:

"claim" means—

(A) right to payment, whenever arising, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured, and whether or not the entity holding such claim knows or has reason to know—

(i) of the act or failure to act giving rise to such right to payment; or

(ii) that such entity could foreseeably assert liability with respect to such act or failure to act.

DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 157 (2d ed. 1990). Under this proposal, it is clear that all claims which had their genesis in prebankruptcy conduct would be discharged irrespective of whether the creditor was aware of its rights. In the absence of an overhaul of the definition of claim or some other legislation resolving the scope of dischargeable claims, the courts must compromise on the competing considerations of the Bankruptcy Code and CERCLA. See Roe, supra note 104, at 849.
Even if the EPA detects pollution before the PRP's bankruptcy case is complete, the agency may be unable to complete the cleanup of the hazardous substances before the debtor's estate is liquidated or a reorganization plan is confirmed. In this situation, the bankruptcy court should give the EPA time to complete the cleanup. The bankruptcy court should give the EPA time to complete the cleanup.

1. Detecting Contamination Before the Debtor's Bankruptcy

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128. On November 5, 1991, the federal district court in Sylvester Brothers Development Co. v. Burlington Northern R.R., 133 B.R. 648 (D. Minn. 1991), considered its Union Scrap reasoning in the context of a PRP contribution action. In Sylvester Bros., a PRP sought contribution under CERCLA from the bankrupt debtor. The debtor was not identified by the government as a PRP until after the confirmation of its Chapter 11 plan and was not actually aware of its liability to the government until after the completion of its bankruptcy reorganization. Id. at 650-51. The court held that the debtor's liability to the government and its contribution liability to other PRPs was not discharged in its earlier bankruptcy. Id. at 653. The court based its decision on the debtor's failure to disclose its CERCLA liabilities in its earlier bankruptcy proceedings and the government agency's lack of actual knowledge of its potential CERCLA action in time to file a claim against the debtor's bankruptcy estate. Id.

Thus, Sylvester Bros., and Union Scrap to a limited extent, suggest that if the EPA can establish that it had not detected or was not aware of the debtor's liability for the release of hazardous substances prior to the completion of the debtor's bankruptcy, the EPA's right to seek reimbursement for its cleanup costs will not be discharged.

It is unclear whether other courts will recognize this distinction between pre- and postbankruptcy detection of a hazardous substance release because courts, in other contexts, have not considered detection of the injuries producing the liability to be a necessary factor for a bankruptcy claim. See, e.g., Grady v. A.H. Robins, 839 F.2d 198, 203 (4th Cir.) (Dalkon Shield user had claim subject to automatic stay even though injury not apparent from use of contraceptive), cert dismissed sub nom. Joynes v. A.H. Robins Co., 487 U.S. 1260 (1988); Roach v. Edge (In re Edge), 60 B.R. 690, 694 (Bankr. M.D. Tenn. 1986) (patient's claim barred though injuries from debtor's prepetition negligent treatment not detected until after the debtor's bankruptcy); In re Johns-Manville Corp., 57 B.R. 680, 680-88 (Bankr. S.D.N.Y. 1980) (person exposed to asbestos had claim despite absence of manifest injury.).

Aside from delaying the debtor's fresh start, using detection as the basis for determining when a claim arises could delay the cleanup of hazardous wastes. If the EPA recognizes that its claim for cleanup costs will not be discharged until it detects environmental contamination, the agency has no incentive to expedite its investigation of possible environmental contamination or to undertake immediate cleanup efforts. Moreover, the EPA's ability to control when the investigation of hazardous substance releases are commenced and when cleanup funds are expended could result in treating similar claims differently. See In re Johns-Manville Corp., 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1989) (allowing third-party actions to determine the existence or nonexistence of a claim permits "parties to artificially juggle their existing substantive rights by deciding for themselves the best time to serve process"); In re Yanks, 49 B.R. 56, 58 (Bankr. S.D. Fla. 1985) (stating that it would be "inequitable" to allow a creditor to preserve his claim against debtor simply by postponing collection efforts until after the bankruptcy proceedings); see also Mabey & Jarvis, supra note 72, at 704 (arguing that allowing the creditor to decide when
to investigate the debtor's prebankruptcy activities and assess the magnitude of any hazardous substance release. Once the EPA has completed its investigation, the court then should require the agency to file a claim valuing the debtor's potential liability under CERCLA. Although the debtor, as a responsible party, potentially could be held severally liable for all of the cleanup costs, the EPA should propose a CERCLA liability estimate that approximates the amount for which it would settle the case with a solvent PRP.

