# American Bankruptcy Institute Law Review

**Volume 9 Number 2 Winter 2001**


## Claims Estimation And The Use Of The "Cleanup Trust" In Environmental Bankruptcy Cases

Francis E. Goodwyn [1]

Bankruptcy law is designed to provide an orderly process of reorganization or liquidation for entities that are having trouble paying their bills, or which anticipate having such trouble in the foreseeable future. Environmental law is designed to promote cleanup of the environment. When these laws clash, many problems occur, but two particularly stand out: setting the cost of cleanup, and apportioning this cost among parties.

Although the policy of environmental law is to promote early cleanup, in practice, the procedure prescribed by environmental regulations for determining the price of cleanup frequently may involve a high−cost, long−term project taking many years to complete. This is difficult or impossible to reconcile with the relatively rapid reorganization or liquidation which is a necessary and integral part of the bankruptcy process. This problem has perhaps originated because environmental statutes were written with little consideration or expectation of bankruptcy law involvement.

The second problem involves allocating the cleanup cost among the entities who may share responsibility for the condition with the debtor, known as "potentially responsible parties" or PRPs, [2] (a group which may include the debtor). The provision of the Bankruptcy Code requiring the disallowance of certain claims for reimbursement or contribution from a debtor's estate [3] can lead to unreasonably harsh treatment of the claims of the non−debtor PRPs. This problem might similarly have originated because the law of disallowance in bankruptcy developed decades ago when environmental degradation was of little concern to anyone, and was intended to deal with very different circumstances involving loan guarantors.

Whatever their origin, both of these problems can be alleviated to some extent by use of the "estimation" procedure contained in the Bankruptcy Code. [4] Estimation can provide a speedy alternative to the lengthy valuation procedure mandated outside of bankruptcy for environmental claims, accomplishing in weeks what may otherwise take years. Where liability for cleanup is shared between multiple entities, estimation can be used to establish a trust mechanism to provide fair apportionment of costs and prevent unfair disallowance.

When an entity owns, or has ever owned, real property that is environmentally contaminated, it faces a multitude of problems. Environmental laws demand that contaminated sites be cleaned up, frequently at enormous cost, and look to both present and past owners, among others, to pay for clean−up. Among present and past owners, fault in causing the contamination may not be relevant, and liability is joint, several and strict. Evaluation of the extent of contamination, and costs of clean−up, may take many years, during which time present and past owners may not know the extent of their liability, but, while cleanup lingers, may be expected to finance the ongoing evaluation process and the cleanup itself.

Cleanup of environmentally contaminated property is the subject of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), [5] the National Contingency Plan (NCP), [6] and administrative regulations that implement CERCLA. The process, administered and enforced by the United States Environmental Protection Agency (EPA) and known as "response," begins when EPA discovers the "release or threatened release" [7] of a hazardous substance. [8] If the threat is short−term or immediate, EPA can undertake a "removal action" under CERCLA section 101(23). [9] If the threat is long−term, EPA first performs a preliminary assessment of overall risk and, depending on the result, and after notice and comment, may place the site on the CERCLA National Priorities

List (NPL). [10]

If the site is placed on the NPL list, EPA next performs a "remedial investigation and feasibility study" (RI/FS) to ascertain possible remedies. [11] Then, a "remedial action" [12] is chosen from alternatives considered in the RI/FS, [13] using nine criteria set forth in the regulations. [14] The proposed remedial plan is published, and opportunity for public comment is provided, before the final plan is selected. [15] The selected remedy is promulgated in a Record of Decision (ROD) [16] and implemented. If hazardous substances remain on the site, the action is reviewed at least every five years to attempt to assure continued protection, [17] and review may lead to further response and implementation if needed. [18]

Implementation may take one of two forms: EPA may do the work itself pursuant to CERCLA section 104 [19] and seek recovery of costs from PRPs pursuant to CERCLA section 107; [20] or under CERCLA section 106(a) EPA may seek to require PRPs to perform the work themselves, either by administrative action or court order. [21] PRPs are defined as (1) present site owners or operators; (2) past owners or operators at the time of disposal; (3) any person who arranged for disposal or transport of hazardous substances; or (4) anyone who currently accepts or in the past accepted hazardous materials to transport. [22]

Liability requires proof that: (1) there has been a release or threatened release of a hazardous substance at a facility; (2) the release has resulted in the incurrence of response costs; and (3) the party sought to be held liable falls within one of the four prescribed classes. [23] Liability is strict, [24] joint and several, [25] and subject to only four listed defenses: that the harm was caused "solely" by (1) act of God; (2) act of war; (3) under limited circumstances, an act of an unrelated third party; or (4) a combination of these factors. [26] PRPs may sue other PRPs for recovery of costs [27] or contribution, [28] whether or not EPA has initiated any action and whether or not the site has been listed on the NPL. [29] The court may "allocate response costs among liable or potentially liable parties using such equitable factors as the court determines are appropriate." [30]

Special problems arise when a present or past owner files a petition in bankruptcy. The principle in environmental law that the "polluter pays" frequently clashes with the policies and objectives of bankruptcy law, which is designed to bring all the claims against the debtor into one forum in which they can be adjudicated and settled, and the debtor granted a "fresh start", free of past obligations.

One problem that frequently comes up in such cases is the valuation of an environmental claim during the course of a bankruptcy. At the time of the bankruptcy, the amount of money required for cleanup of the property may not be known. [31] Bankruptcy law provides a streamlined mechanism for dealing with this problem, known as "estimation", as provided in section 502(c) of the Bankruptcy Code, [32] which gives the bankruptcy court authority to establish the amount for which the claims of PRPs should be allowed to participate in distribution. This includes an estimation of the total anticipated cost of the cleanup. Cases in which environmental claims have been estimated seem to demonstrate that while problems may arise in its application, the process can be considerably useful. [33]

Past and present owners of the property in question and other PRPs, who may be liable for cleanup costs, may file claims in bankruptcy court against the debtor for their actual and anticipated costs. [34] While a process to apportion costs among multiple parties seems fair and reasonable, and eminently suited to the estimation power of the bankruptcy court, in some cases the past and present owners have had their claims disallowed because of section 502(e) of the Bankruptcy Code, [35] which requires the disallowance of contingent reimbursement and contribution claims of parties co−liable with a debtor under certain circumstances. In some of those cases, it has been suggested, unsuccessfully, that the liability be apportioned by means of the court's estimation powers, and that the funds that the court determines should be paid by the debtor's bankruptcy estate should be placed in a trust to be used for cleanup of the contaminated property. [36] The trust mechanism is suggested not only to provide a cleanup fund, and to deal with the long period during which actual cost may be unknown, but also to deal with concerns, in regard to the debtor's possible double liability, which is the perceived reason for the claims−disallowance provisions of section 502(e). [37]

This article will briefly summarize the general characteristics of environmental claims in bankruptcy, and the interplay of environmental law and bankruptcy law. Next it will trace the development and use of claims estimation in bankruptcy, and discuss application of the process to environmental cases. It will be suggested that, while CERCLA poses particular hardships for environmental debtors which are in conflict with bankruptcy policy, estimation can

alleviate these problems to a great extent. Next the article will discuss the interplay of Bankruptcy Code sections 502(c) [38] and 503(e) [39] in the context of parties co−liable for environmental cleanup costs. Several cases in which these issues have arisen will be discussed and analyzed. It will be suggested that disallowance operates in environmental cases in ways that pose unfair hardships for parties co−liable with a debtor. The application of what is denominated in this article as a "cleanup trust" to alleviate some of the identified problems will be discussed and advocated.

**ENVIRONMENTAL CLAIMS IN BANKRUPTCY**

Imagine three companies that have owned a parcel of land ("Toxacre") at different times, upon which each performed a different industrial process. The processes created waste material which each company disposed of on the property in manner which, in each case, seemed reasonable at the time. The three companies are C1, the first owner, C2, the next owner, and C3, the current owner. A governmental environmental agency has notified C1 that Toxacre is badly polluted and must be cleaned up, and that C1 will have to finance this endeavor. C1 protests that it no longer owns Toxacre and that it has not been determined that the pollution on Toxacre was placed there by C1. But C1's protests are unavailing, although it is told that it might have a right against C2 and C3 for contribution. When C1 asks how much money it must pay, Agency answers that studies must be conducted for a period of some years before this information will become available, and that C1 should now fork over (say) $10 million or so to pay for the studies.

What happens if C1 files bankruptcy? The first question is whether C1's obligation to pay for the cleanup is dischargeable in bankruptcy; to answer this it is necessary to determine whether such obligation is a "claim" under the Bankruptcy Code. A "claim" is defined as 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. [40]

Although this definition is very broad, it is not unlimited. The legislative history states that this language "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", [41] but that "rights to an equitable remedy for a breach of performance with respect to which such breach does not give rise to a right to payment are not 'claims.'" [42]

This question was addressed by the United States Supreme Court in *Ohio v. Kovacs*, [43] a case in which the State of Ohio obtained a state court injunction against the debtor, a natural person, ordering him to cease polluting, clean up a site and compensate the state for damage to wildlife. When the debtor did not comply, the State obtained the appointment of a state court receiver, who took possession of the site but had not completed the cleanup when the debtor filed bankruptcy. Ohio objected to the debtor's discharge on the grounds that the obligation was not a "debt", a term defined by the Bankruptcy Code as "a liability on a claim." [44] The United States Supreme Court ruled that the debtor's obligation to the State was indeed a "claim" within the meaning of the statutory definition, [45] and subject to discharge. [46] The Court based its ruling primarily on the fact that, because of the receivership, the debtor had been ejected from the site and did not have the ability to perform anything but the payment of money, and that payment of money was what the State actually was trying to obtain. The Court carefully limited its holding to the facts of the case, and stated:

[W]e do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed ... we do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy ... we do not question that anyone in possession of the site ... must comply with the environmental laws.... [47]

The question of the nature of a "claim" was addressed further in *In re Chateaugay Corp*. [48] The debtor, a diversified steel, aerospace and energy corporation with operations in several states, had filed a chapter 11 petition which

included, in the debtor's schedule of liabilities, numerous "contingent claims" held by the EPA. EPA filed a proof of claim for approximately $32 million for response costs incurred prior to filing at 14 sites EPA had identified, and alleging that the cleanup operation was not complete, that more response costs would be incurred in an unknown amount, and that other sites might be identified. With respect to the question of the nature of a claim, the debtor took the position that all liabilities traceable to pre−petition conduct were dischargeable "claims", even where response costs were incurred post−confirmation. Predictably, in order to avoid discharge, EPA wanted to keep its claims outside of bankruptcy altogether, and thus asserted that any response costs incurred after confirmation were not "claims", and that until response costs had actually been incurred, it did not have a "claim" that could be discharged.

The trial court, first noting that to be dischargeable, an obligation must be a "claim" that arises prior to the filing of bankruptcy, examined prior non−CERCLA authority. [49] The court noted that in all these cases, there had been either a contractual relationship between the debtor and the claimant, or the commission by the debtor of a tort "that could lead to some future injury and a consequent decision of the injured party to seek legal redress against the debtor." [50] There is no contractual relationship in CERCLA cases, and

[I]t is not clear that any tort, or indeed even a constituent element of any such tort, is properly chargeable to the debtor until there is either a release, or a threatened release, of hazardous waste. It follows that unless there has been a pre−petition release or threatened release of hazardous waste, which is a constituent element of CERLCA liability justifying governmental action, there is no pre−petition event as to which any post−petition contingent injury can properly attach. [51]

For there to be a "claim" in the CERCLA context, then, there must, prior to the filing of the bankruptcy petition, be a "release or threatened release" [52] of hazardous waste, without which the necessary pre−petition tortious conduct to which the "claim" could attach is absent. Indeed,

[T]he mere presence of hazardous wastes is not even a constituent element of any tortious conduct, much less a tort in itself. It follows that a discharge in bankruptcy cannot properly rest upon the mere pre−petition existence of such hazardous waste. Where, however, there has been a pre−petition release or threatened release of hazardous waste, there does exist an event that would render any claims arising from that circumstance dischargeable pursuant to the broad definition of "claim" set forth in the Bankruptcy Code. [53]

Thus it appears that for there to be a "claim", there must be a release or threatened release. For example, if one places a storage facility containing hazardous waste on property, no "claim" arises unless and until the facility begins to leak or otherwise allow or threaten to allow its contents to escape. The release or threatened release is the key event, and defines both the fact of the "claim" and the time at which it arises.

The trial court went on to consider the dischargeability of claims for injunctive relief and the definition of "claim," which includes a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." [54] The court ruled that where EPA has a right under the statute to seek payment, even if it should choose not to do so, there is a dischargeable "claim." But where no right to payment exists there is no dischargeable "claim", even if the effect of an injunction would be to cause the debtor to spend money. [55]

On appeal, the Second Circuit first noted that the relationship between bankruptcy law and environmental law is usually described in terms of a conflict between competing interests. [56] The court acknowledged that the Bankruptcy Code and CERCLA "point toward competing objectives," [57] but rejected the notion of "conflict" between the statutes, instead reconciling them as follows:

But to whatever extent the Code and CERCLA point in different directions, we do not face in this context a conflict between two statutes, each designed to focus on a discrete problem, which happen to conflict in their application to a specific set of facts. ... Here, we encounter a bankruptcy statute that is intended to override many provisions of law that would apply in the absence of bankruptcy – especially laws otherwise providing creditors suing promptly with full payment of their claims. [58]

The court also noted that in this case EPA was obviously trying to keep its claims outside of bankruptcy in order later to assert them against the reorganized debtor. However, in many cases, "if unincurred CERCLA response costs are not claims, some corporations facing substantial environmental claims will [not] be able to reorganize at all," [59] and "[a]ccepting EPA's argument in this ... case would leave EPA without any possibility of even partial recovery against a dissolving corporation in a chapter 7 liquidation case." [60]

The court agreed with the district court that CERCLA response costs associated with any pre−petition conduct by the debtor that results in any release or threatened release of hazardous substances are "claims" within the meaning of the Bankruptcy Code. The court was careful to point out, however, that not every pre−petition action of the debtor would result in a claim, only a "release or threatened release." Construction of a storage facility, for example, would not result in a claim. But every pre−petition release or threatened release, does create a "claim" subject to discharge. [61]

The court also agreed with the District Court that injunctive remedies that include a right to payment are "claims." The court noted, however, that while EPA has authority to remove accumulated waste and seek payment, it does not have authority to accept payment as an alternative to continued ongoing pollution. Therefore, orders directing the termination of current pollution are not "claims."

Thus, if EPA directs [the debtor] 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 [the debtor] 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 [the debtor] to take any action that ends or ameliorates current pollution, such an order is not a "claim." [62]

Most environmental injunctions combine obligations which carry rights to payment with obligations that do not, and therefore to that extent the latter are not "claims".

