CERCLA AND THE FRESH START: QUELLING THE ETERNAL CONFLICT FN*

Since Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), FN1 the Bankruptcy Code's ("the Code") **FN2** policy of granting debtors a "fresh start" and CERCLA's policy that environmental polluters be held accountable for their actions have been in continuous conflict. FN3 The clash between these two statutes has arisen in many contexts, including the applicability of the Code's automatic stay to actions under CERCLA, FN4 the abandonment of contaminated property by the bankruptcy trustee, FN5 whether CERCLA cleanup costs should be classified as administrative expenses, FN6 and the timing of CERCLA claims as pre or postpetition. FN7 The most fundamental conflict has been over whether remedial actions under CERCLA constitute "claims" within the meaning of the Code.

Whether CERCLA remedies constitute claims under the Code is fundamental because it is only "claims" that the bankruptcy process pays or discharges. FN8 Courts have been inconsistent in applying the Code's definition of a claim FN9 to environmental obligations imposed on debtors by CERCLA. FN10 However, the recent trend among courts deciding this issue is to hold that CERCLA remedies do not constitute claims under the Code. FN11 While these cases represent a judicial attempt to harmonize the conflicting policies of CERCLA and the Code, it is the conclusion of this Note that their outcome is contrary to the policies of both statutes. FN12

This Note criticizes this recent trend in the case law and reviews several proposals for reconciling the conflict between the Bankruptcy Code and CERCLA. Part I briefly outlines the provisions of CERCLA and the Bankruptcy Code relevant to this Note, as well as the policies underlying both statutes. Part II describes the relevant case law dealing with CERCLA remedies as bankruptcy claims. Part III attacks the recent trend holding most CERCLA injunctions, ordering the abatement or cleanup of pollution, outside of the Code's claim definition, because these injunctions do not embody an "alternative right to payment." Finally, Part IV reviews several proposals to end the conflict between CERCLA and the Bankruptcy Code. This Part concludes that the best solution is for Congress to amend CERCLA to grant the EPA a first priority lien on all the debtor's property, but only when the debtor is the actual polluter.

I. GENERAL OVERVIEW OF CERCLA AND THE BANKRUPTCY CODE

A. CERCLA

Congress enacted CERCLA in response to mounting environmental disasters and embodied in the statute two policies. FN13 First, Congress intended to provide a system for the cleanup of hazardous materials released into the environment. **FN14** Second, Congress enacted a procedure to hold the parties responsible for contamination financially liable for these cleanup costs. FN15 However, the statute takes an indirect approach to holding the actual polluter liable. The class of "potentially responsible parties" under the statute is much broader than just the actual offender. FN16 The statute then permits any party held liable to seek contribution from the actual polluter. FN17 Ideally, this framework will eventually result in CERCLA holding the party responsible for the contamination liable.

Pursuant to the two statutory policies, Congress established the Hazardous Substance Trust Fund ("the Superfund"). The purpose of the Fund is to supply the money necessary for the EPA to conduct a cleanup. FN18 Congress used special environmental taxes on chemical and petroleum producers, and general appropriations to establish the Superfund. FN19

CERCLA's enforcement provisions grant the EPA two methods of responding to an actual or threatened release of a hazardous substance. FN20 First, the EPA can clean up a contaminated site using money supplied by the Superfund. FN21 Once the government completes the cleanup, the EPA can pursue any potentially responsible party for reimbursement of these response costs. FN22 Under the government's second option, "if there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance," the EPA can issue an administrative order or obtain from the courts an injunction requiring the responsible party to abate the condition. FN23 Thus, CERCLA grants the EPA authority to impose vast liability on responsible parties. FN24

B. The Bankruptcy Code

Upon the filing of a bankruptcy petition, the Code creates a bankruptcy estate containing, among other things, all of the debtors "legal or equitable interests in property." FN25 Accordingly, if the debtor still owns the contaminated property, it will become part of the estate. FN26 The remainder of the bankruptcy case depends on the type of bankruptcy involved and whether the debtor is an individual or business entity. FN27

In a chapter 7 liquidation, the claims of creditors are paid out of the estate according to the distribution system established by the Code. FN28 Initially, the Code guarantees secured creditors the value of their collateral. FN29 Next, unsecured creditors are paid, with priority claims receiving payment before a pro rata distribution of the remaining assets among the general unsecured claim holders. FN30 Among the items receiving priority treatment are the administrative expenses of the bankruptcy estate, FN31 claims for alimony and support, FN32 and certain income and other tax claims. FN33 Finally, in the extremely rare case that assets remain after payment to the creditors, they are either returned to the debtor, in the case of an individual, or paid to the equity owners of a dissolving business. FN34 Following distribution, an individual debtor will receive a bankruptcy discharge enjoining creditors from further collection efforts. FN35 While a corporation or partnership debtor does not receive a chapter 7 discharge, FN36 this is of little consequence since the business typically dissolves after completion of the bankruptcy proceeding. **FN37**

Reorganization under chapter 11 provides the business debtor an opportunity to avoid liquidation and retain its assets while meeting its obligations under a plan approved by the bankruptcy court. FN38 The priority for claim payment in chapter 11 is similar to the scheme in chapter 7. FN39 The Code details at length the requirements for plan confirmation; FN40 and confirmation of the chapter 11 plan, with certain exceptions, FN41 discharges the reorganized debtor's preconfirmation debts. FN42

The driving policy behind the Bankruptcy Code is the notion that a process should exist to provide a financially troubled debtor with a method of relief from its pre−bankruptcy debts, a "fresh start." FN43 Congress embodied this fresh start policy in the discharge provisions of the Code. FN44 However, a financially troubled debtor's assets are typically insufficient to meet his liabilities leaving unsecured creditors to receive only pennies on the dollar in bankruptcy. FN45 Thus, the conflict between CERCLA and the Code arises should the Code exclude CERCLA remedies from its provisions in order that the EPA may assert them against reorganized debtors, in accordance with the policy of CERCLA; or should they instead be subject to bankruptcy, paid pro rata like other unsecured claims, and discharged in order that the debtor obtain its fresh start in accordance with the Code's policy? FN46

II. JUDICIAL TREND FINDING CERCLA REMEDIES DO NOT CONSTITUTE "CLAIMS"

The dischargeability conflict is at the heart of judicial decisions dealing with whether CERCLA remedies constitute "claims" within the Code's definition. **FN47** In enacting that definition, Congress intended that courts apply it to "permit the broadest possible relief." FN48 The case law dealing with CERCLA remedies as claims developed from this congressional legacy.

The first shot in the conflict between CERCLA and the Code's definition of a claim was the United States Supreme Court's decision in *Ohio v. Kovacs*. **FN49** Although *Kovacs* dealt with state environmental law and not CERCLA, the opinion has served as the foundation for courts that have considered the identical issue under CERCLA. FN50 In *Kovacs*, the State of Ohio had obtained an injunction against Kovacs ordering him to clean up a waste site; after his failure to comply, the State had a receiver appointed to seize all of Kovacs' assets and utilize them to clean up the contamination. FN51 However, Kovacs filed a chapter 11 bankruptcy petition before the receiver could complete the cleanup. FN52 In response, the State sought a court declaration that the environmental obligations were not dischargeable because they did not constitute claims under the Code. FN53

The Court began by observing that the Code's definition of a claim includes a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." FN54 Thus, the issue, as stated by the Court, was whether the environmental injunction gave rise to a right of payment. FN55 The Court held that, since all the receiver presently wanted was money to defray the cleanup cost, the State had converted the equitable obligation into an obligation to pay money, rendering it a claim dischargeable under the Code. **FN56** The Court in an apparent attempt to

limit its opinion, stated that a "person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions." FN57

In her concurring opinion, Justice O'Connor focused not on the Code definition but on the problem that would develop if the injunction was not a claim. FN58 Justice O'Connor realized that if the environmental obligations were not claims, not only would they avoid discharge, but they would not be paid during the bankruptcy process; and in a chapter 7 case involving a corporate debtor never be paid, because a corporation generally dissolves after liquidation. **FN59**

Following *Kovacs* there has been little dispute that a claim solely for CERCLA cleanup costs falls within the Code's definition. FN60 Similarly, on the authority of *Kovacs*, courts were holding that environmental injunctions constituted claims within the Code's definition FN61 until the Second Circuit shattered this apparent stability with its decision in *LTV Corp. v. United States (In re Chateaugay Corp.)*. FN62