To circumvent the courts' inability to determine the legality and magnitude of the EPA's recovery actions prior to agency enforcement, the bankruptcy court should grant the EPA considerable leeway in valuing its CERCLA reimbursement claim. In the absence of compelling evidence that it is arbitrarily overinflated, the EPA's estimate should function as the agency's CERCLA claim against the debtor's bankruptcy estate.

"it will sue on a claim" will promote "inconsistent results in identical factual settings").

129. Because CERCLA requires the EPA to prioritize cleanup efforts and focus its resources on those sites ranked near the top of its National Priority List (NPL), see supra note 18, the agency may argue that this proposal would pressure it to investigate and take remedial actions at sites dictated, not by the severity of the contamination, but by the financial status of the polluter. Two rebuttals exist. First, in the event the debtor is liquidating pursuant to Chapter 7, the EPA will not be able to recover any of its response costs unless it expedites its investigation and files a claim against the debtor. The EPA's failure to recover its response costs at sites not yet placed on the NPL will reduce the resources available to cleanup more severely contaminated sites. Second, without a cursory investigation of the pollution caused by the PRP, the EPA cannot accurately ascertain whether it warrants the highest priority cleanup.

130. See supra note 22.

131. See supra notes 27-28 and accompanying text.

132. See supra notes 29-30, 116 and accompanying text.

133. Although requiring the EPA to make a preliminary estimate of the bankrupt debtor's CERCLA liability imposes some initial burdens on the agency, if the agency is given sufficient time to conduct its investigation, the burden on the EPA probably will approximate the efforts the agency would undertake before proposing a cleanup settlement agreement with solvent PRPs. See supra notes 27-28 and accompanying text. Moreover, the additional onus placed on the EPA must be balanced against the agency's inability to recover any of its future cleanup costs.

134. When the court is required to place a value on a government claim, it should consider the debtor's interest in successfully reorganizing. Without limiting the value of the government's claim according the debtor's ability to pay, the reorganization may be infeasible. See supra note 50.

135. Congress granted the bankruptcy courts broad equitable power to "issue any order . . . necessary or appropriate to carry out the provisions of [the Code.]" 11 U.S.C. § 105(a) (1988). Because neither the Code nor the Rules of
Once the bankruptcy court establishes the value of the EPA's claim,\textsuperscript{136} it should order the bankruptcy trustee or debtor-in-possession to establish a cleanup trust fund to be used to offset future environmental response costs.\textsuperscript{137} The EPA's share of the debtor's estate, as determined by the Bankruptcy

Bankruptcy Procedure provide any express guidance on how to estimate contingent or unliquidated claims, courts have wide discretion in this area. See Bittner v. Borne Chem. Co., 691 F.2d 134, 135-36 (3d Cir. 1982); see also Benjamin Weintraub & Alan N. Resnick, \textit{From the Bankruptcy Courts: Treatment of Contingent and Unliquidated Claims Under the Bankruptcy Code}, 15 UCC L.J. 373, 379 (1983) (discussing varying approaches courts have used for treating contingent and unliquidated claims). One court has identified the options available to the bankruptcy courts in estimating the value of claims to include "accepting the claimant's claim at face value, estimating the claim at zero and waiving discharge of the claim . . ., arriving at its independent estimation of the claim, or utilizing a jury trial to obtain an accurate estimation." \textit{In re Federal Press Co.}, 116 B.R. 650, 653 (Bankr. N.D. Ind. 1989). It appears that the Code gives the bankruptcy court, or the district court acting on behalf of the bankruptcy court, the authority to accept temporarily the EPA's estimate as the value of its claim.

\textsuperscript{136} As a result of mandatory withdrawal of reference, the district court, as opposed to the bankruptcy court, may be responsible for estimating the value of the debtor's CERCLA liability. See 28 U.S.C. § 157(d) (1988). In \textit{In re National Gypsum Co.}, 134 B.R. 188 (N.D. Tex. 1991), the court rejected the debtor's argument that estimation of a claim was purely a bankruptcy law issue. The court held that mandatory withdrawal was required even when estimation of the value of the CERCLA bankruptcy claim was needed. \textit{Id.} at 193.