The court further ruled that cleanup expenses assessed post−petition, which are incurred to "remedy the ongoing effects of a release of hazardous substances", [63] are entitled to administrative expense priority under section 503(b)(1)(A). [64]

**ESTIMATION**

Assuming that an environmental obligation is a "claim", the Code provides that where its value is not established it can be "estimated":

There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance. [65]

The meaning of this section in connection with environmental claims has been the subject of extensive litigation. In *Chateaugay*, the EPA initially argued that the section could not be applied at all in environmental cases, [66] citing CERCLA section 113(h), [67] which prohibits any pre−enforcement judicial review of EPA decisions. EPA argued that an estimation hearing would amount to preenforcement judicial review, in that it would involve "extensive factual inquiry" [68] concerning "the wisdom and scope of possible remedies" [69] contrary to the statute, and therefore should not be allowed. The court, however, disagreed, stating that "... nothing prevents the speedy and rough estimation of CERCLA claims for purposes of determining EPA's voice in the ... proceedings...." [70] However, no actual estimation hearings were conducted in *Chateaugay*.

The first case in which estimation was actually used to quantify CERCLA claims was *In re National Gypsum*. [71] Shortly after the debtor filed its chapter 11 petition, the United States, on behalf of EPA and the Department of the Interior, filed a proof of claim predicated on CERCLA listing seven Superfund sites nationwide and reserving the right to assert the debtor's liability with respect to at least thirteen other unlisted sites. [72] The debtor filed objection to

the claim along with motions to estimate and classify the claims. [73] Following a withdrawal of the reference requested by the United States, [74] the District Court addressed a number of issues raised by the parties. [75]

The court in *National Gypsum* first considered the seven sites listed (the "Listed Sites") [76] in the proof of claim, as to which the United States alleged that the debtors had arranged for disposal of hazardous substances prior to the petition, that a release or threatened release had occurred prior to the petition, and that the United States had incurred pre−petition response costs and would incur future response costs. [77] All parties apparently agreed that response costs incurred "prior to reorganization" were dischargeable claims, [78] but the United States argued that future response costs, even if based on pre−petition conduct, were not claims subject to discharge. [79] The court, however, citing *Chateaugay* and adopting a similar test, [80] ruled that these costs were claims under the Code. [81]

In connection with the thirteen "Unlisted Sites", [82] the debtors argued that these liabilities were claims, since they arose from pre−petition conduct, but were barred because proofs of claim as to those sites were not filed by the bar date. [83] The United States argued that these debts relating to the unlisted sites were not dischargeable claims because the debtors had made no showing that "dischargeability [was] necessary for confirmation of a plan of reorganization." [84] The debtor had filed for a declaratory judgment and moved for summary judgment on this issue. The United States argued in response that the court lacked jurisdiction to entertain the debtor's claim for declaratory judgment because the United States had not waived sovereign immunity, and because CERCLA 113(h) [85] would bar such declaration. [86] The court ruled that the United States had waived sovereign immunity pursuant to section 106(c) [87] of the Bankruptcy Code, [88] and when the United States filed a Proof of Claim "the exceptions to the jurisdictional bar of section 113(h) were activated." [89] The court noted that it was aware that:

[T]he combined effect of its ruling is that in order to preserve its CERCLA claims against a bankrupt PRP, the United States must file a Proof of Claim; and that in filing such Proof of Claim, the United States subjects itself to declaratory relief, otherwise precluded by Section 113(h), for unlisted sites. However, this is the only reading of CERCLA and the Code that strikes a balance between the objectives served by both statutes. [90]

After giving the United States that "Hobson's choice", the court further noted that: Any other reading would allow the United States, by not filing a Proof of Claim, to preserve its claims for all sites for post−bankruptcy proceedings to the detriment of all other creditors whose claims are discharged, and of the Debtors to the extent post−bankruptcy environmental claims impacts their ability to effectively reorganize. In short, any other reading would allow the United States to completely circumvent the objectives underlying the Code. [91]

The court concluded that all liability at the thirteen Unlisted Sites, all "arising from pre−petition conduct resulting in release or threatened release, fairly within contemplation of the parties, are dischargeable claims." [92] The court rejected the United States' argument, that the claims were not dischargeable because the debtor had not shown discharge to be necessary, on the grounds that "necessity of dischargeability is not determinative of when a CERCLA claim arises for bankruptcy purposes," [93] but apparently ruled that the bar date would be extended to benefit the United States on excusable neglect grounds, saying that "[e]xtension of the bar date as relates to the United States claims for Unlisted Sites is warranted under these circumstances." [94] The court further ruled that some post−petition expenses incurred at one of the sites were for the purpose of preserving the property, and "were necessitated by conditions that posed an imminent and identifiable harm to the environment and public health," [95] and were entitled to administrative expense priority because the debtors still owned the property. [96] Finally the court ruled that the debtors' liability was joint and several among themselves, and, subject to a finding of divisibility, renewed the reference back to the bankruptcy court for estimation on that basis. [97]

One point of contention between the parties was the purpose and effect of estimation of the EPA's claim. The debtors argued that estimation should be used to evaluate the actual amount of the claim and allow it for purposes of distribution; the EPA argued that estimation should be used only to determine entitlement to vote on a chapter 11 plan. [98] The bankruptcy court ruled that "pursuant to section 502(c)(1) of the Bankruptcy Code, the disputed government claims would be:

estimated for purposes of allowance, as well as for voting and for all plan confirmation purposes, including, without limitation, assisting the Court in fulfilling its obligation to make the findings requested by Sections 1129)a)(7)(A)(ii)

and (11) of the Code as well as the findings requested by Sections 1129(b)(1) and (b)(2), if necessary." [99]

The court conducted a three−day hearing which consisted primarily of expert testimony for both sides. [100] At the conclusion the court estimated the maximum value of the EPA's claims, which the EPA had contended came to approximately $69 million, at approximately $11 million. [101] The EPA filed appeals but the parties settled before the appeals were decided, eliminating the need for any further proceedings. [102]

It is instructive, in the absence of an appellate ruling in *National Gypsum*, to compare the comments by the lead counsel to the EPA and the debtors in their law review debate. Counsel for the EPA emphasized the difficulty faced by the government because of the perceived abbreviated nature of the proceedings and lack of adequate preparation time. [103] Counsel for the debtors wrote at length on the severe procedural disadvantages faced by PRPs in non−bankruptcy CERCLA proceedings, particularly the ban on pre−enforcement review, [104] and described the contrasting strategic and procedural advantages of a PRP in bankruptcy facing an estimation hearing as "a whole new ball game." [105] It seems clear that, in this type of case, estimation can provide significant advantages for environmental debtors.

The problem for the environmental debtor, or PRP, outside bankruptcy is that, in keeping with the Congressional policy of encouraging rapid cleanup of contaminated sites, CERCLA gives the EPA wide discretion in selection of remedies, and discourages any judicial review until after the remedy has been selected and, in many cases, implemented. This has the purpose of preventing court proceedings from delaying cleanup. As stated by one court, "[t]o introduce the delay of judicial proceedings at the outset of a cleanup would conflict with the strong congressional policy that directs cleanups to occur prior to a final determination of the part[ie]s' rights and liabilities under CERCLA." [106] Accordingly, under CERCLA section 113(h), [107] federal courts generally lack jurisdiction to entertain challenges to EPA removal or remedial orders issued under CERCLA section 104, [108] or to CERCLA section 106 [109] administrative orders, until EPA sues under CERCLA section 107 [110] to enforce its orders or recover its costs; in other words, until EPA is ready for court. Thus the PRP is forced into the role of a defendant, and also bears the burden of proof. [111] Review is limited to the administrative record which the EPA has compiled at its leisure, and is limited to a showing by the PRP that the EPA action was "arbitrary and capricious." [112] The purpose of all this is obviously salutary, to prevent delay caused by court proceedings, but its fairness is questionable.

There also is a subtle but real attitudinal problem faced by PRPs, perhaps best illustrated by a 1991 non−bankruptcy case. [113] The owner of a contaminated site which also contained a Native American burial ground attempted to prevent EPA from conducting pre−cleanup studies until it had completed appropriate review under the National Historic Preservation Act. [114] The district court ruled that under CERCLA 113(h) [115] it lacked jurisdiction, and the owner appealed. The Third Circuit said:

Although the argument in favor of protecting our Indian heritage does not lack force *even when advanced by a polluter*, we hold that the district court did not err when it dismissed [the owner's] complaint against [EPA] for lack of subject matter jurisdiction. [116]

By contrast, an estimation hearing conducted by a bankruptcy court can afford a dramatically different procedural climate than that in a non−bankruptcy court. In the *National Gypsum* case,

The government had the burden of establishing its claim, without the favorable presumptions that attach in proceedings governed by CERCLA section 113(j). More importantly, where EPA has not yet selected a remedy, the bankruptcy court evaluated the proposed remedies prospectively, eliminating the disadvantages inherent in any attempt to undo a 'done deal.'

...

At the sites for which EPA has not yet selected a remedy, there is no question of 'review' of EPA's decision making. Therefore, there is no 'arbitrary and capricious' standard of review, no deference to a 'scientific' decision of an expert agency, and no limitation to the administrative record. [117]

These advantages for the debtor are most significant in cases where EPA has not yet selected a remedy. By contrast, where the remedy has already been selected, much of the debtor's advantage is relinquished. For example, at a site where EPA had already selected a remedy, the court in *National Gypsum* applied, as a standard of review, whether EPA had acted "arbitrarily and capriciously," and limited its review to EPA's administrative record. [118]

An important preliminary issue for the bankruptcy court in *National Gypsum* was the purpose of the estimation hearing, and, at least by implication, whether the estimate would constitute a limit, or "cap", on the amount the United States could recover if ultimately its claim as adjudicated exceeds the "cap". Whether estimation is a "cap" can be important for determining feasibility of a proposed reorganization plan under section 1129(a)(11), [119] and can have an impact on whether the plan can come apart after its consummation. For example, assume a plan provides for a 25% distribution to unsecured creditors. Prior to confirmation, the court estimates a claim pursuant to section 502(c) [120] at $1 million; the creditor would seem to be entitled to a distribution of $0.25 million. However, suppose further that after confirmation, the same claim is later adjudicated at $4 million. If the estimate is a "cap", the creditor is still only entitled to a distribution of 0.25 million; if the estimate is not a "cap", the creditor arguably might be entitled to a distribution of $1 million (25% of $4 million). In the latter case, the debtor might be unable to continue to make payments under the confirmed plan. If the debtor defaults, it probably cannot reorganize the same debt again under chapter 11, in light of section 1127(b), [121] and it could become necessary to liquidate under chapter 7. (If, however, "substantial consummation", as defined by section 1101, [122] of the plan has not occurred, the debtor might be able to amend the plan under section 1127(b)). [123] Liquidation would very likely result in little or no recovery for any creditors, which would tend to abrogate the purpose of the Bankruptcy Code.

In *National Gypsum*, the debtors argued that estimation should be used to evaluate the actual amount of the claim and allow it; the United States argued that estimation should be used only to determine plan voting rights. [124] The court held that it performed both functions. [125] The Code, in section 502(c), mandates estimation "for purpose of allowance," [126] which would seem to imply a "cap". This is the only mention of "estimation" in the Code, [127] although estimation is also mentioned in the statute dealing with the scope of authority of a bankruptcy judge over "core" proceedings in bankruptcy cases referred by a district court to the bankruptcy court, where the non−exclusive list of "core" proceedings includes

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11. [128]

Additionally, although the word "estimation" is not used in the Federal Rules of Bankruptcy Procedure, Rule 3018(a) [129] provides that a court "after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan." [130]

The *Chateaugay* court suggested that, at least in some cases, estimation could be limited to a speedy and rough estimation of CERCLA claims for purposes of determining EPA's voice in the ... proceedings, with ultimate liquidation of the claims to await the outcome of normal CERCLA enforcement proceedings in which EPA will be entitled to collect its allowable share *(full or pro rata, depending on the reorganization plan)* of incurred response costs. [131]

The district court in *National Gypsum* cited this language. [132] *Chateaugay's* language suggests that, at least in cases where estimation is limited to such a purpose, there would be no "cap", and the EPA argued in the *National Gypsum* bankruptcy court that "allowance should be determined once response actions for the site were selected, and that allowed claims should be treated like any other general unsecured claims under the reorganization plan." [133] Whatever the meaning of *Chateaugay 's* language, it is clear that EPA did not want the estimation to be a "cap." [134] However, the bankruptcy court seemingly ruled against EPA on this issue, implying by its statement, that estimation would be "for purposes of allowance, as well as for voting and for all plan confirmation purposes...." [135] ,

This estimation "cap" issue has also been addressed in some non−environmental cases. In *In the Matter of Baldwin−United Corporation*, [136] an insurance insolvency case involving claims by brokers for contribution in regard

to policyholders' claims on annuities, the court, (while disallowing the claims) discussed the history of estimation and, pointing out that creditors have some protection in the estimation process by virtue of section 502(j), [137] commented that:

When read together with § 502(c), it is apparent that the estimation of a claim conclusively sets the outer limits of a claimant's right to recover either from the debtor or the estate, and that estimated claims are covered by the debtor's discharge, subject only to a § 502(j) motion for reconsideration at a later time. [138]

In *In re Rusty Jones, Inc.*, [139] involving warranty claims for automobile rustproofing, the court ordered estimation for purposes of allowance, liquidation and distribution. [140] The court in *In re George Granger MacDonald* [141] held that a claim for fraud committed while bankruptcy was in progress could be estimated as an administrative claim to avoid delay, but the estimate would not necessarily be a cap and could be reconsidered under section 502(j). [142] In a case involving personal injury and wrongful death tort claims, the bankruptcy court ruled that it had jurisdiction to estimate the claims but only for purposes of voting and plan feasibility. [143] The court ruled that limitations in section 157(b)(2)(B) [144] (which derive from Constitutional limitations on powers of non−Article III bankruptcy judges) prevented it from estimation or liquidation of personal injury or wrongful death claims.

In *In re Mcorp Financial, Inc.*, [145] a case involving three jointly administered chapter 11 cases, the court denied confirmation, stating that "[d]ebtors have chosen to present for confirmation plan(s) which skate a line drawn deliberately thin through various 'tests' incorporated in the Bankruptcy Code. In the event, their progress along this self−chosen and perilous line has been marred by broken edges and failed burdens of proof." [146] One of the "broken edges" was the debtors' attempt to use the estimation statute [147] to "cap" over $2 billion in contested claims at $120 million. The court commented at length:

32. Section 502(c) requires the estimation of any claim the fixing or liquidation of which would unduly delay the administration of the case, such as a contingent claim or unliquidated claim, or any right to payment arising from a right to an equitable remedy for breach of performance. In effect, this subsection requires that all claims against the debtor be converted into dollar amounts. (See 124 Cong. Rec. H11094 (Sept. 28, 1978).

33. The Debtors' approach to this section is unusual in its wholesale use of § 502(c) on over $2 billion in contested claims, to be "capped" for all practical purposes on December 31, 1991, at $120 million. The plan is structured such that these "estimates" are subject to revision downward only, pursuant to 11 U.S.C. 502(j)....