In *Chateaugay* a corporate debtor filed for chapter 11 and submitted a schedule of liabilities that included claims held by the EPA for CERCLA cleanup costs. FN63 The issue in *Chateaugay* was whether CERCLA cleanup costs and injunctions constitute dischargeable bankruptcy claims. FN64 The EPA, hoping to assess the full value of the CERCLA costs against the post−bankruptcy corporation, sought a declaratory judgement that cleanup costs only constitute dischargeable claims if the cleanup action occurred prepetition. FN65 Additionally, the EPA asserted that the injunctions were not claims and therefore unaffected by a bankruptcy discharge. FN66

The Second Circuit, relying on the congressional intent that courts apply the Code's definition of a claim broadly, held that monies owed as CERCLA cleanup costs constitute claims regardless of when the EPA incurs those costs. FN67 To determine whether CERCLA injunctions constitute claims, the court began with the *Kovacs* notion that the only injunctions within the Code's definition are those that embody a "right to payment." FN68 To determine which CERCLA injunctions embody a right to payment, the court distinguished between orders to clean up existing waste that is not currently causing pollution and orders to abate ongoing contamination. FN69 In the case of orders to clean up existing waste, the EPA has the alternative of cleaning the site itself and forcing the responsible party to reimburse the expense. FN70 However, in the case of orders to abate ongoing contamination, CERCLA does not grant the EPA authority to accept payment as an alternative to ordering compliance with the statute. FN71 Utilizing this distinction, the court held that injunctions constitute dischargeable claims if they solely order the cleanup of existing waste not currently causing pollution. FN72 In contrast, injunctions that solely

order the abatement of ongoing pollution are not claims, because they do not embody an alternative right to payment. FN73

Finally, the Second Circuit dealt with hybrid CERCLA injunctions, those that accomplish the dual objectives of eliminating both accumulated waste and ongoing pollution. FN74 The court recognized that if the EPA, instead of issuing such an order, cleaned the contaminated site and then sought reimbursement for the cleanup costs, it would eliminate both the accumulated waste and any continuing pollution. FN75 Regardless, the court held that an injunction, which "to any extent" addresses continuing pollution, does not embody an alternative right to payment and therefore is not a claim. FN76 The *Chateaugay* court reached this conclusion even after admitting that its ruling would place most environmental injunctions outside the Code's definition of a claim. FN77

The courts in *Torwico Electronics, Inc. v. New Jersey, Department of Environmental Protection (In re Torwico Electronics, Inc.)* FN78 and *In re CMC Heartland Partners* FN79 continued the trend begun in the Second Circuit's *Chateaugay* opinion. In *CMC*, the Seventh Circuit held that the EPA could enforce a CERCLA injunction, ordering cleanup to prevent ongoing releases, against a corporate debtor that had completed a bankruptcy reorganization and retained the contaminated property. FN80 According to the court, the EPA was not basing the injunction upon the fact that the corporation owned the property at the time of the initial prepetition release, but upon the fact that it was the current owner of contaminated property posing an ongoing threat. FN81 In other words, the order obligated the reorganized debtor to clean up the site because CERCLA liability for ongoing pollution runs with the land. FN82

Torwico took the principles of *Chateaugay* and *CMC* one step further by finding that environmental liability not only runs with the land, it also runs with the waste. FN83 *Torwico* involved the migration of hazardous substances from a contaminated seepage pit into the local water supply. FN84 Basing its decision on *CMC* and *Chateaugay*, the court held that New Jersey could order a discharged chapter 11 debtor to clean up the pit and thereby eliminate the ongoing contamination of the water supply. FN85 The court reasoned that since the order was to eliminate ongoing pollution it did not embody an alternative right to payment, therefore, it was not a claim the bankruptcy process had discharged. FN86 Finally, the fact that the discharged debtor no longer possessed the seepage pit was irrelevant because, according to the court, a generator of waste has an ongoing responsibility for the waste it deposits. FN87

III. CRITICISM OF THE TREND AND PROPOSED RESOLUTION

The *Chateaugay*, *CMC*, and *Torwico* trend holds that hybrid environmental injunctions embodying an order to clean up ongoing contamination, which the EPA could have eliminated or prevented by removing established pollution, are outside the claim definition. This trend attempts judicially to ensure the payment of environmental cleanup by favoring CERCLA over the Bankruptcy Code. FN88 It is indisputable, as these cases indicate, that orders directing the abatement of purely continuing contamination are not claims within the meaning of the Code. FN89 It would be illogical to contend that a debtor whose drainage line is dumping sewage into a nearby river could continue this pollution because it was dumping before bankruptcy and now has emerged from that process. However, allowing the EPA to accomplish indirectly what the bankruptcy discharge prevents it from accomplishing directly, ordering the clean up of existing pollution, simply by calling it "ongoing" is equally illogical. While this trend attempts to favor CERCLA, the holdings of these cases concerning hybrid injunctions ironically violate the policies embodied in both the Code and CERCLA. FN90

These cases effectively obliterate the Code's fresh start policy by holding that hybrid injunctions do not constitute dischargeable claims. FN91 A hypothetical situation is the best way to illustrate this proposition. Assume that a debtor contaminated the property under its factory with waste that remained contained on the property. If the debtor subsequently obtained a bankruptcy discharge, it would relieve any liability for cleanup costs or injunctions ordering the cleanup of the established pollution. FN92 However, if thirty years from now nearby construction causes the hazardous materials to begin seeping into the local water supply, the EPA could, under the trend opinions, order the discharged debtor to clean up all the waste. FN93 This would be the result regardless of the fact that the EPA could have avoided this outcome by cleaning the property before the ongoing pollution started.

Debtors cannot truly obtain a fresh start if courts are willing to allow the EPA to repackage discharged claims for cleanup costs in the form of injunctions against ongoing pollution. FN94 To protect the debtor's fresh start, courts should consider a CERCLA injunction a dischargeable claim when it orders the abatement of ongoing contamination that the EPA could have eliminated or prevented by cleaning existing waste, the liability for which bankruptcy discharged. The bankruptcy trustee should then estimate and convert these injunctions into a monetary sum because they embody a right to payment. FN95

Since most CERCLA injunctions will be of this hybrid variety, FN96 the recent cases, while claiming to be faithful to the Supreme Court's teachings in *Kovacs*, have gutted that decision by creating a de jure exception to the bankruptcy discharge. FN97 The trend courts justified holding that bankruptcy does not discharge hybrid environmental injunctions by referring to the *Kovacs* statement that a person "may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions." FN98 However, in light of the Supreme Court's recognition of the congressional intent that courts interpret the term "claim" broadly, FN99 this language would seem applicable only to purely continuing injunctions, for example, ordering the debtor to remove the drainage pipe that is pumping waste into a nearby river. The *Chateaugay* court may have sensed it was making a mistake when it noted that it could easily have drawn the line to include hybrid injunctions as claims. FN100 Indeed, *Kovacs'* nuisance language was the only reason offered for excluding them from the claim definition. FN101

Finally, while the trend cases apparently represent an attempt to favor CERCLA, it seems that the courts in *Chateaugay*, *CMC*, and *Torwico* inadvertently detracted from CERCLA's primary purpose of holding liable the person or business responsible for environmental contamination. **FN102** This occurred because these courts failed to recognize the danger Justice O'Connor addressed in *Kovacs*. FN103 If these hybrid injunctions do not constitute

claims then the Code does not provide for their payment during the bankruptcy proceeding. FN104 This may not present a problem when a business reorganizes or an individual liquidates, because the entity responsible for any contamination exists in some form. FN105 However, in a business liquidation, the partnership or corporation usually dissolves, defeating any effort to hold it liable for a single penny. FN106

The intent of Congress, the *Kovacs* opinion, and the policies behind both CERCLA and the Code all indicate that *Chateaugay*, *CMC*, and *Torwico* were wrongly decided. In order to effectuate the Bankruptcy Code's fresh start, courts must hold all CERCLA remedies, except injunctions prohibiting purely ongoing contamination, within the Code's definition of a claim. FN107 If courts hold CERCLA remedies within the Code's claim definition they are subject to discharge unless, in a particular case, a remedy falls within one of the stated exceptions to discharge. FN108 On the other hand, since the Code will classify CERCLA remedies as unsecured claims, holding CERCLA remedies within the Code's provisions does not fully effectuate CERCLA's policy. FN109 Part IV reviews several proposals to remedy this deficiency.