\textsuperscript{137} Although the creation of a trust fund frequently has been used to ensure that money is available to tort victims holding contingent claims, see, e.g., \textit{In re A.H. Robins Co.}, 88 B.R. 742, 751 (E.D. Va. 1988), aff'd sub nom. A.H. Robins v. Mabey, 880 F.2d 694 (4th Cir.), cert. denied, 493 U.S. 959 (1989); Hi-Lo Powered Scaffolding, Inc. v. Penn (\textit{In re Hi-Lo Powered Scaffolding, Inc.}), 68 B.R. 606, 607 (Bankr. S.D. Ohio 1987); \textit{In re Johns-Manville Corp.}, 68 B.R. 618, 621-22 (Bankr. S.D.N.Y. 1987), aff'd, 78 B.R. 407 (S.D.N.Y. 1987), aff'd sub nom. Kane v. Johns-Manville (\textit{In re Johns-Manville}), 843 F.2d 636 (2d Cir. 1988), courts are just beginning to recognize that a trust fund may be an effective means of ensuring that environmental claimants are compensated. See A1 Tech Specialty Steel Corp. v. Allegheny Int'l, Inc. (\textit{In re Allegheny Int'l, Inc.}), 126 B.R. 919, 924 (W.D. Pa. 1991); see also \textit{In re Dant & Russell, Inc.}, 951 F.2d 246, 250 (9th Cir. 1991) (suggesting that the bankruptcy court had the equitable authority to establish a trust fund for future CERCLA liability); New Jersey v. Gloucester Envtl. Management Servs., Inc., 138 F.R.D. 421, 426 (D.N.J. 1991) (a state-approved settlement agreement created a trust fund to offset costs of ongoing remedial action); United States v. Vertac Chem. Corp., 671 F. Supp. 585, 611 (E.D. Ark. 1987) (pursuant to consent decree, polluter placed money in trust fund to address current and future environmental obligations), \textit{vacated in part, without opinion}, 855 F.2d 856 (8th Cir. 1988).

Several commentators have advocated the use of a trust fund to compensate the government and others for claims associated with toxic wastes. See, e.g., Palma J. Strand, Note, \textit{The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation}, 35 STAN. L. REV. 575, 614-16 (1983); Note, \textit{The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings}, 96 HARV. L. REV. 1121,
Code's priority scheme, should be placed in the fund.\(^{138}\) Periodically, as the environmental contamination is cleaned up and the costs are apportioned among the responsible parties, a fund trustee should distribute fund assets to the EPA.\(^{139}\)

To accommodate the uncertainty surrounding the estimation process, all funds remaining after the entire cleanup is complete\(^ {140}\) should be made available proportionally to the debtor's other prebankruptcy creditors.\(^ {141}\) If the fund is ex-


138. Ascertaining the total value of the bankrupt debtor's assets available for distribution to creditors would depend on whether the debtor was liquidating or reorganizing. In a Chapter 7 liquidation, the payment pool would be funded from the debtor's nonexempt prebankruptcy assets. See supra notes 44-46 and accompanying text. In a Chapter 11 reorganization, the payment pool would be funded using the debtor's prebankruptcy assets and post-bankruptcy earnings as determined by the confirmed reorganization plan. See supra notes 47-51 and accompanying text.

139. Once the court has estimated the debtor's total liabilities, creditors should receive shares equal to the total value of the claim they are asserting. See Roe, supra note 104, at 884-92. For example, if the debtor's cleanup liability totaled $400,000, the EPA would receive the equivalent of 400,000 shares in the fund. Id. at 871.

140. Professor Roe has advocated using a payout method similar to a variable annuity contract in cases in which a bankrupt debtor faces large contingent tort liabilities. Id. at 871. Under Roe's proposal, the fund trustee must calculate a preliminary reimbursement ratio to measure the percentage that creditors are likely to be paid on their claim. The ratio is calculated by dividing the total value of all asserted claims against the debtor, including the claims seeking reimbursement of cleanup costs, by the total contemplated value of the fund. Id. For example, if expected claims against the fund totaled $16 million and the projected total value of the fund was only $4 million, the payout ratio would be 25%. If the EPA held 400,000 shares (i.e., $400,000 in claims), it potentially would receive $100,000 from the fund.