34. Section 502(j) provides that a claim that has been allowed or disallowed may be reconsidered for cause, and allowed or disallowed according to the equities of the case. Thus, any claim estimated under § 502(c) is subject to adjustment per § 502(j) after the claim has been liquidated or the contingency removed.

35. The estimation process may fulfill the allowance requirement for purposes of § 1129(a)(9), but will not set the outer limits of a claimants' right to recover. Rather, the ultimate allowance of the claim will set that right. (See In re MacDonald, 128 R.R. 161, 167−168 (Bankr. W.D. Tex. 1991).) The *MacDonald* court was confronted with and analyzed the estimation process under § 502 of post−petition administrative claims; however, it discussed, in dicta, the estimation under § 502 of pre−petition claims, the types of claims at issue in the instant case. *MacDonald* does not stand for the proposition that pre−petition claims can be permanently limited by the estimation process. In a footnote that court specifically stated that the estimation process provides for a § 502(j) reconsideration of an estimated claim. MacDonald, 128 B.R. 161, 167, footnote 8 (Bankr. W.D. Tex. 1991).

36. It is clear that the estimation procedure is not complete without the claimant's right to a § 502(j) reconsideration. If a plan proponent could cut off a claimant's right to a § 502(j) reconsideration, Congress' passage of that provision would be meaningless, and the result would be in contravention of the legislative history on the estimation procedure. The Debtors should not accomplish wholesale circumvention of the claim objection process by utilizing the arbitrary deadline of December 31, 1991 to advance previously entered scheduling deadlines on numerous objections to claims. In essence, the plan provisions terminate contested claimants' rights to any 502(j) reconsideration upward as a result of the cap on the contested claims, the December 31, 1991 deadline for establishing the cap, and the proposed end of January, 1992 distribution. This results in claimants' being put in a prejudicial position in attempting to defend their

proof of claims. [148]

As can be seen, the state of the law on estimation is unsettled. In this article, it is advocated that estimation of environmental claims under section 502(c) [149] should normally be for purposes of allowance, and should constitute a "cap," possibly subject, however, to reconsideration pursuant to section 502(j) [150] (under limited circumstances under which relief pursuant to that statute has been granted). For one thing, the language of the statute is mandatory:

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance. [151]

In other words, if the fixing or liquidation of a claim would unduly delay administration, (or if the claim is a right to payment arising from an equitable remedy for breach of performance), then the court must estimate. As implied by section 157(b)(2)(B) [152] and Rule 3018(a), [153] the court may, in its discretion, estimate for other purposes, but if either the factor of undue delay or right to payment arising from a right to an equitable remedy for breach of performance is present, the court must estimate and it must estimate for purposes of allowance.

The availability of reconsideration under section 502(j) [154] should be rigorously limited preferably to the period before "substantial consummation," [155] otherwise it seems obvious that reconsideration could wreck a reorganization plan. The statute specifies that a claim may be reconsidered only "for cause" [156] and "according to the equities of the case." [157] Equities of the case would surely demand that an estimate should be considered a "cap," except when a plan could still be salvaged in spite of reconsideration, or in cases where there is extraordinary good reason.

No particular method of estimation is prescribed in the Code, and it has been held that courts are free to use whatever method is suitable to the case. [158]

**DISALLOWANCE**

The foregoing discussion has concentrated on how CERCLA poses undue hardships on the debtor and how estimation under the Code can assist the debtor when facing environmental problems. This part will focus on how environmental laws pose inequitable hardships, not so much on the debtor, but on parties co−liable with the debtor, and how these problems could be alleviated by use of the bankruptcy courts' estimation power and equitable powers to create a "cleanup trust."

Imagine a situation in which C2 has filed chapter 11. Years ago, C2 owned a piece of property which is now contaminated. C1, the current owner, who purchased the property from C2, has incurred expenses cleaning up the property, and files a claim for contribution in the chapter 11 case. C2 moves to disallow the claim under section 502(e)(1)(B) [159] on the grounds that it is a contingent claim for contribution.

A number of courts have ruled that section 502(e)(1)(B) requires disallowance of contingent contribution claims. [160] The purpose of the statute is to prevent the possibility of the debtor becoming subject to double liability; according to the legislative history:

Subsection (e) also derived from present law, requires disallowance of the claim for reimbursement or contribution of a codebtor, surety or guarantor of an obligation of the debtor, unless the claim of the creditor on such obligation has been paid in full. The provision prevents competition between a creditor and his guarantor for the limited proceeds in the estate. [161]

A question the courts have not answered is what happens if the claim ceases to be contingent after confirmation, or after the case is "closed." [162] Is the claim now allowed? There are no cases, but it would appear that permitting allowance of the claim would carry the risk of forcing the debtor into default, and forcing the conversion of the case to

chapter 7 liquidation with the attendant risk of abrogating recovery for all debtors, as noted above in the discussion of estimation. [163]

Courts that have ruled on section 502(e)(1)(B) [164] disallowance have generally specified a three−part test to determine whether a claim must be disallowed: the claim must be for "reimbursement or contribution," it must be held by an entity that is "liable with the debtor," and the claim must be "contingent as of the time for allowance or disallowance." [165] The Court in *Dant & Russel*, pointing out that section 502(c) [166] permits estimation of contingent or unliquidated claims in order to avoid delay, stated that "[a]ccordingly, section 502(e)(1)(B) was drafted to 'preven[t] competition between a creditor and his guarantor for the limited proceeds in the estate.'" [167]

The case involved a site leased by a railroad to the debtor, which had been used by the debtor and other lessees of the railroad for the chemical treatment of wood. The EPA had ordered the railroad to perform certain cleanup activities. The railroad had done so, and EPA, while reserving the right to require further action, at the time had not issued further orders. The railroad filed a proof of claim for cleanup costs already incurred at the time of bankruptcy filing, as well as for costs expected to be incurred in the future. The claim was for approximately $14.2 million, of which approximately $1 million was for costs already incurred;

The bankruptcy court found that [the railroad's] CERCLA claim was not barred by 11 U.S.C. § 502(e)(1)(B). However, the court found that [the railroad] was not entitled to recover from the bankrupt the entire $14 million plus it was seeking. Apportioning liability for the cleanup costs, the court declared [the debtor] liable for $7,402,564 of the total amount and ordered [the debtor] to pay [the railroad] this amount. [168]

The bankruptcy court had found that disallowance under section 502(e)(1)(B) was not appropriate because the railroad's CERCLA claim was non−contingent; [169] that is, the claim did not meet the third part of the "three−part test" for disallowance. The Ninth Circuit, by contrast, found that the railroad was not liable "with the debtor", and therefore the claim failed the co−liability requirement, the second part of the "three−part test", so that it was unnecessary to reach the question of contingency. [170] The co−liability requirement was not met because the railroad had not been ordered to perform further cleanup:

In this case, [the railroad] is seeking to recover the cost of future cleanup. Having complied with the original EPA order to conduct specified cleanup tasks, at a cost of less than $1 million, [the railroad] now seeks funding to perform further cleanup operations to finish the job. This latter cleanup has not been ordered by the EPA. When and if it is accomplished, it very well might be at the instigation of [the railroad]. Thus ... there is no third party to whom [the railroad] is "liable with" [the debtor]. [171]

The court thus found that section 502(e)(1)(B) did not disallow the railroad's claim. However, the court went on to find that the bankruptcy court did not have authority under CERCLA 107(a) [172] to force the debtor to pay the railroad for costs that the railroad had not incurred. The court remanded the case for determination of actual costs incurred, stating:

With regard to the cost of future cleanup, CERCLA authorizes award of these funds to [the railroad] after they are incurred. This holding does not interfere with the powers of the bankruptcy court as a court of equity to establish a trust fund if the estate has assets, or to make provision for other forms of relief "necessary or appropriate to carry out the provisions of the bankruptcy code." 11 U.S.C. § 105(a). We express no opinion on the extent of the court's discretionary powers. [173]

The double liability issue was discussed extensively in a case where a PRP had purchased contaminated property from a debtor after bankruptcy had been filed. [174] The court noted that section 502(e)(1)(B) [175] had been originally intended to deal with the typical business guaranty or surety situation, where the guarantor could, by paying the creditor, eliminate the section 502(e)(1)(B) [176] disallowance as provided by section 502(e)(2). [177] However, in CERCLA cases:

... the section 502(e)(2) "fixing" option presents an especially difficult dilemma for [a PRP] involved in a Superfund contribution action. The onerous CERCLA remediation process may take years to complete, leaving PRPs holding the bag, that is, holding unallowable contingent claims for contribution or reimbursement against the chapter 7 estate,

claims typically totaling millions of dollars. In such circumstances, section 502(e)(1)(B) may operate to preclude innocent PRPs from recovering CERCLA response costs from a chapter 7 estate even though the estate clearly is responsible for all or part of the environmental contamination. [178]

In this case, the PRP had endeavored to persuade EPA to file a claim, but EPA refused. The bankruptcy court had disallowed, under section 502(e)(1)(B) [179] , the portion of the claim dealing with future response costs, [180] and the district court affirmed. [181] The circuit court attempted to mitigate the "harsh result occasioned by Bankruptcy Code section 502(e)(1)(B)," [182] by ordering the bankruptcy court on remand to permit the trustee and the PRP a reasonable time to file "surrogate" claims for EPA under section 501(b) [183] or 501(c), [184] and prescribing a complex procedure to allow or disallow the claim depending on various details of the case. [185]

The issue of possible double liability for a debtor was also discussed in *In re Allegheny International, Inc.* [186] In this case, a purchaser of contaminated property from the debtor filed a proof of claim for cleanup costs incurred and to be incurred. The court refused to disallow the future costs under 502(e)(1)(B) on the grounds that the claim was for amounts that the claimant might spend itself, rather than for amounts that the claimant might pay to reimburse a government agency. [187] The court acknowledged that this could result in the incurrence of double liability by the debtor if the claimant failed to perform the cleanup and the government then filed suit against the debtor for cleanup. However, the court reasoned that:

[T]he gravity of this possibility can be diminished. For example, the bankruptcy court may consider the fact that [the claimant] might not incur future response costs when estimating [the claimant's] claim pursuant to 11 U.S.C. § 502(c)(1). ... Additionally, as suggested by [the claimant] ... , the bankruptcy court can require that any distributions on [the claimant's] claim be placed in a trust to be expended on the remediation of the waste sites. ... [U]se of a trust would be an effective means of guaranteeing that distributions on [the claimant's] claim be used to remediate the waste sites. Such a trust would eliminate the potential for double recovery from the debtor for such remediation. [188]

Both *Dant & Russel* and *Allegheny* were cited in *In re Hexcel Corporation,* [189] another case involving a claim by a buyer against a debtor−vendor. The debtor, but not the claimant, had been ordered by a state agency to perform a cleanup. The court distinguished *Dant & Russel* on the grounds that, although the claimant had not been expressly ordered to clean up, the debtor had, and, under the state statute, the buyer, by purchasing the property, came under the statute and could be required to clean up under certain circumstances. [190] Therefore, the *Hexcel* court reasoned, there was compulsion, unlike the case in *Dant & Russel*, and coliability sufficient to disallow the claim. [191] The *Hexcel* court also distinguished *Allegheny*, first pointing out that *Allegheny* had been criticized in another case, [192] on the grounds that there would have been no need for the trust suggested in *Allegheny* if there had not been co−liability, [193] then stating that:

[T]he *Allegheny* court appears to have focussed on the wrong liability. It appears to have focussed on [the claimant's] liability to any contractors that [the claimant] might hire to perform the remediation. *Allegheny* at 923−24. Granted, the debtor would have no liability to these contractors. However, the liability at issue was the debtor's and the claimant's liability to the governmental agency, not the claimant's hypothetical liability to some future contractor. The debtor and the claimant clearly shared this former liability. Similarly, here, [the debtor] and [the claimant] are clearly co−liable to the [state agency]. [194]

Actually, this is not what the court in *Allegheny* said. Rather, the *Allegheny* court held that the claimant was seeking "to recover sums it has personally expended and will personally expend in the future...." [195] EPA had not performed any cleanup and was seeking no relief in the case. The court explained:

... [A]lthough both debtor and [the claimant] are liable for the waste remediation, should [the claimant] undergo the cleanup itself, debtor is liable directly to [the claimant] pursuant to § 9607(a). Contrary to debtor's contention, for purposes of § 502(e)(1)(B), the distinction between a cleanup performed by [the claimant] and a cleanup performed by the EPA is crucial. ... Section 502(e)(1)(B) is not a means of immunizing debtors from contingent liability, but instead protects debtors from multiple liability on contingent debts. [196]

In *In re Eagle−Picher Industries, Inc.,* [197] the court ruled that claimant−PRPs were co−liable on the strength of a special notice letter sent by EPA to the debtor and the claimants, and disallowed the claims under section 502(e)(1)(B). [198] The claimants argued that:

[D]isallowing their claim would defeat the policy objectives of CERCLA, namely, that parties responsible for environmental contamination must share equally in the costs of cleanup. The Claimants contend that CERCLA and bankruptcy policy would be harmonized if this Court invoked its equitable powers under § 105 and "determine[d] [the debtor's] liability at the Site 'for costs when and if incurred.'" ... They argue that [the debtor's] share of future cleanup costs should then be placed in a trust, the proceeds from which would be disbursed to the parties which perform the cleanup. The Interested Parties support the Claimant's trust suggestion, and also request an estimation hearing to determine [the debtor's] share of the liability for the cleanup, which share could then be funded through a trust facility. [199]

The court rejected the claimant's argument, citing another case [200] for the proposition that § 502(e)(1)(B) fosters, rather than discourages, expeditious cleanup of a hazardous waste site since those seeking contribution will be required to incur the expenses relating to a cleanup before stating an allowable claim. ... Similarly, in the instant case, the Claimants possess only a contingent claim until they pay for the cleanup of the Sites. The prospect o seeking contribution from [the debtor] and other PRPs is a reward for assuming the costs of remediation that encourages the Claimants to commit the necessary resources to remediate the Sites. We therefore reject the Claimants' argument that the policy goals of CERCLA are undermined by the operation of § 502(e)(1)(B) in this matter.