IV. PROPOSALS TO HARMONIZE CERCLA AND THE BANKRUPTCY CODE

As those who oppose discharging CERCLA remedies point out, the Code will classify these remedies as general unsecured claims and they will receive little, if any, payment clearly contravening the policy that those responsible pay for environmental damage. FN110 This Part of the Note considers several alternative proposals to avoid this outcome, and attempts to better harmonize CERCLA and the Code. It is the conclusion of this Note that the best solution is to amend CERCLA to grant the EPA a first priority lien on all the debtor's property, but only when the debtor is the actual polluter.

A. Amending the Bankruptcy Code

The first proposal is for Congress to amend the Code's priority scheme to provide for the full payment of CERCLA claims ahead of all secured and unsecured claims. FN111 Amending the Bankruptcy Code to resolve its conflict with environmental law is not a new concept; FN112 however, providing for the full payment of CERCLA remedies ahead of all other claims goes beyond any amendment previously proposed. FN113 Altering the Code's payment scheme in this manner would eliminate the problem of debtors avoiding CERCLA liabilities and the primary argument against treating CERCLA injunctions as claims.

Amending the Code to satisfy CERCLA claims before any other obligations forces the question: What makes CERCLA claims so unique that the Code should grant them the best opportunity for payment? The answer lies in the nature of environmental damage. As Congress's enactment of CERCLA recognizes, when a polluter contaminates property it must be cleaned to insure that future damage to the environment will not occur. In 1985, the Congressional Office of Technology Assessment estimated that the total cost to clean up all environmental pollution under CERCLA would be one hundred billion dollars. **FN114** If CERCLA is unable to recover cleanup costs and reimburse the Superfund, the taxes currently supporting the Fund will be vastly insufficient; the Fund will eventually fail, leaving the government to pay the full cost of environmental pollution. FN115 The huge dollar amounts involved and the fact that environmental cleanup must occur, makes CERCLA claims different from normal debts or other statutory claims, and justifies insuring that CERCLA recovers cleanup costs.

While amending the Code in this fashion would constitute a fundamental change, structuring the bankruptcy payment scheme to accommodate the important policies embodied in another statute is not without precedent. Section 766 alters the normal bankruptcy payment scheme, but only when the property in question is "customer property." Under the Code, when a commodities broker (other than a clearing house) liquidates under chapter 7, customer claims receive priority over all other claims and expenses except administrative expenses relating to customer property. FN116 Section 766 may grant this "super priority" even over creditors holding secured claims. FN117 Congress created this special treatment for customer claims in order to "maintain consistency" with the Commodity Exchange Act's FN118 policy of providing consumer protection. FN119 Given the strong policy Congress embodied in CERCLA, that environmental polluters pay for their damage, amending the Code to provide payment of CERCLA claims ahead of all others appears consistent with the approach of section 766. However, the super priority section 766 creates in customer property falls short of creating a similar priority, for CERCLA claims, in all the debtor's property.

On the surface this approach appears to punish the debtor's creditors and not the debtor itself, but the debtor will be held accountable indirectly. FN120 If creditors dealing with a waste producer are aware that the cost of pollution may fall on them, FN121 they will shift the cost to the polluter through less favorable credit terms. FN122 In economic terms, the proposal would internalize to the debtor's business the external cost of environmental pollution. FN123

Providing for the payment of CERCLA remedies ahead of all other claims may deter businesses from reorganizing under chapter 11, forcing them to liquidate. **FN124** The purpose of chapter 11 is to provide financially troubled businesses with a method of rehabilitation so they may contribute to the gross domestic product and promote employment. FN125 However, companies that caused large environmental damage in the past would seem most likely to continue polluting after bankruptcy. FN126 It is better that these companies liquidate rather than continue to threaten public welfare and the environment. FN127

Amending the Code to provide a super−priority for CERCLA claims raises potential constitutional considerations. FN128 Any constitutional problems arise because a secured creditor, unlike the holders of unsecured claims, possesses a property right by way of its security interest. FN129 The Constitution protects the rights of secured creditors "to the extent of the value" of their collateral. FN130 Therefore, stripping secured creditors of this property right by granting CERCLA claims a higher priority may constitute an unconstitutional taking without just compensation in violation of the Fifth Amendment. FN131

The United States Supreme Court has never held it unconstitutional for the Bankruptcy Code to strip a secured creditor of its security. FN132 However, in United States v. Security Industrial Bank FN133 this issue was before the Court. FN134 The issue in *Security Bank* was whether section 522(f) of the Code, FN135 permitting an individual debtor to avoid nonpossessory, nonpurchase−money liens on certain property, constituted an unconstitutional Fifth Amendment taking when applied to liens that arose before enactment of the Code. FN136 Strategically, the Supreme Court side−stepped the issue and held that Congress intended the provision to apply only prospectively. FN137 *Security Bank* does not resolve the constitutionality of stripping existing secured creditors of their security, but it does make clear that the Bankruptcy Code may constitutionally prioritize CERCLA remedies above prospectively created security interests.

While the United States Supreme Court refused to decide the constitutionality of retroactive lien avoidance, the bankruptcy court in *In re Heldor Industries, Inc.*, FN138 did not. The court found that it would generally be unconstitutional for the bankruptcy estate to utilize encumbered property to satisfy environmental obligations. FN139 However, when a secured creditor has adequate protection under the Bankruptcy Code, there is no constitutional problem with the use of its collateral to satisfy environmental obligations. **FN140** The constitutional issue does not arise because the Code has taken nothing from the secured creditor; the property right protected by the Fifth Amendment is the value of the collateral and not the property itself. FN141

Thus, it appears that, unless the Code also requires adequate protection, creating a super−priority for CERCLA claims must be prospective in order for it to meet constitutional constraints. There is, however, a larger problem with amending the Bankruptcy Code in this manner. While internalizing the costs of environmental damage to the actual polluter is an attractive proposition, the use of a super−priority for CERCLA remedies would have a much broader effect.

As previously noted, CERCLA does not confine liability to the actual polluter, but instead reaches a broader group of potentially responsible parties. FN142 This places the collateral of every secured creditor, of every potentially responsible party in jeopardy. FN143 Therefore, a CERCLA super−priority would force all secured creditor's lending to landowners to protect against this loss by charging sufficiently high interest rates. FN144 In effect, amending the Bankruptcy Code to create a super−priority would force all landowners in the country to bear the costs of environmental pollution whether or not they are polluters. While this may be a desirable approach, the stated purpose of CERCLA is to hold liable those actually responsible for environmental damage. **FN145** Additionally, forcing all secured lenders to protect their security may force the costs of real estate financing so high it would cause a massive depression of the real estate market. FN146 Therefore, amending the Bankruptcy Code to grant CERCLA claims priority over both secured and unsecured claims appears to be a case of killing the patient to save the leg.

B. Amending CERCLA

An alternative to amending the Bankruptcy Code is to amend CERCLA. Several commentators have proposed amending CERCLA in order to make it a less depressing factor in real estate values. FN147 One proposal entails amending CERCLA "to provide for full cleanup of all contaminated properties by the federal government, with the government having the right of recourse only against those who were responsible for the contamination." FN148 This proposal would limit the liability of any other owners or operators to those involved in fraud or those receiving a windfall from the cleanup. FN149

This proposal is typical of suggested amendments to CERCLA; they focus on reducing the scope of people liable under the statute. FN150 In that respect, these proposals provide CERCLA with a more direct approach to reaching its stated purpose of holding the actual polluter liable, as opposed to the more indirect approach the statute currently employs. FN151 However, also typical of these proposals is their failure to address the problems that occur when the Bankruptcy Code comes into play. These proposals fail to address the fact that the Code will assign the CERCLA claims unsecured status, assuring that they will receive little, if any payment. FN152

Neither amending the Bankruptcy Code to create a super−priority for CERCLA claims nor amending CERCLA to focus liability on the actual polluter appears sufficient to insure payment by the actual polluter. Perhaps the best solution is a combination of both proposals; amending CERCLA to grant the EPA a first priority lien on all the debtors property, but only when the debtor is the actual polluter. FN153 Therefore, when an actual polluter goes into bankruptcy, the EPA would have priority over any other secured or unsecured creditor. **FN154**

This proposal would force secured creditors to internalize the costs of environmental pollution when dealing with a potential polluter. FN155 The secured creditor's shifting the potential loss of its security to the actual polluter through higher interest rates, and subsequent payment to the EPA during bankruptcy, would actually enforce CERCLA's policy of holding those responsible for environmental damage liable without forcing all landowners to bear the costs of pollution. Additionally, this proposal would obtain the benefits that proposals calling for a narrowing of the parties potentially liable under CERCLA; making CERCLA more consistent with its purpose of holding liable those actually responsible for environmental damage and making CERCLA less of a depressing force in real estate values.