To minimize the risk of overcompensating earlier claimants at the expense of subsequent creditors, the fund trustee periodically would distribute the fund proceeds based on the projected payout ratio. Id. at 870. The fund trustee would determine the number and timing of these periodic payouts based on a projection of when all of the contingent bankruptcy claims, including EPA's CERCLA claim, would accrue. The trustee should proportionally distribute part of each creditor's share value immediately. Periodically, as new estimates of the aggregate amount of contingent claims become available, the payout ratio would be adjusted. Under this proposal, creditors with the highest priority, which may include the EPA with its administrative expense claims, should be paid in full before lower priority claimholders are compensated.

141. Absent unanticipated difficulties, the court should limit the time frame in which the government is allowed to assert its reimbursement claims. On the date established by the court, the fund trustee should calculate the final payout ratio and proportionally distribute the remaining fund assets to the EPA and other creditors. This approach would not only ensure equitable compensation of the bankrupt debtor's creditors; it also would provide the EPA...
hausted prior to the completion of the cleanup, the EPA should be allowed to bring an action to determine the cause of the deficit. If additional cleanup funds are needed to remove hazardous substances from locations that were unknown and unforeseeable during the debtor's bankruptcy case, the EPA should be allowed to assert additional reimbursement claims against the reorganized debtor. If, however, the additional cleanup was foreseeable, the court should bar future recovery.

2. Detecting Contamination After the Debtor's Bankruptcy

The second context in which courts may be asked to determine the discharge of CERCLA liability occurs when prepetition releases are discovered after the conclusion of the debtor's bankruptcy case. Courts facing this question should focus on whether the reorganized debtor's liability for the release of hazardous substances was foreseeable prior to the completion of the debtor's bankruptcy proceedings.

In assessing whether the debtor's CERCLA liability was foreseeable, courts should examine two factors: whether hazardous substances previously had been detected on the debtor's property or on property to which the debtor had processed or shipped waste; and whether the debtor's prebankruptcy activities involved potential hazardous substance releases. If the debtor was responsible for or associated with a detected release of pollutants before entering bankruptcy, some CERCLA liability undoubtedly was foreseeable. Similarly, if the debtor operated a business that produced, used, processed, or transported any type of hazardous substances, the debtor's future liability under CERCLA probably would have been foreseeable.

with an incentive to expedite its investigation and cleanup. If the EPA's investigation and cleanup is not completed within a reasonable time, so that the court can accurately assess the total value of the EPA's future cleanup costs, the EPA's ability to recover postbankruptcy cleanup costs from the debtor should be limited.

142. It is unsettled whether estimation caps liability for purposes of participation in the final distribution of the debtor's estate. Some courts have held that the estimated value functions as a cap on the debtor's liability. See, e.g., In re Storage-Technology Corp., 77 B.R. 824, 825 (Bankr. D. Colo. 1986); In re Baldwin-United Corp., 57 B.R. 751, 758 (S.D. Ohio 1985). Others courts, citing § 502(j), have been willing to reconsider the allowed claim under certain circumstances. See, e.g., In re MacDonald, 128 B.R. 161, 168 (Bankr. W.D. Tex. 1991); In re Lane, 68 B.R. 609, 613 (Bankr. D. Haw. 1986); In re Nova Real Estate Inv. Trust, 23 B.R. 62, 66 (Bankr. E.D. Va. 1982). However, having estimation function as a cap will provide the EPA with an incentive to expedite its investigation and cleanup.
If the EPA did not investigate the debtor's potential CERCLA liability at the time of the debtor's bankruptcy, courts should bar the agency from pursuing any postbankruptcy claims against the debtor. If, however, the EPA diligently investigated the debtor's responsibility for hazardous substance releases, the court should evaluate the detected contamination on a substance-by-substance and location-by-location basis to determine whether the EPA could or should have foreseen the subsequent manifestation of contamination while the debtor's bankruptcy was pending. If the answer is yes, the court should bar the EPA from pursuing postconfirmation recovery from the reorganized debtor. The courts should, however, allow the EPA to pursue postbankruptcy CERCLA claims associated with contamination that could not have been anticipated at the time of the debtor's discharge.143

B. JUSTIFICATION FOR THE FORESEEABILITY APPROACH

By focusing on the foreseeability of the debtor's CERCLA liability, courts in both of the contexts described above can extend the term “claim” to its broadest possible limit without undermining the EPA's recovery of cleanup costs.144 Any right to payment under CERCLA that is “contingent”—i.e., within the