We next consider the suggestion that a trust be established to distribute funds from [the debtor's] estate to fund its liability for future cleanup costs. The proposal to establish a trust i this matter is inappropriate because it does not address the disallowance issues of section 502(e)(1)(B). A trust would not change the co−liability status of the parties in our case or the contingent nature of the Claims, and therefore would not allay the risk of double recovery which section 502(e)(1)(B) was enacted to prevent. As to the request by the Interested Parties for an estimation hearing, estimation of contingent liability for purposes of claims allowance pursuant to section 502(c) is a method of treating direct contingent claims rather than contingent claims of co−liable parties. *See 3 Collier on Bankruptcy* ¶ 502.05, at 502−87−88 (15th ed. 1990) [201] (section 502(e)(1)(B) applies to claims of entities secondarily liable, while section 502(c) applies to claims of the debtor's creditors)). The proposals relating to an estimation hearing and trust facility are therefore rejected. [202]

This ruling was affirmed by the District Court. [203]

In another proceeding in the *Eagle−Picher* case, the bankruptcy court disallowed a claim, filed by a purchaser of property from the debtor, pursuant to section 502(e)(1)(B). [204] The Sixth Circuit remanded on the issue of whether EPA, which had never filed a proof of claim, could still do so because of excusable neglect, reasoning that if it could, the claimant and debtor would be co−liable, permitting disallowance of the claim. [205] On remand, the bankruptcy court disregarded the instructions of the Sixth Circuit, instead deciding the issue on other grounds, and the Bankruptcy Appellate Panel remanded again. [206] In so doing, it stated:

On remand, the bankruptcy court can and should exercise its considerable equitable powers to ... provide a creative resolution that will (1) enforce [the debtor's] responsibilities under applicable environmental laws and its settlement agreement with the EPA, (2) protect [the debtor] from the double liability that § 502(e)(1)(B) was designed to prevent, and (3) protect against a possible windfall to [the claimant]. By way of example only, it is noted that a creative solution was suggested in [Allegheny, supra n. 182]:

The bankruptcy court can require that any distributions on [the claimant's] claim be placed in a trust to be expended on the remediation of the waste sites. Bankruptcy courts are courts of equity, ... possessing power to issue any order necessary or appropriate to carry out the provisions of the bankruptcy code. 11 U.S.C. § 105(a); ... Creation of a trust to be expended on contingent claims is a frequently used mechanism for insuring that such claims are properly disbursed. ... In the present case, use of a trust would be an effective means of guaranteeing that distributions on [the claimant's] claim be used to remediate the waste sites. Such a trust would eliminate the potential for double recovery from the debtor for such remediation. [Omissions added].

The Panel recognizes that in this case, the bankruptcy court previously rejected such an approach when proposed by other creditors. ... Nevertheless, in light of the tenor of the opinion of the court of appeal and its confirmation of the bankruptcy court's "broad equitable powers," the suggestion is worthy of fresh consideration. [207]

Fresh consideration follows.

**THE CLEANUP TRUST**

The purpose of section 502(e)(1)(B) [208] is to "prevent... competition between a creditor and his guarantor for the limited proceeds in the estate." [209] For example, where a corporation has borrowed from a bank and an individual has given a personal guarantee, the section prevents claims being allowed for both the bank and the individual. The individual's claim is disallowed because it is "contingent" (until the individual pays off the bank, removing contingency, in which case the bank no longer has a claim). To the extent that the section prevents a debtor's possible double liability to both a creditor and its guarantor, its purpose and rational are clear. The section does not, however, seem to work so efficiently in environmental cases involving several parties potentially liable for cleaning up the same property. For one thing, there seems to be a lack of consensus among courts as to when the debtor and another party are "co−liable" for cleanup costs, so as to mandate disallowance. At least one court required that both parties be under actual court order, [210] while others have ruled it sufficient that a party might someday become liable given rather unlikely scenarios. [211]

More important is the potential for abuse. There seems to be nothing to prevent a debtor, which is subject to a future environmental claim filed by an entity that has assumed responsibility for environmental damage, from gaining the benefit of disallowance of the claim under section 502(e)(1)(B) [212] simply because the debtor, along with the claimant, might also someday be ordered to clean up the property. If the contingent claim subsequently becomes "fixed" after discharge, the debtor will presumably assert its bankruptcy discharge as a defense. The parties that have accepted responsibility for performing the cleanup, however, cannot recover from the debtors' estate, and the debtor walks away scot free from the mess it helped create. Surely Congress did not intend such a result. Moreover, the non−debtor co−liable parties could be subjected to contribution claims in suits in non−bankruptcy courts brought by parties who paid for the cleanup.

Such a possibility may have been the motivation for the court in *Allegheny* to suggest that an inter vivos trust be created to dedicate some of the debtor estate's assets to the cleanup. A trust could be set up in such a way that would prevent the debtor being subjected to double liability but could also be a receptacle for the debtor's fair share of cleanup funds, provided that the trust is consistent with administrative priority and confirmation requirements of the Bankruptcy Code, thus satisfying CERCLA's objective that all parties responsible share in the costs of cleanup, while recognizing that post−bankruptcy cleanup costs are entitled to administrative priority under section 503(b). [213]

It is clear that the court would have to use its estimation powers under section 502(c) [214] to quantify the debtor's contribution to the trust. The trust could be given the power to sue such other parties for their share of cleanup costs, predicated on an assignment of the debtor estate's claims against such other parties.

By way of example, assume that C2 has filed a chapter 11 petition and C1, who prior to filing has purchased contaminated property from C2, has filed a claim for its cleanup costs. Let us say that C1 has already spent $1 million and plans to spend another $4 million, and accordingly files its claim for $5 million, which should be allowed except for its contingent character. Suppose further that C2 has assets not subject to security interests of $2 million, and unsecured debt other than C1's claim in the amount of $3 million. If C1's claim for funds already expended is allowed but the claim for future cleanup costs is disallowed under 502(e)(1)(B), then the total unsecured debt will be $4 million. With assets of $2 million, unsecured creditors, including C1, will get a $2 million distribution on their $4 million of claims, or 50% of their claims; thus C1 will get $500,000. The balance of $1.5 million will be distributed to the other unsecured creditors.

On the other hand, if the court perceives that it can set up a liquidation trust as a condition to confirmation of a chapter 11 plan, C1's claim in the full amount of $5 million will be allowed. Total unsecured debt will now be $8 million, with $2 million of assets to satisfy it, so that 25%, rather than 50%, is available for unsecured creditors on their claims. C1's

share would go into the trust, i.e., 5/8 of $2 million, or $1.25 million, and the balance of $750,000 would be distributed to the other unsecured creditors. Or possibly the plan will distinguish between C1's future claim ($4 million) and it's $1 million already spent, making the trust a separate creditor for the future claim, in which case C1 will receive a distribution of $250,000 as its share of the unsecured distribution, and the trust will get $1 million. Either way, more money is available for cleaning up the contamination, but establishment of the trust has insured that C2 has no possibility of being subjected to double liability. If anything is left after C1's share of the cleanup cost is ultimately fixed, the balance would be paid to all creditors, pro rata, including C1.

The preceding example assumes that the funds to go into the trust will be deemed to constitute a distribution on the claimant−PRP's claim. Also in this example the various claims are treated differently but fairly. Since the distributions vary, C1's claim would have to be separately classified. The trust would obviously be an adequate means for implementation of the plan pursuant to section 1123(a)(5)(B), [215] by the transfer of property to the trust as set out above. In this example there should be little difficulty meeting the requirements of section 1129(a)(7)(A), [216] that creditors receive at least as much as they would in a chapter 7 liquidation, since the same environmental problems would exist in a liquidation and a similar cleanup trust could be set up.

There is a lurking confirmation issue, however, under section 1129(a)(1), (2), and (3). [217] The distribution to the trust on C1's contingent contribution claims could be viewed as recognition of that claim, rather than its disallowance as required by section 502(e)(1)(B), [218] and thus not in compliance with the Bankruptcy Code. But a court could overcome that problem on the theory that payment to the trust is not a distribution on C1's contingent claim, and that each time the trust makes a payment toward the cleanup, C1's contingent claim is in essence reconsidered pursuant to section 502(j) [219] in recognition of the equities of the case; thus at the time of each payment by the trust, the payment is tantamount to a distribution on a fixed, not a contingent, claim to the extent of that payment.

Moreover, as an alternative to a chapter 11 plan proposed by the debtor, if exclusivity has ended, C1 might itself become the proponent of a plan embodying a clean−up trust that is funded by the debtor estate's assets. C1's class could be the accepting class if the general creditors were to reject the plan.

One court seems to have ordered the establishment of a cleanup trust, although apparently by agreement of parties. [220] The debtor had operated a manufacturing facility which had deposited waste in the claimant's municipal landfill for many years prior to the debtor's filing of chapter 11. The claimant filed a proof of claim for pre−petition, post−petition and anticipated response costs. The bankruptcy court, citing *Allegheny*, [221] denied the debtor's motion to disallow the contingent portion of the claim pursuant to section 502(e)(1)(B). [222] The court cited the suggestion in Allegheny that a trust fund be established, and stated that "[b]oth [parties] have suggested, and the court agrees, that [the debtor] establish a trust fund for distribution on [the claimant's] claim." [223] The court went on to order and schedule, by agreement of the parties, an estimation hearing to determine the amount of [the claimant's] claim. [224]

What advantages exist for use of a cleanup trust? First, under present law, when PRPs ultimately spend money on cleanup, they often find their claims were previously disallowed under 502(e)(1)(B). [225] This may have the effect of discouraging such entities from expending funds for this purpose. Recovery for expenditures on an administrative priority basis may be unclear, and in any event an anticipated distribution may be long delayed. This effect is contrary to section 502(e)(1)(B)'s [226] purpose to encourage early payment by PRPs and thus earlier cleanup. [227] Section 502(e)(1)(B) [228] should be interpreted so as to reconcile it with CERCLA's goal of early cleanup, akin to that of section 502(e)(1)(B) [229] . A cleanup trust can help to accomplish that reconciliation in that funds of the debtor estate are earmarked for cleanup, to the benefit of the other PRPs, who after all are entitled to have the debtor participate in the cleanup.

As an additional benefit of a cleanup trust, the return of the land to the market would be facilitated. Establishment of the trust would provide a source of funds which would go further to ensure early cleanup than applying pressure against PRPs with the threat of disallowance. Also, using theories and procedures that have been developed in mass tort cases, [230] the court could issue a "channeling injunction" that would direct all claims for cleanup costs to the trust and away from those PRPs who have had their share of the cleanup costs estimated. This could facilitate the trustee's ability to sell the land free and clear of interests of third parties in the property. [231] Much potentially valuable land that is now lying idle because of environmental problems [232] could be returned to the marketplace, to the benefit of all

parties and society in general.

In summary, the problems faced by debtors trying to deal with CERCLA, which seems to have been written without consideration of the concerns or time constraints of bankruptcy, can be alleviated in many cases by use of estimation to arrive at a valuation of environmental claims. Different problems are faced by co−liable PRPs dealing with the disallowance provisions of the Code; these problems frequently arise from the fact that it is difficult or impossible to perform cleanups rapidly enough to change contingent claims into fixed claims within the time constraints of a bankruptcy case. Establishment of a cleanup trust may help to resolve these problems. Estimation is required to determine the amount to be paid into a cleanup trust.

Thus it can be seen that the two problems addressed in this article can both be alleviated by use of the estimation procedure. First, estimation can provide an alternative to the lengthy valuation procedure mandated outside of bankruptcy for environmental claims. Second, where liability for cleanup is shared by multiple entities, estimation can be used to establish a trust mechanism to provide for fair apportionment of costs.

---

**FOOTNOTES:**

[1] Francis E. Goodwyn has a Master's degree in biology and worked as an environmentalist before entering law school. He has been in solo law practice since 1980, and is now emphasizing bankruptcy. This article was submitted in compliance with the writing requirement for Mr. Goodwyn's LL. M. in Bankruptcy degree at St. John's University School of Law. Back To Text

[2] . See infra notes 18−21. Back To Text

[3] . See 11 U.S.C. § 502(e)(1)(B) (1994). This section precludes allowance of, and thus ultimately distribution on, various "contingent" claims for reimbursement or contribution made by claimants who have co−liability with the debtor. (In an environmental case, this could mean a debtor and non−debtor PRP who both cause contamination of a site). The purpose of the section is to encourage a loan guarantor, whose claim against the debtor is "contingent" upon his payment to the creditor, to pay off a creditor, thus removing the contingency, during the pendency of the bankruptcy case. But in environmental cases, various practical considerations may make it difficult or impossible for the non−debtor PRP to "pay off" the "creditor" until after the bankruptcy case has been closed. The result is often that the non−debtor PRP incurs cleanup expenses on behalf of the debtor but receives no distribution. See infra text accompanying note 160. Back To Text

[4] . See 11 U.S.C. § 502(c) (1994) (stating "[t]here shall be estimated for purpose of allowance under this section (1)any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or (2)any right to payment arising from a right to an equitable remedy for breach of performance"); see also In re Nat'l Gypsum Co., 139 B.R. 397, 406 (N.D. Tex. 1992) (applying estimation procedure); In re Lane, 68 B.R. 609, 611 (Bankr. D. Haw. 1986) (stating § 502(c) is mandatory and creates affirmative duty for court to estimate unliquidated claims). Back To Text

[5] . See 42 U.S.C. §§ 9601−9675 (1994) (The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund)). Congress passed this statute in 1980 to establish the multi−billion dollar "Superfund" to finance cleanup of hazardous waste sites and collect funds from responsible parties. See Fine Organics Corp. v. Hexcel Corp. (In re Hexcel Corp.), 174 B.R. 807, 811 (Bankr. N.D. Cal. 1994) (imposing on any owner of facility that is contaminated with hazardous substances liability for all costs associated with investigation and remediation of property); Jupiter Dev. Corp. v. Kahn (In re Hemingway Transp.), 174 B.R. 148, 166 (Bankr. D. Mass. 1994) (discussing liabilities imposed by CERCLA); In re Chateaugay Corp., 112 B.R. 513, 517−19 (S.D.N.Y. 1990) (outlining reasoning behind Congress' enactment of CERCLA). Back To Text

[6] . See 40 C.F.R. § 300 (2000) (setting forth detailed standards, procedures and requirements for cleanup); see also Holloway v. Gaylord Chem., 922 F. Supp. 1154, 1159 (E.D. La. 1996) (same); Quaker State Minit−Lube v. Fireman's Fund Ins. Co., 52 F.3d 1522, 1525 (10th Cir. 1995) (imposing liability for cleanup). Back To Text

[7] . See infra note 51 and accompanying text. Back To Text

[8] . See 42 U.S.C. §§ 9601(14), 9602 (1994) (defining hazardous substance); see also Cipri v. Bellingham Frozen Foods, 213 Mich. App. 32, 42 (1995) (analyzing definition of hazardous substance). Back To Text

[9] . 42 U.S.C. § 9601(23) (1994). "Removal" is:

the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damages to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

Id; see also Geraghty & Miller v. Conoco Inc., 234 F.3d 917, 926 (5th Cir. 2000) (stating removal actions are considered immediate or interim responses). See generally Johnson v. James Langley Operating Co., 226 F.3d 957, 962 (8th Cir. 2000) (declaring plain language of CERCLA does not incorporate measurable threshold into definition of hazardous substances). Back To Text

[10] . See 42 U.S.C. § 9605(c) (1994) (providing for NPL, list of sites deemed particularly hazardous and qualifying for special treatment under CERCLA); see also United States v. Akzo Nobel Coatings, 990 F. Supp. 897, 900 (E.D. Mich. 1998) (describing application of NPL). Back To Text

[11] . See 40 C.F.R. § 300.430(a)(2) (2000); see also Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648, 650 (6th Cir. 2000) (ascertaining remedies after completing RI/FS); United Technologies Corp. v. Browning−Ferris Indus., 33 F.3d 96, 105 (1st Cir. 1994) (discussing notice requirements under statute). Back To Text

[12] . 42 U.S.C. § 9601(24) (1994). Remedial actions are those actions consistent with permanent remedy taken instead or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.