Since the success of this proposal relies on the ability of secured lenders to investigate fully a likely polluter, in order to assign the proper interest rate and thereby internalize the costs of a potential CERCLA cleanup, it raises questions about the availability of the mortgagee exception to CERCLA liability. FN156 CERCLA's definition of an "owner" currently excludes from liability "persons possessing indicia of ownership (such as a financial institution) who, without participating in the management or operation of a vessel or facility, hold title . . . in order to secure a loan." FN157 In *United States v. Fleet Factors Corp.*, FN158 the Eleventh Circuit indicated that, under this definition, CERCLA would still hold a secured creditor liable "if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions." FN159 The type of investigation that the proposal would require from secured creditors, in order that they be able to internalize the costs of environmental pollution, may not rise to the level of involvement that the *Fleet Factors* court indicated would cause liability as an owner. Nevertheless, Congress should also amend CERCLA to clarify that these investigations are not sufficient to cause the imposition of liability as a responsible party.

Amending CERCLA to grant the EPA a first priority lien over the property of an actual polluter raises constitutional questions similar to those involved in amending the Bankruptcy Code to grant CERCLA claims priority over existing secured creditors. FN160 As previously indicated, an existing secured creditor possesses a constitutionally protected property right in the value of its collateral. FN161 The court in *Kessler v. Tarrats*, FN162 held a retroactive superlien statute constitutional; however, the statutory superlien in *Kessler* only applied to the contaminated property. FN163 The *Kessler* court reasoned that the secured creditor lost its priority because of the environmental pollution, thus, the polluter, and not the State, committed any potential "taking" of the collateral. FN164 Therefore, an issue remains over the constitutionality of a superlien, on all the debtor's property, that applies retroactively to security interests existing prior to enactment of the statute. FN165

The *Heldor* case indicates that the Constitution will only permit CERCLA to grant the EPA first priority liens on a prospective basis. FN166 The constitutional issue aside, a retroactive superlien is undesirable. The proposal to create a CERCLA superlien on all the property of an actual polluter is based upon the notion that, knowing it may lose its collateral, the secured creditor will pass this cost to the polluter through higher interest rates. However, existing secured creditors could not have anticipated this potential loss when they made their loans, and thus would not have made an interest rate adjustment. Therefore, a retroactive superlien would be contrary to the policy of this proposal. Even if only constitutionally applicable to security interests created in the future, amending CERCLA to grant the EPA a first priority lien on the property of an actual polluter and holding that the Code's definition of a claim encompasses all CERCLA remedies, except injunctions against purely ongoing contamination, is the best, and perhaps only, possible solution to the ongoing conflict.

CONCLUSION

The conflict between CERCLA and the Bankruptcy Code has existed since Congress enacted the environmental statute in 1980. Recent case law holding nearly all CERCLA injunctions outside the Code's claim definition has only exacerbated the problem by failing to properly consider the policies Congress embodies in both statutes. In order to ensure the debtor a "fresh start" and simultaneously permit the payment of cleanup costs, courts should hold that the Code's definition of a claim includes CERCLA injunctions ordering the abatement of ongoing contamination caused by previously existing pollution. Finally, to provide the best chance for full payment of these remedies during bankruptcy, Congress should amend CERCLA to provide the EPA with a first priority lien on all the debtor's property, but only when the debtor is an actual polluter.

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Footnotes

FN* This paper was awarded the American College of Bankruptcy Prize for student writing on the subject of environmental problems and bankruptcy.

FN1 42 U.S.C. §§ 9601−9675 (1994).

FN2 11 U.S.C. §§ 101−1330 (1994).

FN3 *See* Michael A. Bloom, *Bankruptcy's Fresh Start vs. Environmental Cleanup: Statutory Schizophrenia*, 6 VILL. ENVTL. L.J. 107, 113 (1995) (stating decisions favoring environmental law undermine bankruptcy's fresh start); J. Ricky Arriola, Note, *The Life & Times of a CERCLA Claim in Bankruptcy: An Examination of Hazardous Waste Liability in Bankruptcy Proceedings*, 67 ST. JOHN'S L. REV. 55, 58−59 (1993) (recognizing conflict between bankruptcy and environmental law); John P. Berkery, Comment, *The Dischargeability of CERCLA Cleanup Costs Incurred After Bankruptcy*, 9 BANKR. DEV. J. 417, 424 (1992) (same); Arnold E. Capriotti, Jr., Note, In re Chateaugay Corp.*: An Argument for Legislative Intervention in the War between CERCLA and the Bankruptcy Code*, 4 VILL. ENVTL. L.J. 443, 443−44 (1993) (same); Linda Johannsen, Note, United States v. Whizco, Inc.*: A Further Refinement of the Conflict Between Bankruptcy Discharge and Environmental Cleanup Obligations*, 20 ENVTL. L. 207, 207 (1990) (same); John C. Ryland, Note, *When Policies Collide: The Conflict Between the Bankruptcy Code and CERCLA*, 24 MEM. ST. U. L. REV. 739, 740 (1994) (same); Norman I. Silber, Note, *Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870, 870 (1985) (recognizing conflict between environmental law and bankruptcy in abandonment of contaminated property). *See generally* KATHRYN R. HEIDT, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY (1993 & Supp. 1994) (containing comprehensive review of interplay between Bankruptcy Code and environmental obligations). *But see* Joseph L. Cosetti & Jeffery M. Friedman, Midlantic National Bank, Kovacs, *and* Penn Terra: *The Bankruptcy Code and State Environmental Law Perceived Conflicts and Options for the Trustee and State Environmental Agencies*, 7 J.L. & COM. 65, 76 (1987) ("There is no conflict between . . . environmental law and federal bankruptcy law.").

FN4 *Compare* United States v. Johns−Manville Sales Corp., 18 Env't Rep. Cas. (BNA) 1177, 1181−82 (D.N.H. 1982) (refusing to lift stay on injunction that would force cleanup because compliance would require expenditure of substantial estate funds) *with* Commonwealth Oil Ref. Co. v. United States (*In re* Commonwealth Oil Ref. Co.), 805 F.2d 1175, 1189−90 (5th Cir. 1986) (lifting automatic stay even though compliance with cleanup order would require expenditure of estate funds), *cert. denied*, 483 U.S. 1005 (1987). *See also* Richard J. DeMarco, Jr., Note, *Clean−up Orders and the Bankruptcy Code: An Exception to the Automatic Stay*, 59 ST. JOHN'S L. REV. 292, 306−14 (1985) (discussing applicability of § 362(b)(5)'s governmental police or regulatory power exception to automatic stay).

FN5 *See* Midlantic Natl. Bank v. New Jersey, Dep't of Envtl. Protection, 474 U.S. 494, 506−07 (1986) (holding that bankruptcy trustee may not abandon property in contravention of state environmental law and bankruptcy court may not approve such an act without acting to adequately protect public health and safety); *see also* Silber, *supra* note 3, at 883−87 (proposing amendment to Code's abandonment provisions allowing trustee to balance competing interests of the estate and environment).

FN6 *Compare* LTV Corp. v. United States (*In re* Chateaugay Corp.), 944 F.2d 997, 1009−10 (2d Cir. 1991) (holding debtor may classify cleanup cost for prepetition releases as administrative expenses because they constitute "actual, necessary costs and expenses of preserving the estate") *and In re* T.P. Long Chem., Inc., 45 B.R. 278, 286 (Bankr. N.D. Ohio 1985) (holding costs incurred by the EPA constitute administrative expenses) *with In re* Pierce Coal & Constr., 65 B.R. 521, 531 (Bankr. N.D. W. Va. 1986) (holding claim for reclamation arising prepetition not entitled to administrative expense priority). *See generally* Stanley M. Spracker & James D. Barnette, *The Treatment of Environmental Matters in Bankruptcy Cases*, 11 BANKR. DEV. J. 85, 101−06 (1994) (offering breakdown of court allowance and disallowance of administrative expense priority for different types of environmental claims).

FN7 *Compare In re* Cottonwood Canyon Land Co., 146 B.R. 992, 998 (Bankr. D. Colo. 1992) (finding that for bankruptcy purposes CERCLA claims arise when hazardous substances are released) *with* United States v. Union Scrap Iron & Metal, 123 B.R. 831, 838−39 (D. Minn. 1990) (holding timing of CERCLA claims as pre or postpetition is governed by date the EPA incurs the cleanup costs) *and* Jensen v. Bank of America (*In re* Jensen), 114 B.R. 700, 702 (Bankr. E.D. Cal. 1990) (same), *rev'd*, 127 B.R. 27 (Bankr. 9th Cir. 1991), *aff'd*, 995 F.2d 925 (9th Cir. 1993). *See also* Berkery, *supra* note 3, at 44−46 (attacking holdings of *Jensen* and *Union Scrap* because they provide incentive for manipulation by the EPA, as it may delay cleanup until after bankruptcy is completed to avoid possibility of discharge).