143. This Note has focused primarily on recovery by the EPA. In many cases, private parties assert claims against the bankrupt debtor. In general, this should not affect the applicability of the foreseeability approach proposed by this Note. The courts should discharge a PRP's CERCLA contribution claims only to the extent the liability was or is foreseeable at the time of the debtor's bankruptcy. However, a PRP's ability to recover from the debtor's bankruptcy estate will depend upon whether its contribution claim is or can be liquidated before the completion of the bankruptcy proceedings. See 11 U.S.C. § 502(e)(1)(B) (1988); see also Syntex Corp. v. Charter Co. (In re Charter Co.), 862 F.2d 1500, 1504 (11th Cir. 1989) (holding that CERCLA contribution claims that are contingent and unliquidated during the pendency of the bankruptcy of another PRP will be disallowed); Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.), 126 B.R. 656, 661-62 (D. Mass. 1991) (same).

144. Premising a legal right on foreseeability occurs in tort law. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43 (5th ed. 1984). Under tort principles, if an individual cannot reasonably foresee any injury as the result of her act, the injury is said not to be “proximately caused” by the actor's conduct. Id. Without proximate cause, the actor cannot be held liable for negligence. Id. § 42, at 273. The courts have applied varied tests for determining whether or not a tort injury was foreseeable. They generally consider an injury to be foreseeable unless it was unusual and surprising in light of the facts. Id. The Restatement (Second) of Torts states that the consequences of an action are not foreseeable, if after looking back in time, with full knowledge of all that has occurred, the event still appears to be “highly extraordinary.” RESTATMENT (SECOND) OF TORTS § 435(2) (1965).
contemplation of the parties—will be discharged. Moreover, limiting dischargeable claims to those that are foreseeable is consistent with the debtor's fresh start because the liability that the debtor can anticipate at the time of its bankruptcy will be discharged. Only liability for which the EPA and other creditors cannot reasonably be expected to assert their rights will escape discharge.

In addition, using foreseeability as the benchmark for determining whether a dischargeable bankruptcy claim exists should expedite the detection and cleanup of environmental contamination. Under this approach, the debtor's motivation to hide its pollution is reduced because the CERCLA liability will not be discharged unless the release of hazardous substances is detected or reasonably foreseeable prior to the completion of the debtor's bankruptcy proceedings. Therefore, to increase the likelihood of obtaining a discharge, the debtor has an incentive to provide information regarding its use and release of hazardous substances. The more assistance the debtor provides to the EPA, the more inclined the courts should be to find that the debtor's liability was foreseeable and thus discharged. Moreover, this would give the EPA an incentive to expedite its investigation into potential environmental problems so that it will not be precluded from asserting future claims that a court may later deem to have been foreseeable during the pendency of the debtor's bankruptcy. The debtor's cooperation, coupled with expedited EPA efforts, should speed the detection and cleanup of hazardous wastes.

CONCLUSION

CERCLA holds polluters financially accountable for the environmental contamination they cause. The Bankruptcy Code provides a system in which a debtor's obligations can be estimated, paid with the debtor's available assets, and subsequently discharged. A conflict between these laws arises when a debtor seeks to be discharged from a cleanup obligation that

145. When the cleanup of hazardous substances has not been completed, courts are likely to consider the EPA's right to payment as a contingent claim. See United States v. LTV Corp. (In re Chateaugay Corp.), 944 F.2d 997, 1005 (2d Cir. 1991). Before a right to payment can be considered a contingent claim capable of discharge, however, the EPA's right to payment must be foreseeable. See supra notes 100-01 and accompanying text. Consequently, the Bankruptcy Code already requires courts to consider whether or not a bankrupt debtor's environmental cleanup liability is foreseeable before it can classify a creditor's rights as a "contingent claim."
has not fully matured at the time of the bankruptcy. This Note argues that the three approaches courts have adopted to determine when a CERCLA claim arises in bankruptcy are inadequate.

An analysis of the dischargeability of environmental cleanup obligations should begin with a consideration of whether or not the debtor's CERCLA liability is foreseeable. If the contamination is foreseeable, the claim should be included in the debtor's liquidation or reorganization plan. If, however, the CERCLA claim is not foreseeable, the cleanup liability should remain with the debtor. This approach fosters the debtor's fresh start without discounting CERCLA's dual objectives of expediting cleanup and ensuring that responsible parties bear the costs.