Id; see also United States v. Dico Inc., 2001 App. LEXIS 20584 at *32 (8th Cir. 2001) (stating CERCLA's definition of remedial action is broad and includes monitoring necessary for protection of public health, welfare, and environment). Back To Text

[13] . See 40 C.F.R. § 300.430(f) (2000) (explaining process for selecting remedy); see also American Policy Holders Ins. Co. v. Nyacol Prods., No. 91−8667, 1995 Mass. Super. LEXIS 225,*2−*3 (Sept. 18, 1995) (requiring selection of appropriate remedial action). Back To Text

[14] . 40 C.F.R. § 300.430(f)(1)(i) (2000). The criteria are:

(1) Overall protection of human health and the environment. . .

(2) Compliance with [applicable or relevant and appropriate requirements]. . .

(3) Long−term effectiveness and permanence. . .

(4) Reduction of toxicity, mobility, or volume through treatment. . .

(5) Short−term effectiveness. . .

(6) Implementability. . .

(7) Cost. . .

(8) State acceptance. . .

(9) Community acceptance. . .

Id. Back To Text

[15] . See 42 U.S.C. § 9617(a) (1994) (requiring notice of proposed plan); see also United States v. AVX Corp., 962 F.2d 108, 118(1st Cir. 1992) (discussing notice of plan); United States v. Akzo Coatings of Am., 949 F.2d 1409, 1419 (6th Cir. 1991) (requiring public comment). Back To Text

[16] . See 40 C.F.R. § 300.430(f)(2)(ii) (2000) (requiring rationale for plan); see also United States v. SEPTA, 235 F.3d 817, 821 (3d Cir. 2000) (issuing Record of Decision); United States v. Burlington Northern R.R., 200 F.3d 679, 693 (10th Cir. 1999) (explaining promulgation of Record of Decision). Back To Text

[17] . See 42 U.S.C. § 9621(c) (1994) (providing for possible review if hazardous substances remain on site); see also M.R. (Vega Alta), Inc. v. Caribe Gen. Elec. Prods., Inc., 31 F. Supp. 2d 226, 234 (P.R. Cir. 1998) (finding no federal jurisdiction where remedial action is still underway and not completed); Ohio v. United States EPA, 997 F.2d 1520, 1534 (D.C. Cir. 1993) (analyzing CERCLA review procedure). Back To Text

[18] . See 42 U.S.C. § 9621(c) (1994) (providing for possible review if hazardous substances remain on site); see also M.R. (Vega Alta), Inc., 31 F. Supp. 2d at 234 (discussing absence of federal jurisdiction until remedial action is completed and concluding that requiring EPA to submit five year review would not have effect on remedial action); Ohio, 997 F.2d at 1534 (stating rendering sight safe will result in sight not being designated for review). Back To Text

[19] . See 42 U.S.C. § 9604 (1994) (providing for response authorities); see also Pritikin v. DOE, 254 F.3d 791, 799 (9th Cir. 2001) (explaining timing of funding); United States v. Omega Chem. Corp., 156 F.3d 994, 999 (9th Cir. 1998) (dealing with consent of landowner for EPA response). Back To Text

[20] . See 42 U.S.C. § 9607 (1994) (providing for liability of clean up costs); see also Lancaster v. State of Tenn. (In re Wall Tube & Metal Products Co.), 831 F.2d 118, 123 (6th Cir. 1987) (allowing reimbursement of costs as administrative expenses under CERCLA); American Bumper & Mfg. Co. v. Hartford Fire Ins. Co., 452 Mich. 440, 468 (Mich. Sup. Ct. 1996) (Pitney J. Dissent) (finding under strict liability of CERCLA EPA's basis for recovery of costs). Back To Text

[21] . See 42 U.S.C. § 9606(a) (1994) (providing for delegation of clean up work via court order); see also United States v. Hardage, 982 F.2d 1436, 1439 (10th Cir. 1992) (requiring clean up by court order); Matakas v. Citizens Mut. Ins. Co., 202 Mich. App. 642, 646 (1993) (requiring clean up by administrative order). Back To Text

[22] . See 42 U.S.C. § 9607(a) (stating which persons are subject to liability); see also U.S. v. CDMG Realty Co., 96 F.3d 706, 713 (3d Cir. 1996) (describing which persons or entities constitute PRP's); DuFrayne v. FTB Mortgage Services (In re DuFrayne), 194 B.R. 354, 362 (Bankr. E.D. Pa. 1996) (recounting characteristics of PRP's). Back To Text

[23] . See 42 U.S.C. § 9606(a) (1994) (stating that liability requires "an actual or threatened release of hazardous substance from a facility,...[which] may be necessary to abate such danger or threat"); id. § 9607(a) (outlining four prescribed classes); see also United States v. Wallace, 961 F.Supp. 969, 974 (N.D.Tex. 1996) (describing plaintiff's requirements to sustain CERCLA claim); Courtaulds Aerospace, Inc. v. Huffman, 826 F.Supp. 345, 349 (E.D. Cal. 1993) (describing when persons are strictly liable for CERCLA claims). Back To Text

[24] . See 42 U.S.C. § 9607(b) (1994) (imposing strict liability on PRP offenders); see also Morrisville Water & Light Dep't v. U.S. Fidelity & Guaranty Co., 775 F.Supp. 718, 722 (D. Vt. 1991) (noting that CERCLA establishes strict liability on certain described parties); Thomas v. FAG Bearings Corp., 846 F.Supp 1382, 1386−87 (W.D. Mo. 1994) (pointing out that Congress intended CERCLA violators to be held strictly liable). Back To Text

[25] . See 42 U.S.C. § 9607(a) (1994) (providing impliedly for joint and several liability); see also O'Neil v. Picillo, 883 F.2d 176, 178−79 (1st Cir. 1989) (discussing that joint and several liability in CERCLA cases is well−settled and adopted from tort law); United States v. Alcan Aluminum Corp., 990 F.2d 711, 721−22 (2d Cir. 1993) (holding manufacturer jointly and severally liable for cost of slurry wall in government action for response costs under CERCLA). Back To Text

[26] . See 42 U.S.C. § 9607(b) (1994) (stating liability is excused if release of hazardous substance and damage therefrom resulted from "(1) an act of God; (2) an act of war; (3) an act or omission of a third party..."); CERCLA originally contained another "defense" in that a secured creditor who, "without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility" was excluded from the definition of "owner or operator"; this was intended to protect mortgage lenders from liability for cleanup costs. See id. § 9601(20)(A). However, court interpretations of this exemption created concern in the lending industry about the extent of this protection, especially in the event of foreclosure, and in 1996 Congress extended the protection with passage of the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, which essentially protects mortgage lenders from environmental liability even in foreclosure, provided the lender takes commercially reasonable steps to dispose of the property after foreclosure. See id. § 9601(20)(E)−(G) (defining terms used in Act and discussing management and exclusions of members not participating in management). Back To Text

[27] . See id. § 9607(a)(4) (providing for response costs, including "all costs of removal or remedial action incurred by the U.S...; any other necessary costs...consistent with the contingency plan; damages for injury to, destruction of, or loss of natural resources...; and the costs of any health assessment or health effects study..."); see also Adhesives Research, Inc. v. American Inks & Coatings, 931 F.Supp. 1231, 1238−39 (M.D.Pa. 1996) (deciding any person who incurs response costs has standing to bring cost recovery action); Chemical Waste Mgmt, Inc. v. Armstrong World Indus., Inc., 669 F.Supp. 1285, 1291 (E.D. Pa. 1987) (finding in light of statutory provision, any person, including PRP's may recover response costs from owners, operators, etc.). Back To Text

[28] . See 42 U.S.C. § 9613(f) (1994) (allowing parties to maintain claim for contribution from other PRPs); see also Borough of Sayreville v. Union Carbide Corp., 923 F.Supp. 671, 677 (D.N.J. 1996) (concluding recovery claims brought by PRP's under CERCLA are limited to claims for contribution); Sun Co., Inc. (R&M) v. Browning−Ferris, Inc., 919 F.Supp. 1523, 1528 (N.D. Okla. 1996) ( ruling PRPs may only bring actions against other PRPs for contribution), aff'd. in part, rev'd in part on other grounds, 124 F.3d 1187. Back To Text

[29] . See, e.g., Richland−Lexington Airport Dist. v. Atlas Properties, Inc., 901 F.2d 1206, 1208−09 (4th Cir. 1990) (finding prior government approval was not pre−requisite to private recovery for clean up costs under CERCLA); United States v. Allied−Signal, Inc., 820 F.Supp. 1118, 1119−20 (S.D. Ind. 1991) (concluding it was not relevant whether facility that released hazardous substances was properly placed on NPL); Allied Towing v. Great Eastern Petroleum Corp., 642 F. Supp. 1339, 1349 (E.D.Va. 1986) (rejecting requirement that parties need prior government approval before private suit can be brought). Back To Text

[30] . See 42 U.S.C. § 9613(f)(1) (1994) (governing actions brought for contribution); Borough of Sayreville, 923 F.Supp. at 677 (expounding that in order to resolve contribution claims, courts may allocate response costs among liable parties); Chemical Waste Mgmt, Inc., 669 F.Supp. at 1291 (relying on text of section 9613(f)(1) to justify PRPs actions against other PRPs based on contribution). Back To Text

[31] . See supra notes 9−14 and accompanying text (asserting process may take many years). Back To Text

[32] . 11 U.S.C. § 502(c) (1994); see also In re Chateaugay Corp., 944 F.2d 997, 1006 (2d Cir. 1991) (finding "nothing prevents estimation of CERCLA claims for purposes of determining EPA's voice in the proceeding"); In re Nat'l Gypsum Co., 139 B.R. 397 (N.D. Tex. 1992) (illustrating use of estimation to quantify CERCLA claims). Back To Text

[33] . See infra text regarding the National Gypsum case accompanying notes 70−96; see also In re Nat'l Gypsum Co., 139 B.R. at 406 (discussing purpose of claims which is to determine status given to CERCLA claims in bankruptcy

proceeding). Back To Text

[34] See 11 U.S.C. §§ 501−510 (1994); AM Int'l, Inc. v. Datacard Corp., DBS, Inc., 106 F.3d 1342, 1348 (7th Cir. 1997) (illustrating past owner may file CERCLA claims in bankruptcy court against debtor); see also In re Peerless Plating Co., 70 B.R. 943, 948 (W.D. Mich. 1987) (noting debtor's bankrupt statutes is no bar to CERCLA claims). Back To Text

[35] . See 11 U.S.C. § 502(e) (1994); see also Matter of Reading Co., 900 F.Supp. 738, 745 (E.D. Pa. 1995) (discharging debtor's liability as to claim when creditor had knowledge of its claim prior to bankruptcy discharge order and party sat on its rights), aff'd., 115 F.3d 1111; In re Cottonwood Canyon Land Co., 146 B.R. 992, 997 (Bankr. D. Colo. 1992) (discharging claims and all debts arising before date of confirmation by reason of entry of order of confirmation). Back To Text

[36] . See, e.g., In re Allegheny Int'l, Inc., 126 B.R. 919, 924 (W.D. Pa. 1991 (indicating use of trusts would be "an effective means of guaranteeing that distributions on [the claimant's] claim be used to remediate the waste sites"), aff'd, 950 F.2d. 721 (3d Cir. 1991); In re Eagle−Picher Indus., Inc., 144 B.R. 765, 769−70 (Bankr. S.D.Ohio 1992) (suggesting use of trust fund to hold debtor's share of future cleanup costs). Back To Text

[37] . In re Alleghany Int'l, Inc., 126 B.R. at 924 (discussing section 502(e)(1)(B) and providing three elements usually construed as requirements: "(1) the claim must be for reimbursement or contribution; (2) the entity asserting the claim must be liable with the debtor on the claim of a creditor; and (3) the claim must be contingent at the time of its allowance or disallowance."); In re Eagle−Picher Indus., Inc., 144 B.R. at 769−70 (concluding establishment of trust would be inappropriate in case at bar because it would not alter co−liability status of parties and would not reduce risk of double recovery which section 502(e)(1)(B) seeks to prevent). Back To Text

[38] . See 11 U.S.C. § 502(c) (1994) (discussing types of claims and right to payment which should be estimated for purpose of allowance). Back To Text

[39] . See id. § 502(e). Back To Text

[40] . Id. § 101(5) (defining "claim" within meaning of bankruptcy law); see also In re Cottonwood Canyon Land Co., 146 B.R. at 997 (clarifying definition of "claim" according to section 101(5) of Code). Back To Text

[41] . See Notes of Committee on the Judiciary, S. Rep. No. 95−989. Back To Text

[42] . Id. Back To Text

[43] . 469 U.S. 274 (1985). Back To Text

[44] . See Ohio v. Kovacs, 469 U.S. 274, 276−77 (1985) (noting state filed complaint "seeking a declaration that Kovacs' obligation under the stipulation and judgment . . . was not dischargeable in bankruptcy because it was not a 'debt,' a liability on a 'claim,' within the meaning of the Bankruptcy Code."); see also 11 U.S.C. § 101(12) (1994) (defining "debt" for purposes of title 11 as "liability on a claim"). See, e.g., In re Wisconsin Barge Lines, Inc., 91 B.R. 65, 67 (Bankr. E.D. Mo. 1988) (reasoning since debt is defined as "liability on a claim" and "[l]egislative history indicates Congress intended the term 'claim' to have the broadest possible definition," fines incurred by debtor constitute debt under Code). Back To Text

[45] . Kovacs, 469 U.S. at 278−79 (reasoning, inter alia, Congress intent to broader definition of "claim"). Back To Text

[46] . The word "discharge" could cause some confusion in a article of this type, since it can have radically different meanings in bankruptcy, where it refers to being relieved from the legal obligation to pay a debt, and environmental law, where it refers to allowing a substance to flow away or escape. Effort has been made in this article to confine the use of the word to its meaning in bankruptcy. See Black's Law Dictionary (6th ed. 1990) (defining "discharge" as it pertains to bankruptcy as "[t]he release of a debtor from all of his debts which are provable in bankruptcy, except as

such are excepted by the Bankruptcy Code."). Back To Text

[47] . Kovacs, 469 U.S. at 284−85. Back To Text

[48] . 112 B.R. 513 (Bankr. S.D.N.Y. 1990). Back To Text

[49] . Id. at 520 (citing In re Chateaugay Corp., 87 B.R. 779, 796 (S.D.N.Y. 1988)) (quoting In re Johns−Manville Corp., 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986)), aff'd on other grounds sub nom; see Pension Benefit Guaranty Corp. v. LTV Corp., 875 F.2d 1008 (2d Cir. 1989) (holding claim arose with creation and maintenance of pension plan), cert. granted, 110 S. Ct. 321 (1989); see also Grady v. A.H. Robins Co., 839 F.2d 198, 203 (4th Cir. 1988) (discerning claim's arise at time of tortious act), cert. dismissed, 487 U.S. 1260 (1988); In re Edge, 60 B.R. 690, 701 (Bankr. M.D. Tenn. 1986) (holding claim arises at time of negligent act);. In re Chateaugay Corp., 112 B.R. at 520 n.11 (noting these cases involved claim definition for automatic stay purposes, but stated "there appears to be no basis to construe that provision differently for purposes of defining dischargeability"). Back To Text