FN8 The discharge provisions of the Code state that it is "debts" that bankruptcy discharges. 11 U.S.C. § 524(a) (1994). However, the Code defines a "debt" as "liability on a claim." *Id.* § 101(12).

FN9 *Id.* § 101(5).

FN10 James K. McBain, Note, *Environmental Impediments to Bankruptcy Reorganizations*, 68 IND. L.J. 233, 238 (1992) (comparing judicial decisions dealing with environmental obligations in bankruptcy).

FN11 Torwico Elecs., Inc. v. New Jersey, Dep't of Envtl. Protection (*In re* Torwico Elecs., Inc.), 8 F.3d 146, 151 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1576 (1994); *In re* CMC Heartland Partners, 966 F.2d 1143, 1146−47 (7th Cir. 1992); LTV Corp. v. United States (*In re* Chateaugay Corp.), 944 F.2d 997, 1008−09 (2d Cir. 1991).

FN12 *See* discussion *infra* part II.

FN13 H.R. REP. NO. 1016, 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6119−20; *see* O'Neil v. Picillo, 682 F. Supp. 706, 719 n.2 (D.R.I. 1988) (recognizing Congress had two purposes intended for CERCLA), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

FN14 *See* H.R. REP. NO. 1016, *supra* note 13, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 6119−20 (stating one goal of CERCLA is to "establish a program for appropriate environmental response action").

FN15 *Id.* In a business context this amounts to internalizing the external costs of environmental contamination. Spracker & Barnette, *supra* note 6, at 87.

FN16 CERCLA broadly defines a potentially responsible party ("PRP") to include the following:

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. . . .

. . . .

CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994). Liability among PRPs is potentially joint and several. *See* United States v. Chem−Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983).

FN17 *See* CERCLA § 113, 42 U.S.C. § 9613(f)(1) (1994) (indicating that courts should use equitable principles when considering contribution claims).

FN18 CERCLA § 111, 42 U.S.C. § 9611 (1994).

FN19 I.R.C. §§ 59A, 4611, 4661, 4671, 9507(b) (1994); Scott Wilsdon, Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1264 (1987).

FN20 CERCLA authorizes a response action whenever there is a release or threatened release into the environment of any hazardous substance, pollutant, or contaminant which may present an imminent and substantial danger to the public health or welfare. CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1) (1994).

FN21 CERCLA § 104(c), 42 U.S.C. § 9604(c) (1994).

FN22 CERCLA § 107(a), 42 U.S.C. § 9607(a). The statute provides a defense to liability for reimbursement of response costs when the release or threat of release was caused by an act of god, war, or an act or omission of certain nonemployee, nonagent third parties. CERCLA § 107(b), 42 U.S.C. § 9607(b).

FN23 CERCLA § 106(a), 42 U.S.C. § 9606(a).

FN24 McBain, *supra* note 10, at 236.

FN25 11 U.S.C. § 541 (1994). The estate is actually much broader than simply the debtor's legal and equitable interests in property. *See id.* For example, it includes property that would have been property of the estate, if possessed on the date of filing, but received within 180 days after filing by bequest, devise, inheritance, property settlement with the debtor's spouse, final divorce decree, or from a life insurance policy or death benefit plan. *Id.* § 541(a)(5). The estate also includes any "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." *Id.* § 541(a)(6). Certain types of property and interests are excluded from the estate. *Id.* § 541(b).

FN26 *Id.* § 541.

FN27 *See* Spracker & Barnette, *supra* note 6, at 86−87 (outlining provisions of Code).

FN28 *Id.* at 86.

FN29 11 U.S.C. § 506 (1994). If the secured creditor is undersecured the trustee will usually abandon the property to the secured creditor and it will receive an unsecured claim for any amount the allowed claim exceeds that security. *In re* Addison Properties Ltd. Partnership, 185 B.R. 766, 770 (N.D. Ill. 1995). If the secured creditor is oversecured the Code entitles it to interest on the claim. 11 U.S.C. § 506(b) (1994).

FN30 11 U.S.C. § 507 (1994).

FN31 *Id.* § 507(a)(1).

FN32 *Id.* § 507(a)(7).

FN33 *Id.* § 507(a)(8).

FN34 *Id.* § 726.

FN35 11 U.S.C. § 524 (1994). Certain types of claims are not dischargeable. *Id.* § 523. Additionally, under certain circumstances the Code may prohibit the debtor from obtaining a chapter 7 discharge. *Id.* § 727.

FN36 *Id.* § 727(a)(1).

FN37 *See* Ohio v. Kovacs, 469 U.S. 274, 286 (1985) (O'Connor, J., concurring) (stating that following bankruptcy distribution corporate debtors typically dissolve under state law).

FN38 *See* Spracker & Barnette, *supra* note 6, at 86 (describing structure and composition of the Code). Chapter 11 is available to individual debtors but they are unlikely to utilize it because the Code entitles creditors to vote on the reorganization plan. 11 U.S.C. § 1129 (1994). Individuals wishing to retain their assets after bankruptcy are more likely to utilize the chapter 13 payment plan. *See id.* §§ 1301−1330.

FN39 *See supra* notes 29−34 and accompanying text.

FN40 11 U.S.C. § 1129 (1994).

FN41 *Id.* §§ 523, 1141(d)(2).

FN42 *Id.* § 1141(d)(1). The chapter 11 discharge is actually a complex interplay of §§ 523, 727, and 1141. *See id.* § 1141. For example, chapter 11 may not discharge a debt based upon § 1141's incorporation of the § 523 exceptions to discharge or the § 727(a) grounds for denying a discharge. *See id.* §§ 523, 727(a), 1141(d). However, this denial is insignificant for a chapter 11 corporation or partnership because the reorganization has restructured any remaining debts.

FN43 *See* S. REP. NO. 989, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5793 (stating Congress enacted redemption provisions of Code to aid debtor's fresh start). Some commentators have suggested that the fresh start policy is not applicable in chapter 11. *E.g.*, Philippe J. Kahn, Note, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability in Chapter 11*, 14 CARDOZO L. REV. 1999, 2034−37 (1993). One commentator utilized this proposition to conclude that the EPA should be able to assert CERCLA liability against a discharged debtor. *Id.* There is a second goal of the Bankruptcy Code, to provide a system of equitable distribution among creditors. *See* Begier v. IRS, 496 U.S. 53, 54 (1990) (indicating equality among creditors is central policy of Code).

FN44 *See* S. REP. NO. 989, *supra* note 43, at 7, *reprinted in* 1978 U.S.C.C.A.N. at 5793 (indicating that Code's discharge provisions are at heart of fresh start policy); *see also* Berkery, *supra* note 3, at 421 (stating that debtors achieve a fresh start through the Code's discharge provisions).

FN45 *See* Johannsen, *supra* note 3, at 211 ("If any money remains after administrative expenses and the secured creditors are paid, unsecured creditors divide the remainder, often receiving only a few cents per dollar owed.")

FN46 *See id.* at 228 (concluding that in order to resolve conflict Congress should amend Code to exempt environmental obligations from discharge). The fact that insurers typically refuse coverage for environmental contamination under comprehensive general liability policies only magnifies the danger that environmental cleanup costs will go unpaid. *See* Michael J. Cadigan, Litigation Issue, *Environmental Liability: Bankruptcy and Insurance Issues*, 22 ENVTL. L. 1279, 1285−92 (1992).

FN47 *See* 11 U.S.C. § 101(5) (1994). The Code defines a "claim" as any:

(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 of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Id. This definition constituted a significant departure from prior law in terms of breath and meaning. *See* 2 COLLIER ON BANKRUPTCY [[paragraph]] 101.05, at 101−28 (Lawrence P. King ed., 15th ed. 1995).