[50] In re Chateaugay Corp, 112 B.R. at 520. Back To Text

[51] . Id. at 521. Back To Text

[52] . This term comes from CERCLA § 106 (42 U.S.C. § 9606) and § 107 (42 U.S.C. § 9607) which refer to the "release or threatened release" of hazardous substance. "Release" is defined in CERCLA § 101(22) as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, or other closed receptacles containing any hazardous substance or pollutant or contaminant)...." See 42 U.S.C. § 9601(22) "Threatened release" does not appear to be statutorily defined but the literature speaks of such things as corroding storage tanks, impoundments about to overflow, and similar items. Thus for example if an actively maintained storage facility contains tanks holding hazardous waste, there is not yet any "release or threatened release." "Threatened release" might occur when corrosion appears on the tanks, or when they become abandoned. "Release" occurs when waste begins to leak out of the tanks. See, e.g., U.S. v. Northernaire Plating Co., 670 F.Supp. 742, 747 (W.D. Mich. 1987) (holding "[t]he evidence of the presence of hazardous substances at the facility, when combined with the evidence of the unwillingness of any party to assert control over the substances, amounts to a threat of a release."). Back To Text

[53] . In re Chateaugay Corp, 112 B.R. at 520. Back To Text

[54] . See 11 U.S.C. § 101(5)(B) (1994); see also In re Chateaugay Corp., 112 B.R. 513, 522 (Bankr. S.D.N.Y. 1990) (discussing definition of "claim"). Back To Text

[55] . See id. at 522−23. Back To Text

[56] . In re Chateaugay Corp., 944 F.2d. 997 (2d. Cir. 1991), the court agreed with parties in general:

[T]hat the Bankruptcy Code and CERCLA point toward competing objectives: [t]he Code aims to provide reorganized debtors with a fresh start, an objective made more feasible by maximizing the scope of a discharge[,whereas,] CERCLA aims to clean up environmental damage, an objective that the enforcement agencies in this litigation contend will be better served if their entitlement to be reimbursed for CERCLA response costs based on pre−petition pollution is not considered to be a "claim" and instead may be asserted at full value against the reorganized corporation.

Id. Back To Text

[57] . See id. at 1002. Back To Text

[58] . See id. Back To Text

[59] . See id. at 1005. Back To Text

[60] . See In re Chateaugay Corp., 944 at 1005. Back To Text

[61] . See id; see also 11 U.S.C. § 727 (1994); In re Nat'l Gypsum Co., 139 B.R. 397, 412 (N.D. Tex. 1992) (holding environmental damage from debtors' pre−petition conduct that was squarely in contemplation of parties constituted "claim" under Bankruptcy Code). Back To Text

[62] . See In re Chateaugay Corp., 944 F.2d 997, 1008 (2d. Cir. 1991). Back To Text

[63] . See id. at 1010. Back To Text

[64] . See id; see also 11 U.S.C. § 503(b)(1)(A) (1994) (providing "[a]fter notice and a hearing, there shall be allowed administrative expenses . . . including− the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case."). Back To Text

[65] . See 11 U.S.C. § 502(c) (1994); see also In re Claremont Towers Co., 175 B.R. 157, 162 n.2 (Bankr. N.J. 1994) (stating because creditor failed to timely file proof of claim, it was barred from voting claim or receiving distribution from debtor on claim); In re Interco, 137 B.R. 993, 994 (Bankr. E.D. Mo. 1992) (discussing debtors' motion for estimation of claim, as bankruptcy court was vested with authority to estimate contingent or unliquidated claim for purposes of allowance in bankruptcy case). Back To Text

[66] . See In re Chateaugay Corp., 944 F.2d at 1005−06; see also In re Combustion Equip. Assocs., 838 F.2d 35, 37 (2d Cir. 1988) (noting Congress amended CERCLA in 1986 to make clear that statute precluded preenforcement judicial review); In re Nat'l Gypsum, 139 B.R. at 404 (discussing EPA investigation pursuant to CERCLA section 113(h)). Back To Text

[67] . 42 U.S.C. § 9613(h) (1994) (providing "[n]o Federal court shall have jurisdiction under Federal law other than under [diversity of citizenship jurisdiction] or under State law which . . . [relates to cleanup standards] . . . to review any challenges to removal or remedial action . . . or to review any order issued under § 9606(a) of this title, in any action . . ."). Back To Text

[68] . See In re Chateaugay Corp., 944 F.2d at 1006. Back To Text

[69] . Id. Back To Text

[70] . Id. Back To Text

[71] . 139 B.R. 397 (N.D. Tex. 1992). Back To Text

[72] . See id. at 399−400. Back To Text

[73] . See id. at 400. Back To Text

[74] . See id. Back To Text

[75] . See id. at 400−01 (discussing debtors' potential liability, possible extensions of claims bar date, and response costs incurred post petition). Back To Text

[76] . 139 B.R. 397, 403 n.16 (N.D. Tex. 1992) (listing sites Asbestos Dump Sites (Millington, New Jersey), Salford Quarry facility (Montgomery County, Pennsylvania), City Industries Site (Orlando, Florida), Yellow Water Road (Jacksonville, Florida), Coaklely Landfill (North Hampton, New Hampshire), H.O.D. Landfill (Antioch, Illinois), and Yeoman Creek Landfill (Waukegan, Illinois)). Back To Text

[77] . See id. at 402. Back To Text

[78] . See id. at 403. The court no doubt meant confirmation of a plan by the quoted phrase. Back To Text

[79] . See id. at 403−04 (contending under Bankruptcy Code substantive non−bankruptcy law determines when claim arises and CERCLA does not create liability or a claim until costs are expended or remedial measures adopted to address environmental hazards). See generally Lightlowler v. Continental Ins. Co., 769 A.2d 49, 54 (Conn. 2001) (stating claim exists only if before filing bankruptcy petition, there are elements necessary to give rise to right to payment, under relevant non−bankruptcy law). Back To Text

[80] . See In re Nat'l Gypsum Co., 139 B.R. at 404−09, (citing In re Chateaugay, 944 F2d. 997 (2d Cir. 1991)). The test differed from that proposed in In re Chateaugay in that it incorporated a requirement that for a future response cost to be a claim, it must be based on pre−petition conduct, as specified in Chateaugay, and must be within the "fair contemplation" of the parties. Factors "relevant to whether fair contemplation of future costs based on pre−petition conduct can occur ... include knowledge by the parties of a site in which a PR may be liable, NPL listing, notification by EPA of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs." See id. at 407 (court footnote omitted) (dismissing as meaningless In re Chateaugay distinction between "debtor's conduct and the release or threatened release resulting from [the] conduct."). Back To Text

[81] . See In re Nat'l Gypsum Co., 139 B.R. at 397, 409 (N.D. Tex. 1992) (holding "all future response and natural resource damages cost based on pre−petition conduct that can be fairly contemplated by the parties at the time of Debtor's bankruptcy are claims under the Code."). Back To Text

[82] . See id. at 403 n.16 (listing sites Bay Drum Site (Tampa, Florida), Florence Land Recontouring Landfill (Florence Township, New Jersey), Wide Beach Development (Brant, New York), Sixty−Second Street Dump (Tampa, Florida), Gold Coast Oil Site (Miami, Florida), Kin−Buc Landfill (Edison, New Jersey), McKin Co. (Gray, Maine), Liquid Disposal Inc. (Utica, Michigan), SED Inc. (Greensboro, North Carolina), Cannons Engineering Corp. (Bridgewater, Massachusetts), Operating Industries, Inc. Landfill (Monterey Park, California), Taylor Road Landfill (Hillsborough County, Florida), and Sand Springs Petrochemical Complex (Sand Springs, Oklahoma)). Back To Text

[83] . See id. at 409. See generally Fed. R. Bankr. Proc. 9006(b) (1987) (providing time periods and filing requirements for claims). Back To Text

[84] . See In re Nat'l Gypsum Co., 139 B.R. at 409. Back To Text

[85] . 42 U.S.C. § 9613(h) (1994) (providing "[n]o Federal court shall have jurisdiction under Federal law other than under [diversity of citizenship jurisdiction] or under State law which . . . [relates to cleanup standards] . . . to review any challenges to removal or remedial action . . . or to review any order issued under § 9606(a) of this title, in any action . . ."). Back To Text

[86] . See In re Nat'l Gypsum Co., 139 B.R. at 409 (claiming section 113(h) acts as jurisdictional bar to such declarations). Back To Text

[87] . 11 U.S.C. § 106(c) (1994) (providing, notwithstanding any assertion of sovereign immunity, determinations are binding on governmental units). But see In re LTV Steel Co., 264 B.R. 455, 464 (Bankr. N.D.Ohio 2001) (holding section 106 unconstitutional because it was not enacted pursuant to fourteenth amendment). Even if the section 106(c) waiver does not withstand constitutional scrutiny, immunity in this case was waived by the filing of a proof of claim. Back To Text

[88] . See In re Nat'l Gypsum Co., 139 B.R. 397, 410 (N.D. Tex. 1992); see also Army and Air Force Exch. Serv. v. Sheehan, 456 U.S. 728, 734 (1982) (stating unequivocally expressed waiver of sovereign immunity is necessary to maintain lawsuit against United States); In re Neavear, 674 F.2d 1201, 1204 (7th Cir. 1982) (stating section 106(c) waives sovereign immunity of United States relating to questions of dischargeability of debts owed). Back To Text

[89] . See In re Nat'l Gypsum Co., 139 B.R. at 411 (court footnote omitted); see also Voluntary Purchasing Croups v. Reilly, 889 F.2d 1380, 1390 (5th Cir. 1989) (stating section 113(h) barred judicial review of a PRP's complaint); 132 Cong. Rec. H9582 (daily ed. Oct. 8, 1986) (stating review may not be sought unless it falls within category specified by section 113(h)). Back To Text

[90] . See In re Nat'l Gypsum Co., 139 B.R. at 411 n. 34. Back To Text

[91] . See id. at 411 (court footnote omitted). Back To Text

[92] . See id. at 412 (stating prior decisions barring declaratory relief were limited to cases where United States had not brought cost recovery suit). Contra Voluntary Purchasing Groups v. Reilly, 889 F.2d 1380, 1390 (5th Cir. 1989) (holding section 113(h) to be jurisdictional bar). Back To Text

[93] . See In re Nat'l Gypsum Co., 139 B.R. at 412 n. 37. Back To Text

[94] . See id. at 412. See generally Mackie v. Production Oil Co., 100 B.R. 826, 827 (N.D.Tex. 1988) (holding extending bar date requires unique or unusual circumstances). Back To Text

[95] . See In re Nat'l Gypsum Co., 139 B.R. at 413; see also Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot., 474 U.S. 494, 502 (1986) (holding property cannot be abandoned if it would contravene state and local laws to protect health or safety); In re Chateaugay Corp., 944 F.2d 997, 1010 (2d Cir. 1991) (stating claim may be fixed if it remedies ongoing effects of hazardous substances). Back To Text

[96] . See In re Nat'l Gypsum Co., 139 B.R. at 412−13 (stating only small portion of United States claim falls under administrative status because of all sites only one was still owned by debtors). Back To Text

[97] . See id. at 414−15; Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989) (holding where harm is indivisible liability must be joint and several); United States v. Chemdyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983) (holding Congress intended liability to be joint and several). Back To Text

[98] . Proceedings in the Bankruptcy Court subsequent to the renewal of the reference did not result in any published opinion. Counsel for both sides, however, subsequently wrote law review articles describing the proceedings. See Joel M. Gross and Suzanne Lacampagne, Bankruptcy Estimation of CERCLA claims: The process and the Alternative, Va. Envtl. L.J. 235 (1993) [hereinafter Gross, Bankruptcy Estimation of CERCLA Claims] (discussing differences between Bankruptcy Code and CERCLA particularly with respect to estimating future claims); David F. Williams, et al., A Whole New Ballgame: Judicial Review and Estimation of CERCLA Claims in Bankruptcy, 22 Envtl. L. Rep. 10,785 (1992) [hereinafter Williams, A Whole New Ballgame] (noting although 1986 Suprefund Amendments were written to "favor a free hand for EPA in cleaning up hazardous waste sites . . ." under Bankruptcy Code "a court [might be led to] estimate a company's liability on terms much more favorable than would be available under standard Suprefund procedures."). See generally In re Mac Donald, 128 Bankr. 161, 164 (W.D. Tex. 991) (discussing importance of estimation in evaluating feasibility of plan). Back To Text

[99] . The bankruptcy court opinion is not reported. Its decision, however, is thoroughly described by the lead counsel for the EPA and for the debtors. See Gross, Bankruptcy Estimation of CERCLA Claims, supra note 97 at 255 (citing In re Nat'l Gypsum Co., Nos. BK390−37213−SAF−11, BK390−37214−SAF−11, (Bankr. N.D. Tex. June 2, 1992) (court block quote in original) (not reported)). Back To Text

[100] . See Gross, Bankruptcy Estimation of CERCLA Claims, supra note 97, at 259 (noting bankruptcy judge allowed total of 12 hours to be split between two parties who called total of 14 witnesses to testify. This resulted in such time constraints, even experts "testifying in areas of great technical and scientific complexity" testified for less than an hour and sometimes as little as one−half hour). Back To Text

[101] See Williams, A Whole New Ballgame, supra note 97, at 10,785. Back To Text

[102] . See Gross, Bankruptcy Estimation of CERCLA Claims, supra note 97, at 263−64. Back To Text

[103] . See id. at 264 n. 163 (contrasting three−day bankruptcy court hearing with two other non−bankruptcy CERCLA cases "in which remedy issues were litigated without a prior administrative hearing.") (citing United States v. Ottati & Gross, Inc. 694 F. Supp. 977 (D.N.H. 1985)), aff'd in part, vacated and remanded in part, 900 F. 2d 429, (1st Cir. 1990)). The Ottati & Gross, Inc., trial took 184 days (including some partial days) see id; see also United States v. Hardage, 733 F. Supp. 1424 (W.D. Okl. 1989) (describing instance where even though court employed expediting mechanisms, trial took almost three weeks; both cases involving one site). Back To Text

[104] . See 42 U.S.C. § 9613 (h) (1994) (legislating against pre−enforcement review by courts); see also Redland Soccer Club, Inc. v. Dept. Of Army, 801 F.Supp. 1432, 1435 (M.D. Pa. 1992) (stating both plain meaning and legislative history indicate federal courts not hear challenges until remedial actions are complete). It is my understanding that under the provision, no Person May bring any lawsuit in federal court regarding a federally approved removal or remedial action except when the removal action has been completed or when the remedial action has been taken or secured. "Taken and secured" means that all of the activities set forth in the record of decision which includes the challenged decision have been completed. Moreover there is to be no review of a removal action where there is to be a remedial action at the site. Thus, for example, review of the adequacy of a remedial investigation and feasibility study, which is a removal action, would not occur until the remedial action itself has been taken. See generally United States v. State of Colo., 990 F.2d 1565, 1577 (10th Cir. 1993) (recognizing federal courts are barred from reviewing any "challenges" to CERCLA response actions), cert. denied, 114 S.Ct. 922 (1994). Back To Text