FN48 S. REP. NO. 989, *supra* note 43, at 22, *reprinted in* 1978 U.S.C.C.A.N. at 5807−08; H.R. REP. NO. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6266; *see also* Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 558 (1990) (recognizing congressional intent that claim be broadly applied to hold that restitution obligations are dischargeable); Grady v. A.H. Robins Co., 839 F.2d 198, 200 (4th Cir.) (stating congressional intent was for courts to broadly apply Code's claim definition), *cert. dismissed*, 487 U.S. 1260 (1988); Robinson v. McGuigan (*In re* Robinson), 776 F.2d 30, 34 (2d Cir. 1985) (same), *cert. granted*, 475 U.S. 1009, *rev'd*, 479 U.S. 36 (1986); Avellino & Bienes v. M. Frenville Co. (*In re* M. Frenville Co.), 744 F.2d 332, 336 (3d Cir. 1984) (same), *cert. denied*, 469 U.S. 1160 (1985); Placer United States, Inc. v. Dahlstrom (*In re* Dahlstrom), 129 B.R. 240, 241 (Bankr. D. Utah 1991) (recognizing congressional intent that claim be broadly applied to find that punitive damages may be held nondischargeable); Roach v. Edge (*In re* Edge), 60 B.R. 690, 692−94 (Bankr. M.D. Tenn. 1986) (stating congressional intent was for courts to apply broadly Code's claim definition).

FN49 469 U.S. 274 (1985).

FN50 *See, e.g.*, Torwico Elecs., Inc. v. New Jersey, Dep't of Envtl. Protection (*In re* Torwico Elecs., Inc.), 8 F.3d 146, 148 (3d Cir. 1993) ("[A] proper interpretation of the Supreme Court decision in . . . *Kovacs* . . . is instrumental in resolving this case."), *cert. denied*, 114 S. Ct. 1576 (1994).

FN51 *Kovacs*, 469 U.S. at 275−76.

FN52 *Id.* The bankruptcy case was subsequently converted into a chapter 7 liquidation. *Id.* at 276 n.1.

FN53 *Id.* at 276. The State was seeking a basis for the Court to require that Kovacs' post−bankruptcy income be used to finish the cleanup and this would be the case if the obligation was not subject to the bankruptcy discharge. *See id.*

FN54 *Id.* at 278 (citing 11 U.S.C. § 101(5) (1994)). The legislative history of the Code states that the definition of a claim "is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy." 124 CONG. REC. 32,393 (1978) (statement of Rep. Edwards); *id.* at 33,992 (statement of Sen.

DeConcini).

FN55 *Kovacs*, 469 U.S. at 275.

FN56 *Id.* at 282−83. *But see* Roger D. Colton et al., *Seven−cum−eleven: Rolling the Toxic Dice in the U.S. Supreme Court*, 14 B.C. ENVTL. AFF. L. REV. 345, 357−58 (1987) (disagreeing with the Supreme Court's conclusion). The authors attack the *Kovacs* conclusion that the injunctions embodied an alternative right to payment. *Id.* at 357. The authors support this assertion with the facts that the original injunctions did not allow Kovacs the option of making a monetary payment in lieu of compliance and that *no* Ohio law provided that payment could constitute adequate performance of a cleanup order. *Id.*

FN57 *Kovacs*, 469 U.S. at 285.

FN58 *See id.* at 285−86 (O'Connor, J., concurring) (addressing concern that if environmental injunctions are not claims this would constitute an impediment to enforcing environmental obligations).

FN59 *Id.*

FN60 LTV Corp. v. United States (*In re* Chateaugay Corp.), 944 F.2d 997, 1006 (2d Cir. 1991) (indicating that response costs whether incurred or not are dischargeable claims); Providence & W. R.R. v. Penn Cent. Co., 30 Env't Rep. Cas. (BNA) 1309, 1311 (D. Mass. 1989) (holding action by individual debtor to recover response costs constituted bankruptcy claim); *see* Dant & Russell, Inc. v. Burlington N. R.R. (*In re* Dant & Russel, Inc.), 951 F.2d 246, 249 (9th Cir. 1991) (assuming CERCLA cleanup costs are within Code's claim definition); *In re* Penn Cent. Transp. Co., 944 F.2d 164, 167 (3d Cir. 1991) (implying that CERCLA cleanup costs are within Code's claim definition), *cert. denied*, 503 U.S. 906 (1992); *In re* Reading Co., 900 F. Supp. 738, 745 (E.D. Pa. 1995) (assuming CERCLA cleanup costs are within Code's claim definition); *see also In re* Stevens, 53 B.R. 783, 789 (Bankr. D. Me. 1985) (finding cleanup costs under state statute with language similar to CERCLA within Code's claim definition), *rev'd*, 68 B.R. 774 (D. Me. 1987).

FN61 United States v. Whizco, Inc., 841 F.2d 147, 150 (6th Cir. 1988) (holding injunction issued under Surface Mining Control and Reclamation Act of 1977 constituted claim because compliance would require expenditure of money); United States v. Robinson (*In re* Robinson), 46 B.R. 136, 138−39 (Bankr. M.D. Fla.) (holding injunction issued under River and Harbor Act requiring debtor to restore marsh land constituted a claim), *rev'd on other grounds*, 55 B.R. 355 (M.D. Fla. 1985).

FN62 944 F.2d 997 (2d Cir. 1991).

FN63 *Id.* at 999. The EPA filed claims covering $32 million incurred cleanup costs and indicated that when it completed the cleanup at all sites $32 million might be a fraction of the total cleanup costs. *Id.*

FN64 *Id.* at 1000−01. There was also an issue concerning the treatment of response costs assessed postpetition as administrative expenses under the Code. *Id.* at 1009−10. The court held that such a classification was proper. *Id.*

FN65 *See id.* at 1000 (describing nature of EPA's arguments).

FN66 *See id.* at 1001 (indicating government's understanding of district court's decision was that discharge left unaffected all injunctions ordering cleanup of debtor's property).

FN67 *Chateaugay*, 944 F.2d at 1005. The court did note that the costs must relate to prepetition releases or threatened releases of hazardous substances, but this portion of the opinion relates to the timing of CERCLA costs because in chapter 7 it is only prepetition, and in chapter 11 preconfirmation, obligations that constitute dischargeable claims. 11 U.S.C. §§ 727, 1141 (1994). The Second Circuit utilized the relationship between the EPA and the firms subject to its regulations as a basis for finding cleanup costs constitute claims even when the EPA is not aware of any contamination at a particular site. *Chateaugay*, 944 F.2d at 1005.

FN68 *Id.* at 1007−08.

FN69 *Id.* at 1007.

FN70 *Id.* at 1008; *see* CERCLA §§ 106, 107, 42 U.S.C. §§ 9606, 9607 (1994) (detailing the alternative remedies and enforcement provisions under CERCLA).

FN71 *Id.* at 1008.

FN72 *Chateaugay*, 944 F.2d 1008.

FN73 *Id.* One commentator, Kathryn R. Heidt, believes the *Chateaugay* court held that CERCLA injunctions do not constitute claims, because it wrongly incorporated a timing issue into the claim definition question. Kathryn R. Heidt, *Undermining Bankruptcy Law and Policy:* Torwico Electronics, Inc. v. New Jersey Department of Environmental Protection, 56 U. PITT. L. REV. 627, 639 (1995). While Ms. Heidt is correct that timing has no role in the definitional issue of what constitutes a claim, she is incorrect that the court included this timing element in its decision. *See* 11 U.S.C. § 101(5) (1994) (containing absence of any timing element). The *Chateaugay* court actually based its decision on whether the EPA has statutory authority under CERCLA to, as an alternative to injunctive relief, clean up the property and then pursue the responsible parties for reimbursement. *Chateaugay*, 944 F.2d at 1008. The court found such authority for existing pollution but not ongoing pollution, and based its decision on this statutory fact and, not the timing of the pollution. *See id.*

FN74 *Chateaugay*, 944 F.2d at 1008.

FN75 *Id.*

FN76 *Id.* The court claimed that, based upon the Supreme Court's statement that no person could maintain a nuisance, it was being faithful to the ruling in *Kovacs* by holding hybrid injunctions do not constitute claims. *Id.*; *see supra* note 57 and accompanying text.

FN77 *Chateaugay*, 944 F.2d at 1008.

FN78 8 F.3d 146 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1576 (1994).

FN79 966 F.2d 1143 (7th Cir. 1992).

FN80 *Id.* at 1146−47. The bankruptcy reorganization in *CMC* occurred under the old Bankruptcy Act of 1898. *Id.* at 1144. However, this does little to affect the opinion's relevance because the court's CERCLA analysis follows that used by the courts in *Chateaugay* and *Torwico*. *See id.* at 1145−47. The *CMC* court noted that whatever confusion may have existed over whether CERCLA cleanup costs constituted claims under the Code was not present under the 1898 Act as these costs clearly constituted claims under that statute. *Id.* at 1146.