[105] . See Williams, A Whole New Ballgame, supra note 97, at 10,785 (discussing advantages for PRP in CERCLA, including stronger bargaining position against EPA). Back To Text

[106] . See Wagner Seed Company v. Daggett, 800 F.2d 310, 314−15 (2d Cir.1986) (stating Congressional policy strongly favors swift cleanup without delay caused by court proceedings); see also U.S. v. State of Colo., 990 F.2d 1565, 1577 (10th Cir. 1993) (recognizing federal courts are barred from reviewing any "challenges" to CERCLA response actions), cert. denied, 114 S.Ct. 922 (1994); Redland Soccer Club, Inc. v. Dept. of Army, 801 F.Supp. 1432, 1435 (M.D. Pa. 1992) (stating both plain meaning and legislative history indicate federal courts not hear challenges until remedial actions are complete). Back To Text

[107] . 42 U.S.C. § 9613(h) (1994) (stating district courts do not have jurisdiction pre−cleanup); see also Boarhead Corp. v. Erickson, 923 F.2d 1011, 1013 (3d Cir. 1991) (stating section 113 shows intent of Congress to deny district courts' jurisdiction to hear complaints challenging pre−cleanup activities); Alabama v. EPA, 8721 F. 2d 1548, 1557 (11th Cir. 1989) (stating "[t]he plain language of the statute indicates that § 113(h)(4) applies only after a remedial action is actually completed."). Back To Text

[108] . 42 U.S.C. § 9604 (1994) (providing removal or remedial actions to EPA). See generally State of Colo., 990 F.2d at 1577 (recognizing federal courts are barred from reviewing any "challenges" to CERCLA response actions), cert. denied, 114 S.Ct. 922 (1994); Wagner Seed Co. v. Daggett, 800 F.2d 310, 314−15 (2d Cir. 1986) (stating Congressional policy strongly favors swift cleanup without delay caused by court proceedings). Back To Text

[109] . See 42 U.S.C. § 9606 (1994) (stating if there is imminent and substantial endangerment to public health or welfare or environment because of actual or threatened release of hazardous substance from facility, relief may be required as necessary); see also In re CMC Heartland Partners, 966 F.2d 1143, 1148 (7th Cir. 1992) (holding CERCLA postpones all judicial review under section 106 until work has been performed or EPA itself applies for judicial enforcement); Redland Soccer Club, Inc., 801 F.Supp. at 1435 n.3 (M.D.Pa. 1992) (reiterating no lawsuit may commence regarding section 9606 of CERCLA until after order is completed). Back To Text

[110] . See 42 U.S.C. § 9607 (1994); see also State of Colo., 990 F.2d at 1577 (recognizing federal courts are barred from reviewing any "challenges" to CERCLA response actions), cert. denied, 114 S.Ct. 922 (1994); Redland Soccer Club, Inc., 801 F.Supp. at 1435 n.3 (reiterating no lawsuit may commence regarding section 9607 of CERCLA until after order is completed); Wagner Seed Co., 800 F.2d at 314−15 (stating Congressional policy strongly favors swift cleanup without delay caused by court proceedings). Back To Text

[111] . See United States v. Northeastern Pharm. & Chem. Co., 810 F.2d. 726, 747 (8th Cir. 1986) (assigning plaintiff burden of proving government's response costs were inconsistent), cert. denied, 484 U.S. 848 (1987); see also United States v. Alcan Aluminum Corp. 990 F.2d 711, 722 (2d Cir. 1993) (stating government has no burden of proof in determining what caused release of hazardous waste and triggered response costs); United States v. Rohm & Haas Co. 939 F.Supp. 1142, 1150 (D.N.J. 1996) (stating defendants have burden of proving costs are not consistent with NCP). Back To Text

[112] . See 42 U.S.C. § 9613(j) (1994); see also In re CMC Heartland Partners, 966 F.2d 1148 (7th Cir. 1992) (holding CERCLA postpones all judicial review under section 106 until work has been performed or EPA itself applies for judicial enforcement); Boarhead v. Erickson, 923 F. 2d 1011, 1013 (3d Cir. 1991) (holding plain language of CERCLA section 113 indicates Congress intended to deny district courts jurisdiction to hear complaints concerning EPA'S Superfund cleanup or pre−cleanup activities). Back To Text

[113] . See Boarhead, 923 F.2d at 1011. Back To Text

[114] . See 16 U.S.C. § 470 (1994) (protecting historical sites); see also Penn Central Transp. Co. v. New York City, 438 U.S. 104, 108 (1978) (stating section 470 was enacted to encourage preservation of sites and structures of historic. Architectural, or cultural significance); Fourth Branch Assoc. v. FERC, 253 F.3d 741, 745 (D.C. Cir. 2001) (stating analyses and consultations are required under National Environmental Policy Act). Back To Text

[115] . See 42 U.S.C. § 9613(h) (1994) (stating district courts do not have jurisdiction pre−cleanup); see also Boarhead, 923 F.2d at 1013 (emphasis added) (holding plain language of CERCLA section 113 indicates Congress intended to deny district courts jurisdiction to hear complaints concerning EPA'S Superfund clean−up or pre−cleanup activities); In re CMC Heartland Partners, 966 F.2d at 1148 (holding CERCLA postpones all judicial review under section 106 until work has been performed or EPA itself applies for judicial enforcement). Back To Text

[116] . See 42 U.S.C. 9613(h) (1994) (stating district courts do not have jurisdiction pre−cleanup); see also Boarhead, 923 F.2d at 1013 (holding plain language of CERCLA sections 113 indicates Congress intended to deny district courts jurisdiction to hear complaints concerning EPA'S Superfund cleanup or pre−cleanup activities); In re CMC Heartland Partners, 966 F.2d at 1148 (holding CERCLA postpones all judicial review under section 106 until work has been performed or EPA itself applies for judicial enforcement). Back To Text

[117] . Williams, A Whole New Ballgame, supra note 97, at 10,785 (discussing manner in which rule and results of CERLA proceedings are radically altered when potentially responsible party is debtor subject to bankruptcy proceedings). Back To Text

[118] . See In re Nat'l Gypsum Co., 139 B.R. 397, 402 (N.D. Tex. 1992); see also Eagle−Picher Indus., 197 B.R. 260, 269 (Bankr. S.D. Ohio 1996) (finding in examining EPA decisions, arbitrary and capricious standard of review applies); In re Commonwealth Oil Refining Co., 58 B.R. 608, 615−16 (Bankr. W. D. Tex. 1985) (dismissing motion for stay in while in consideration of debtor's failure to allege EPA acted in arbitrary or capricious manner). Back To Text

[119] . See 11 U.S.C. § 1129(a)(11) (1994) (stating "confirmation of the plan is not likely to be followed by the liquidation or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."); see also In re Trident Shipworks, Inc., 247 B.R. 513, 514−15 (Bankr. M.D. Fla. 2000) (finding if estimation process also involved ultimate determination of amount to which claimants would be entitled, it would have presented task impossible to accomplish within time frame fixed for confirmation); In re MacDonald, 128 B.R. 161, 167 (Bankr. W.D. Tex. 1991) (holding estimation amount of post−petition administrative claim does not necessarily set "outer limit" of claimant's right to recovery because doing so would jeopardize due−process rights of those claimants). Back To Text

[120] . See 11 U.S.C. § 502(c) (1994) (stating any contingent or unliquidated claim what would delay administration of case or any right to payment arising from right to equitable remedy for breach of performance shall be estimated). See generally In re N.Y. Med. Group, 265 B.R. 408, 414 (Bankr. S.D.N.Y. 2001) (noting stay relief does not preclude

estimation under section 502(c)); In re Interco Inc., 211 B.R. 667, 683 (Bankr. E.D. Mo. 1997) (estimating unliquidated pre−petition claim against debtors for purposes of allowance and payment pursuant to section 502(c) and finding debtor's claim required estimation according to section 502(c)). Back To Text

[121] . See 11 U.S.C. § 1127(b) (1994) (stating "debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan"); In re Nylon Net Co., 225 B.R. 404, 406 (Bankr. W.D. Tenn. 1998) (denying debtor's motion to reopen its chapter 11 bankruptcy case in order to enjoin state court collection lawsuits filed in response to debtor's alleged default in plan payments to unsecured creditors); see also In re Stevenson, 148 B.R. 592, 596 (Bankr. D. Idaho 1992) (holding mere fact debtor missed one payment under confirmed plan of reorganization did not preclude plan had been "substantially consummated" so as to preclude any post confirmation modification). Back To Text

[122] . See 11 U.S.C. § 1101(2) (1994). The statute reads:

"substantial consummation" means—

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.

Id.; see also In re Superior Used Cars Inc., 258 B.R. 680, 688 (Bankr. W.D. Mich. 2001) (finding there had been substantial consummation under section 1101(2) where all parties had been performing under terms of plan for over two years); In re Rickel & Assocs., 260 B.R. 673, 677−80 (Bankr. S.D.N.Y. 2001) (denying debtor's motion to modify confirmation order under § 1127(b) because plan had been substantially consummated). Back To Text

[123] . See 11 U.S.C. § 1127(b). The statute reads:

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

Id.; 7 Collier on Bankruptcy ¶ 1127.04 at 1127−7 to –8 (Lawrence P. King et al. eds., 15th ed. Rev. 2000) (stating post−confirmation modification may be made only by proponent or by reorganized debtor, but not by court and may take place any time after confirmation, but must take place before plan is substantially consummated); see also Rickel., 260 B.R. at 677 (stating section 1127(b) provides sole means for modifying confirmed plan). Back To Text

[124] . See supra n. 97. Back To Text

[125] . See In re C.F. Smith & Assocs., 235 B.R. 153, 159 (Bankr. D. Mass. 1999) (stating "a section 502(c) estimation procedure is often employed for purposes other than adjudicating the merits of claim, such as to determine voting rights or to determine a plan's feasibility"); In re Farley, Inc., 146 B.R. 748, 756 (Bankr. N.D. Ill. 1992) (estimating injury and contribution claims for purpose of voting); Joel M. Gross & Suzanne Lacampagne, Bankruptcy Estimation of CERCLA Claims: The Process and the Alternative, 12 Va. Envtl. L.J. 235, 253 (1993) (noting Bankruptcy Code permits estimation for purposes of allowance that can assist court and parties in preparing and evaluating reorganization plan). Back To Text

[126] . See 11 U.S.C. § 502(c) (1994) (ordering estimation of any contingent or unliquidated claim that would unduly delay administration of case). It should be noted that section 502(c) does not mandate estimation in every case, but only where "fixing or liquidation ... would unduly delay the administration of the case." See id. Back To Text

[127] . The word "estimates," used as a noun, occurs in section 524(g)(2)(B)(ii)(V), where it is used in the context of "periodic review of estimates of the numbers and values of present claims and future demands..." having to do with operations of a trust which has been set up to assume liabilities of a debtor subject to claims for damages related to exposure to asbestos. See 11 U.S.C. § 524(g)(2)(B)(ii)(V); In re Eagle−Picher Indus., 203 B.R. 256, 262−63 (Bankr. S.D. Ohio 1996) (stating personal injury trust agreement created under chapter 11 will operate to review estimates of claims relating to debtor's liability for asbestos exposure). Back To Text

[128] . 28 U.S.C. § 157(b)(2)(B) (1994) (stating "core" proceedings in chapter 11 do not include "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11"). Back To Text

[129] . Fed. R. Bankr. P. 3018(a). Back To Text

[130] . Id. Back To Text

[131] . See supra note 66 (emphasis added). Back To Text

[132] . See In re Nat'l Gypsum Co., 139 B.R. 397, 406 (N.D. Tex. 1992) (quoting finding of court in In re Chateaugay Corp., 944 F.2d 997, 1006 (2d Cir. 1991)). Back To Text

[133] . See supra note 125 (author's footnote omitted) (citing United States Briefing on Purpose and Effect of Estimation Proceeding at 2 (Apr. 14, 1992)); In re Nat'l Gypsum Co., Nos. BK390−37213−SAF−11 & BK390−37214−SAF−11). Back To Text

[134] . Id.; see supra note 97. Back To Text

[135] . See supra note 98. Back To Text

[136] . 55 B.R. 885 (Bankr. S.D. Ohio 1985). Back To Text

[137] . 11 U.S.C. § 502(j) (1994) (permitting creditor to seek to have any claim reconsidered for cause, so long as case has not been closed); see In re Costello, 136 B.R. 296, 298 (Bankr. M.D. Fla. 1992) (recognizing section 502(j) "technically permits reconsideration of the allowance or disallowance of any claim so long as it is open for 'cause'"); see also In re Lane, 68 B.R. 609, 613 (Bankr. D. Haw. 1986) (noting court may reconsider claim for cause if judgment is more than amount provided for). Back To Text

[138] . Baldwin−United, 55 B.R. at 898. Back To Text

[139] . 143 B.R. 499 (Bankr. N.D. Ill. 1992), rev'd in part, 153 B.R. 535 (N.D. Ill. 1993). Back To Text

[140] . See id. at 506 (stating best alternative in these situations is to estimate claims). Back To Text

[141] . 128 B.R. 161 (Bankr. W.D. Tex. 1991). Back To Text

[142] . See id. at 165−66 n.7; see also United States v. Sterling Consulting Corp. (In re Indian Motorcycle Co.), 261 B.R. 800 (1st Cir. 2001) (supporting holding in MacDonald). Back To Text

[143] . See In re Farley, Inc., 146 B.R. 748, 753 (Bankr. N.D. Ill. 1992) (holding bankruptcy court has jurisdiction to conduct estimation for personal injury claims); see also In re Poole Funeral Chapel, Inc., 63 B.R. 527, 533 (Bankr. N.D. Ala. 1986) (stating chapter 11 debtors in personal injury case should have claims against them estimated); Alan N. Resnick, Bankruptcy as a Vehicle for Resolving Enterprise−Threatening Mass Tort Liability, 148 U. Pa. L. Rev. 2045, 2052−53 (2000) (discussing bankruptcy courts' jurisdiction to "estimate personal injury and wrongful death claims for the purposes of facilitating the formulation of chapter 11 plan, determining voting rights and measuring plan feasibility"). Back To Text

[144] . 28 U.S.C. § 157(b)(2)(B) (1994). The statute provides that core proceedings include but are not limited to:

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under Chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11.