FN81 *Id.* at 1146−47. The court made clear that the EPA could not simply "repackage" a discharged claim for cleanup costs by framing it as an injunction against an ongoing release. *Id.* at 1147. In order to avoid this, the court required that the site in question pose "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance." *Id.* (quoting CERCLA § 106, 42 U.S.C. § 9606(a) (1994)). It seems this poses a potential problem. When the court utilized the triggering language for the EPA's ability to issue abatement orders under § 106 of CERCLA it seems to have inadvertently indicated the EPA may assert all § 106 injunctions against discharged debtors and not only those related to ongoing releases. *See* LTV Corp. v. United States (*In re* Chateaugay Corp.), 944 F.2d 997, 1006, 1008 (2d Cir. 1991) (explaining that some injunctions under § 106 of CERCLA deal with existing contamination while others cover continuing pollution).

FN82 *CMC Heartland*, 966 F.2d at 1146.

FN83 Torwico Elecs., Inc. v. New Jersey, Dep't of Envtl. Protection (*In re* Torwico Elecs., Inc.), 8 F.3d 146, 151 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1576 (1994). In *Torwico*, the State of New Jersey was attempting to impose liability based upon various state and federal environmental laws and not specifically CERCLA. *Id.* at 147. However, given the court's analysis, it seems the decision would have been identical if the case involved CERCLA. *See id.* at 149−51. The court found both *CMC* and *Chateaugay* to be "persuasive and consistent" with the *Torwico* facts. *Id.* at 150.

FN84 *Id.* at 147. The State never filed a proof of claim with the bankruptcy court even though it was aware of the seepage pit and the possible water supply contamination before the deadline for filing a claim, therefore, bankruptcy would have discharged any liability for CERCLA cleanup costs. *See id.*

FN85 *Id.* at 151. While reaching this conclusion the court cited the limiting language from *Kovacs* indicating that "a debtor could not maintain an ongoing nuisance in direct violation of state environmental laws." *Id.* at 149 (referring to Ohio v. Kovacs, 469 U.S. 274, 285 (1985)).

FN86 *Id.* at 151. "[I]t is undisputed that the order was issued under statutory sections which do not allow the state to perform the cleanup and then sue for reimbursement of its costs." *Id.* at 151 n.6.

FN87 *Id.* at 151. The debtor in *Torwico* had been leasing the property at the time of the contamination. *Id.* at 147.

FN88 John W. Ames et al., *Third Circuit Joins Seventh and Puts Yet Another Nail in the Reorganization Coffin: Contamination Cleanup Responsibility Not Only Runs with the Land, It Runs with the Waste*, AM. BANKR. INST. J., Feb. 1994, at 8, 8; *see also* McBain, *supra* note 10, at 244. The McBain article discusses this judicial destruction of the Code in the context of courts favoring environmental obligations at the expense of creditors holding security interests. *Id.* at 244−50. CERCLA's legislative history is almost devoid of any evidence that Congress was aware of the potential conflict between the two statutes. *See* Capriotti, *supra* note 3, at 447 n.27.

FN89 *See, e.g.*, LTV Corp. v. United States (*In re* Chateaugay Corp.), 944 F.2d 997, 1008 (2d Cir. 1991).

FM90 Bloom, *supra* note 3, at 113 (recognizing that *Chateaugay* & *Torwico* significantly undermine the debtor's "fresh start"). For a discussion of how these decisions undermine CERCLA's goal of holding polluters liable see *infra* notes 102−06 and accompanying text.

FN91 *See* Robert McNeal, *The Dischargeability of Environmental Liabilities in Bankruptcy*, 6 TUL. ENVTL. L.J. 61, 65 (1992). This article contends that exempting contingent environmental liabilities from discharge is contrary to the definition of a claim and would create, in effect, an eternal debtor's prison for individuals and companies facing these liabilities. *Id.* at 88.

FN92 Torwico Elecs., Inc. v. New Jersey, Dep't of Envtl. Protection (*In re* Torwico Elecs., Inc.), 8 F.3d 146, 151 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1576 (1994); *In re* CMC Heartland Partners, 966 F.2d 1143, 1146 (7th Cir. 1992); LTV Corp. v. United States (*In re* Chateaugay Corp.), 944 F.2d 997, 1002−06 (2d Cir. 1991).

FN93 *See Chateaugay*, 944 F.2d at 1008. *Torwico* and *CMC* indicate that this will be the outcome whether the debtor retained the property, sold it twenty years ago, or lost it through the bankruptcy process. *Torwico*, 8 F.3d at 151; *CMC Heartland*, 966 F.2d at 1146−47.

FN94 *CMC Heartland*, 966 F.2d at 1147. The *CMC* court clearly intended a different outcome when it established a test for the EPA to prove that it was not repackaging forfeited claims; however, the test seems to fail its purpose. *See id.*

FN95 11 U.S.C. § 502(c) (1994).

FN96 *Chateaugay*, 944 F.2d at 1008.

FN97 *See* Ames et al., *supra* note 88, at 8 (indicating creation of an exception to the Code's discharge provisions for environmental obligations is for Congress alone).

FN98 Ohio v. Kovacs, 469 U.S. 274, 285 (1985).

FN99 *Id.* at 279.

FN100 *Chateaugay*, 944 F.2d at 1009.

FN101 *Id.*

FN102 *See* H.R. REP. NO. 1016, *supra* note 13, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 6119−20 (describing purpose of CERCLA's provisions).

FN103 Ohio v. Kovacs, 469 U.S. 274, 285−86 (1985) (O'Connor, J., concurring).

FN104 *Id.*; *see* 11 U.S.C. § 502 (1994).

FN105 *See Kovacs*, 469 U.S. at 286 (O'Connor, J., concurring). Justice O'Connor indicated that there is no danger in finding environmental injunctions do not constitute claims when the debtor is an individual. *Id.* However, there is a danger because the emerging individual may be left with essentially no assets for the EPA to pursue.

FN106 *Id.*

FN107 *See* Bloom, *supra* note 3, at 113 ("*Chateaugay* and *Torwico* significantly undermine the `fresh start' objective of the Code."); McBain, *supra* note 10, at 251 ("Environmental obligations for response costs should be classified as claims . . . .").

FN108 *See* John P. Hennigan, Jr., *Accommodating Regulatory Enforcement and Bankruptcy Protection*, 59 AM. BANKR. L.J. 1, 47−51 (1985) (discussing the applicability of the Code's discharge provisions to environmental remedies).

FN109 *See* Ryland, *supra* note 3, at 757−58 (noting that if CERCLA remedies are relegated to unsecured status they will likely receive pennies on the dollar in payment).

FN110 *Id.* There is a possibility of classifying CERCLA claims as administrative expenses, in which case bankruptcy would pay them after any secured claims but before any other unsecured claims. *See supra* note 6.

FN111 In chapter 11 this would entail amending § 1129 so the requirements for confirmation include that the plan not satisfy any claim or interest unless the plan first provides for full payment of all CERCLA claims. *See* 11 U.S.C. § 1129 (1994). Additionally, Congress would have to create powers allowing the trustee to strip secured creditors of their allowed secured claims.

FN112 *See, e.g.*, Kathryn R. Heidt, *Products Liability, Mass Torts and Environmental Obligations in Bankruptcy: Suggestions for Reform*, 3 AM. BANKR. INST. L. REV. 117, 142−50 (1995) (suggesting changes to Bankruptcy Code in order to ensure that environmental and other obligations are subject to bankruptcy); Silber, *supra* note 3, at 882−92 (proposing changes to §§ 554, 523, and 507 "in order to close loopholes, deter irresponsible waste disposal, and improve the chances that debts owed by individual polluters will be repaid"). *But see* McNeal, *supra* note 91, at 62 ("[T]he Bankruptcy Code provides adequate means for . . . determining the dischargeability of environmental problems . . . .").

FN113 Professor Heidt has suggested that, as a matter of corrective justice, bankruptcy should strip creditors of their security but only to the extent they benefited from the debtor's pollution activities. Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L.

REV. 347, 374 (1990). Treating tort creditors (the EPA in the case of CERCLA) above unsecured creditors is not an entirely new concept. *See* Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887 (1994) (proposing that Article 9 of the Uniform Commercial Code allow tort claimants to recover from secured property).

FN114 CONGRESSIONAL OFFICE OF TECHNOLOGY ASSESSMENT, SUPERFUND STRATEGY 3 (1985).

FN115 This has already occurred once when the initial $1.6 billion funding of the Superfund proved insufficient, necessitating a $8.5 billion replenishment. Superfund Revenue Act of 1986, Pub. L. No. 99−499, §§ 501−522, 100 Stat. 1613, 1760−81.

FN116 11 U.S.C. § 766 (1994). The Code provides that distribution to the customer "shall be in the form of (1) cash; (2) the return or transfer . . . of specifically identifiable customer securities, property, or commodity contracts; or (3) payment of margin calls." *Id.* § 766(h).

FN117 State Bank v. Bucyrus Grain Co. (*In re* Bucyrus Grain Co.), 127 B.R. 45, 51−52 (D. Kan. 1988) (finding valid customer claim entitled to priority over secured creditor's right to setoff but refusing to decide whether bank's secured claim may defeat customer claim), *appeal dismissed*, 905 F.2d 1362 (10th Cir. 1990).

FN118 7 U.S.C. §§ 1−24 (1994).

FN119 S. REP. NO. 989, *supra* note 48, at 8, *reprinted in* 1978 U.S.C.C.A.N. at 5794; *see also Bucyrus Grain*, 127 B.R. at 48 (discussing legislative history of § 766(h)).

FN120 Colton et al., *supra* note 56, at 367. This indirect liability relies upon the principles of economic theory. *See id.*

FN121 Perfect information is one of the principle aspects of a market economy. *See* HOWARD M. WACHTEL, LABOR AND THE ECONOMY 77 (2d ed. 1988).

FN122 Colton et al., *supra* note 56, at 375. Additionally, secured creditors could obtain insurance to guard against the loss of their security. *See* LoPucki, *supra* note 113, at 1906−07.

FN123 Colton et al., *supra* note 56, at 376.

FN124 Ryland, *supra* note 3, at 757. This may occur because chapter 11 requires the plan to provide full payment of all administrative expenses. 11 U.S.C. § 1129(a)(9)(A) (1994). Since CERCLA claims could absorb the debtor's entire ability to satisfy claims the plan would not comply with the confirmation requirements, forcing the debtor into chapter 7. *See* Ryland, *supra* note 3, at 757 n.121.

FN125 *See generally* Alan Miller et al., *The Environment Will Take Precedence Over the Objectives of the Bankruptcy Code if Other Courts Follow the 3d Circuits Lead*, NAT'L L.J., June 20, 1994, at B4 n.26 (noting potential ramifications of *Torwico* on rejection of unexpired leases).

FN126 Colton et al., *supra* note 56, at 378.

FN127 *Id.*

FN128 *See* McBain, *supra* note 10, at 248−50 (discussing constitutionality of laws altering position of secured creditors).

FN129 Chrysler Credit Corp. v. Ruggiere (*In re* George Ruggiere Chrysler−Plymouth, Inc.), 727 F.2d 1017, 1019 (11th Cir. 1984).

FN130 Wright v. Union Cent. Life Ins. Co., 311 U.S. 273, 278 (1940).

FN131 *See Chrysler Credit*, 727 F.2d at 1019 ("[S]ecurity interests are `property rights' protected by the Fifth Amendment from public taking without just compensation.").

FN132 *Cf.* United States v. Security Indus. Bank, 459 U.S. 70, 74 (1982) (refusing, expressly, to decide this issue on facts of this case).

FN133 459 U.S. 70 (1982).

FN134 *See id.* at 70 (describing Court of Appeals holding).

FN135 11 U.S.C. § 522(f)(2) (1994).

FN136 *Security Indus. Bank*, 459 U.S. at 73.

FN137 *Id.* at 81−82.

FN138 131 B.R. 578 (Bankr. D.N.J. 1991), *motion to vacate denied sub nom.* State v. Heldor Indus., Inc. (*In re* Heldor Indus., Inc.), 139 B.R. 290 (D.N.J. 1992), *rev'd*, 989 F.2d 702 (3d Cir. 1993).

FN139 *Id.* at 578.

FN140 *See* Chrysler Credit Corp. v. Ruggiere (*In re* George Ruggiere Chrysler−Plymouth, Inc.), 727 F.2d 1017, 1019 (11th Cir. 1984) (indicating that Code's adequate protection requirement makes use of cash collateral constitutional).

FN141 *Heldor*, 131 B.R. at 586. While *Heldor* appears to have slammed the door on amending the Code to grant CERCLA claims priority over existing secured creditors, *In re* Environmental Waste Control, Inc., 125 B.R. 546 (N.D. Ind. 1991), reopened the door slightly. *See* McBain, *supra* note 10, at 261−62. *Environmental Waste* held that the Bankruptcy Code permitted the use of encumbered estate property to fund an environmental cleanup. *Environmental Waste*, 125 B.R. at 552. The secured creditor raised the argument that such an action constituted an unconstitutional taking of its security interest. *Id.* However, the court stated that the creditor's argument was based upon a lack of adequate protection and that the issue of adequate protection was outside the scope of its decision. *Id.* While *Environmental Waste* raises the slight possibility that bankruptcy may constitutionally subordinate creditors with existing security interests, the court's failure to address the adequate protection requirement seriously undermines its precedential value. *See* McBain, *supra* note 10, at 261−62.

FN142 *See* CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994) (defining "potentially responsible parties").

FN143 *See supra* notes 120−23 and accompanying text (explaining benefit of super priority for environmental claims as internalizing external costs of environmental pollution).

FN144 *Id.*

FN145 *Supra* note 15 and accompanying text.

FN146 *See* Wilsdon, *supra* note 19, at 1294 (indicating that possible CERCLA liability will depress value of property); *see also* H. Glenn Boggs, *Real Estate Environmental Damage, the Innocent Residential Purchaser, and Federal Superfund Liability*, 22 ENVTL. L. 977, 986 (1992) (indicating that potential CERCLA liability in residential context would only worsen depression of real estate market).

FN147 *See, e.g.*, Michael B. Kupin, *New Alterations of the Lender Liability Landscape: CERCLA After the* Fleet Factors *Decision*, 19 REAL ESTATE L.J. 199, 215−216 (1991) (concluding Congress should address mortgagee liability under CERCLA to avoid aggravating already depressed real estate market).

FN148 MICHAEL T. MADISON & ROBERT M. ZINMAN, MODERN REAL ESTATE FINANCING: A TRANSACTIONAL APPROACH 1179 (1991).

FN149 *Id.*

FN150 *See, e.g.*, John C. Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493, 1525 (1994) (stating Congress should amend CERCLA to excuse liability if party can prove it did not cause contamination).

FN151 *Supra* notes 15−18 and accompanying text.

FN152 *Supra* note 110 and accompanying text.

FN153 Congress has considered, but never enacted, a CERCLA superlien. *See* H.R. 2817, 99th Cong., 1st Sess. (1985). Several States have included superliens in their environmental statutes. McBain, *supra* note 10, at 249 n.100. However, the approaches taken by these superlien statute vary. Margaret Murphy, *The Impact of "Superfund" and Other Environmental Statutes on Commercial Lending and Investment Activities*, 41 BUS. LAW. 1133, 1153 (1986).

FN154 *See supra* notes 28−34 and accompanying text (describing Code's payment scheme).

FN155 *See supra* notes 120−23 and accompanying text (discussing affects of creating a bankruptcy super−priority for CERCLA claims).

FN156 *See* MADISON & ZINMAN, *supra* note 148, at 1175 (referring to possible exclusion of mortgagee from definition of owner as mortgagee exception).

FN157 CERCLA § 101(4), 42 U.S.C. § 9601(4) (1994).

FN158 901 F.2d 1550 (11th Cir. 1990).

FN159 *Id.* at 1557−58.

FN160 *See* Michael D. Zarin, *The Constitutionality of Retroactive State Super−Priority Lien Statutes*, 90 COM. L.J. 346, 354 (1985) (utilizing *Security Industrial Bank* to analyze constitutionality of superlien statutes).

FN161 *Supra* note 130 and accompanying text.

FN162 476 A.2d 326 (N.J. Super. Ct. App. Div. 1984).

FN163 *Id.* at 329.

FN164 *Id.* at 332.

FN165 *See* Zarin, *supra* note 160, at 352−55. Mr. Zarin concludes that superlien statutes should be held unconstitutional if they apply retroactively. *Id.* at 355. New Hampshire's superlien statute takes this approach. N.H. REV. STAT. ANN. § 147−B:10−b (1980 & Supp. 1995). However, no reported decision has determined the constitutionality of New Hampshire's statute.

FN166 *See supra* notes 138−41 and accompanying text.