Id.; In re Schepps Food Stores, Inc., 169 B.R. 374, 376 (Bankr. S.D. Tex. 1994) (finding personal injury claims invoke exception to court's usual jurisdictional power). But see In re Dow Corning Corp., 211 B.R. 545, 555−56 (Bankr. E.D. Mich. 1997) (noting court has authority to estimate mass tort claims for personal injuries to confirm plan). Back To Text

[145] . 137 B.R. 219 (Bankr. S.D. Tex. 1992). Back To Text

[146] . Id. at 221. Back To Text

[147] . 11 U.S.C. § 502(c) (1994) (stating estimation required with any contingent or unliquidated claim, fixing or liquidation of which would unduly delay administration of case or any right to payment arising from right to equitable remedy for breach of performance); see In re Nat'l Gypsum Co., 139 B.R. 397, 495 (N.D. Tex. 1992) (recognizing Code's requirement of estimation of all claims which "unduly delay the administration of the case"); see also In re Lane, 68 B.R. 609, 611 (Bankr. D. Haw. 1986) (stating duty of bankruptcy court to estimate is mandatory under statute). Back To Text

[148] . In re Mcorp Fin'l, 137 B.R. at 225−26. Back To Text

[149] . 11 U.S.C. § 502(c) (1994); see In re Nat'l Gypsum, 139 B.R. 397, 400 (N.D. Tex. 1992) (finding cases involving CERCLA should follow bankruptcy policy favoring estimation of unliquidated claims prior to determining liability); see also Marion M. Walsh, The Dischargeability of Post−Confirmation CERCLA Liability: In re Chateaugay and Beyond, 1 N.Y.U. Envtl. L.J. 95, 102 (1992) (discussing estimation of environmental claims). Back To Text

[150] . 11 U.S.C. § 502(j) (1994); see In re Miles, 39 B.R. 494, 497 (Bankr. W.D.N.Y. 1984) (stating 11 U.S.C. § 502(j) permits reconsideration). See generally Menachem O. Zelmanovitz & Elana C. Jacobson, The Reconsideration of Contingent and Disputed Claims Under Bankruptcy Code Section 502(j), 23 Seton Hall L. Rev. 1612, 1615−17 (1993) (discussing reconsideration under 502(j)). Back To Text

[151] . 11 U.S.C. § 502(c) (1994) (emphasis added); see In re McCall, 44 B.R. 242, 244 (Bankr. E.D. Pa 1984) (recognizing mandatory nature of estimation is supported by legislative history); see also In re Nova Real Estate Inv. Trust, 23 B.R. 62, 65 (Bankr. E.D. Va. 1982) (interpreting language in 11 U.S.C. § 502(c) as mandatory, requiring estimation of unliquidated claims). Back To Text

[152] . 11 U.S.C. § 502(b)(2)(B) (1994) (allowing court to determine if claim is for unmatured interest). Back To Text

[153] . Fed. R. Bankr. P. 3018(a). The Rule provides, in part:

(a) ...

... Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

Id.; see In re Goldstein, 114 B.R. 430, 432 (Bankr. E.D. Pa. 1990) (discussing importance of last sentence of Rule 3018 in allowing claims); see also Swift v. Bellucci (In re Bellucci), 119 B.R. 763, 768 n.8 (Bankr. E.D. Cal. 1990) (stating plan may be confirmed despite pending objections to claims). Back To Text

[154] . 11 U.S.C. § 502(j) (1994). But see In re Cassell, 206 B.R. 853, 856 (Bankr. W.D. Va. 1997) (recognizing there is no time limit for seeking reconsideration of uncontested order disallowing claims); James N. Duca & Cori Ann C. Yokota, The Role of Res Judicata in Bankruptcy Claim Allowance Proceedings, 17 U. Haw. L. Rev. 1, 48−49 (1995) (stating there is no time limit to bring reconsideration claim). Back To Text

[155] . See 11 U.S.C. § 1101(2) (1994) (defining substantial consummation to be "(A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan."); see also Jorgensen v. Federal Land Bank of Spokane (In re Jorgensen), 66 B.R. 104, 107 (B.A.P. 9th Cir. 1986) (explaining concept of substantial consummation usually arises in issues of plan modification and binding effect of confirmed plan); In re Heatron, Inc., 34 B.R. 526, 527, 529 (Bankr. W.D. Mo. 1983) (finding plan of debtor had not been substantially consummated where only 53% of total amount due was transferred to creditors because "substantial" suggests more than halfway). Back To Text

[156] . See 11 U.S.C. § 502(j) (1994) (stating "[a] claim that has been allowed or disallowed may be reconsidered for cause."); see also In re Excello Pres, Inc., 83 B.R. 539, 541 (Bankr. N.D. Ill. 1988) (indicating creditor "must assert fraud, newly discovered evidence, mistake, excusable neglect, or any of the other matters pertinent to a Fed.R.Civ.P. 60(b) motion to assert 'cause' for reconsideration under Code section 502(j)."); Karen−Richard Beauty Salon, Inc. v. Fontainebleau Hotel Corp., 36 B.R. 896, 898 (Bankr. S.D. Fla. 1983) (observing what constitutes "cause according to the equities of the case" is not clear, however, grounds alleged need not be sufficient to mandate disallowance of claim). Back To Text

[157] . See 11 U.S.C. § 502(j) (1994) (stating "[a] reconsidered claim may be allowed or disallowed according to the equities of the case."); see also Kirwan v. Vanderwerf (In re Kirwan), 164 F.3d 1175, 1177 (8th Cir. 1999) (stating court need not wait for formal motion to reconsider claim, but may do so sua sponte); In re Schaffer, 173 B.R. 393, 394−95 (Bankr. N.D. Ill. 1994) (suggesting that in determining reconsideration of claim court should weigh "the extent and reasonableness of any delay, prejudice to the debtor and other creditors, effect on administration, and the moving creditor's good faith."). Back To Text

[158] . See Bittner v. Borne Chem. Co. Inc., 691 F.2d 134, 135 (3d Cir. 1982) (expressing belief that Congress intended estimation to be carried out initially by bankruptcy judges using whatever method is best suited to facts at hand); see also In re Rusty Jones, Inc., 143 B.R. 499, 505 (Bankr. N.D. Ill. 1992) (indicating bankruptcy judges should use whatever method necessary in estimating claims); David S. Salsburg & Jack F. Williams, A Statistical Approach To Claims Estimation In Bankruptcy, 32 Wake Forest L. Rev. 1119, 1130 (1997) (stating bankruptcy court gives wide discretion in estimating value of claim). Back To Text

[159] . See 11 U.S.C. § 502(e)(1)(B) (1994) providing that:

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

...

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or.…)

Id.; see also In re New York Trap Rock Corp., 153 B.R. 648, 651 (Bankr. S.D.N.Y. 1993) (indicating contingent CERCLA claim is not direct claim, but depends rather on co−liability of parties is disallowable for reimbursement under section 502(e)(1)(B) of Bankruptcy Code); Al Tech Specialty Steel Corp. v. Allegheny Int'l, Inc. (In re Allegheny Int'l, Inc.), 126 B.R. 919, 921 (Bankr. W.D. Pa. 1991) (listing three elements statute generally requires: "(1) the claim must be one for reimbursement or contribution; (2) the entity asserting the claim must be liable with the debtor on the claim of a creditor; and (3) the claim must be contingent at the time of its allowance or disallowance."). Back To Text

[160] . See, e.g., Syntex Corp. v. Charter Co. (In re Charter Co.), 862 F.2d 1500, 1504 (11th Cir. 1989) (finding in case of contingent CERCLA and state environmental law claims section 502(e)(1)(B) does not impermissibly contravene policies and goals underlying CERCLA); In re Pub. Serv. Co. of N.H., 129 B.R. 3, 4 (Bankr. D.N.H. 1991) (stating section 501(b) of Code provides that for purposes of distribution, claim for reimbursement or contribution allowed under section 502 shall be subordinated to all claims or interests are senior to or equal to claim or interest represented by security of debtor); In re Amatex Corp., 110 B.R. 168, 169−70, 172−73 (Bankr. E.D. Pa. 1990) (disallowing asbestos claims even though liability against claimant not yet established); In re Pettibone Corp., 110 B.R. 837, 846−47 (Bankr. N.D. Ill. 1990) (finding claim for surety of reimbursement is disallowed under section 502(e)(1)(B), but such claim is allowed as pre−petition claim at time it becomes fixed after commencement of case); In re Early & Daniel Indus., Inc., 104 B.R. 963, 968 (Bankr. S.D. Ind. 1989) (holding NACC's claim must be disallowed because claim is contingent in that NACC has not yet paid anything to LaSalle under Guaranty); In re Wedtech Corp., 87 B.R. 279, 283 (Bankr. S.D.N.Y. 1988) (establishing joint tortfeasors are within reach of section 502(e)(1)(B)); In re Provincetown−Boston Airlines, Inc., 72 B.R. 307, 310 (Bankr. M.D. Fla. 1987) (holding underwriter's claim is disallowed as contingent claim for contribution or reimbursement asserted by party which is liable with debtor). Back To Text

[161] . See S. Rep. No. 95−989, at 718 (1994). Back To Text

[162] . See 11 U.S.C. § 350 (1994) (stating "(a) [A]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case. (b) [A] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."); see also S. Rep. No. 95−989, at 692 (1994) (explaining although case may be reopened, laches may constitute bar to action that has been delayed too long); 3 Collier on Bankruptcy ¶ 350.02[1] at 350−53 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (stating one purpose of section 350 is to put end to administration of estate and although it authorizes reopening of case it is intended to reopen case only for newly discovered assets not scheduled or not known to trustee). Back To Text

[163] . See supra notes 118−22 and accompanying text. Back To Text

[164] . See 11 U.S.C. § 502(e)(1)(B) (1994); see also In re Eagle−Picher Indus., Inc., 235 B.R. 876, 879 (B.A.P. 6th Cir. 1999) (indicating bankruptcy courts are courts of equity with power to issue any order necessary to enforce provisions of Bankruptcy Code); In re Allegheny Int'l, Inc., 126 B.R. at 924 (suggesting creative result to problem of double recovery section 502(e)(1)(B) is meant to prevent and recommending creating trust to ensure distributions on debtor's claim would be used to clean up toxic sites). Back To Text

[165] . See Dant & Russell, Inc. v. Burlington N. R.R. Co. (In re Dant & Russel Inc.), 951 F.2d 246, 248 (9th Cir. 1991) (citing three requirements for claim to be disallowed under section 502(e)(1)(B)); see also In re A & H, Inc., 122 B.R. 84, 85 (Bankr. W.D. Wis. 1990) (suggesting three−part test for claim to be disallowed); In re Provincetown−Boston Airlines, Inc., 72 B.R. at 309 (reiterating three requirements for disallowing claim). Back To Text

[166] . See 11 U.S.C. § 502(c) (1994) (indicating any contingent or unliquidated claim, fixing or liquidation of which would cause delay, shall be estimated by court); see also In re Dant & Russell Inc., 951 F.2d at 248 (observing section 502(c) permits estimation of contingent and unliquidated claims in order to avoid delay in administration of estate); supra note 150−52 and accompanying text. Back To Text

[167] . See In re Dant & Russel Inc., 951 F.2d at 248. Back To Text

[168] . See id. at 247; see also In re Ecco D'Oro Food Corp., 249 B.R. 300, 302 (Bankr. N.D. Ill. 2000) (discussing barriers of section 502); In re Fox, 64 B.R. 148, 151 (Bankr. N.D. Ohio 1986) (discussing section 502(e)(1)(B)). Back To Text

[169] . See In re Dant & Russel, 951 F.2d at 248 (finding industrial company's CERCLA claim to be non−contingent). See generally In re Am. Cont'l Corp., 119 B.R. 216, 217−19 (Bankr. D. Az. 1990) (discussing contingent claims for reimbursement). Back To Text

[170] . See In re Dant & Russel, 951 F.2d at 248. But see In re Am. Cont'l Corp., 119 B.R. at 218−19 (working through contingency analysis). Back To Text

[171] . See id. at 248−49. Back To Text

[172] . See In re Dant & Russell, Inc., 951 F.2d at 250 (finding bankruptcy court did not have power under 42 U.S.C. § 9607(a) to force railroad to pay costs they had not yet incurred); 42 U.S.C. § 9607(a) (1994) (identifying covered persons, scope, recoverable costs and damages, interest rates, and comparable maturity date); see also id. § 9613(g)(2) (providing for declaratory actions to determine liability as to future cleanup costs). Back To Text

[173] . See In re Dant & Russel, Inc., 951 F.2d at 250. Back To Text

[174] . In Juniper Dev. Group v. Kahn, the defendant owned property upon which the Massachusetts Department of Environmental Quality Engineering discovered oil drums leaking a substance which contained petroleum based constituents. Defendant then filled chapter 11 proceeding. Plaintiff purchased land from defendant. Defendant then converted its chapter 11 proceeding to chapter 7. The EPA later discovered drums containing solvents and pesticides considered "hazardous substances" under CERCLA. 993 F.2d 915 (1st Cir. 1993); see also supra note 7 (citing 42 U.S.C. § 9601(14)) (defining "hazardous substance"). Back To Text

[175] . See supra note 158 (quoting 11 U.S.C. § 502(e)(1)(B) (1994)); see also Ralph Brubaker, Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non−Debtor Releases in Chapter 11 Reorganizations, 1997 U. Ill. L. Rev. 959, 1006 n.166 (1997) (observing section 502(e)(1)(B) "applies to contribution/indemnification rights arising from any type of co−liability, including both contract and tort"). But see William M. Winter, Note & Comment, Preserving the Benefit of the Bargain: The Equitable Result, 13 Bank. Dev. J. 543, 565−66 (1997) (suggesting applying "contingent claim" concept may be appropriate in discharging environmental tort liability, but inappropriate when used to discharge lease or contract claims). Back To Text

[176] . See supra note 158 (quoting section 502(e)(1)(B)); see also In re Hemingway Transp., Inc., 993 F.2d at 923 (stating section 502(e)(1)(B) is usually invoked against claims "arising from voluntary contractual relationships."); id. (citing H.R. Rep. No. 595 at 354 (1977) and S. Rep. No. 989 at 65 (1978) and noting sole purpose in enacting section 502(e)(1)(B) was to "to prevent[] competition between a creditor and his guarantor for the limited proceeds of the estate."). Back To Text

[177] . 11 U.S.C. § 502(e)(2) (1994). This statute provides:

A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of filing of the petition.

Id. Back To Text

[178] . In re Hemingway Transp., Inc., 993 F.2d at 924; see also 11 U.S.C. § 502(e)(1)(B) (1994) (disallowng contingency claims); id. § 502(e)(2) (allowing contingency claims to become fixed during case commencement). Back To Text

[179] . See In re Hemingway Transp., Inc., 993 F.2d at 920 (noting bankruptcy court had disallowed future response costs); see also Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.), 105 B.R. 171, 176−77 (Bankr. D. Mass. 1989) (disallowing future response costs); see also 11 U.S.C. § 502(e)(1)(B) (1994) (stating rule which disallows contingent claims for reimbursement). Back To Text

[180] . See In re Hemingway Transp, Inc., 105 B.R. at 176−78 (holding future cleanup costs to be considered contingent in costs rely upon speculated litigation by federal government). But see id. at 172 (noting plaintiffs claim was for "indemnification or contribution") (emphasis added); In re Wedtech Corp., 85 B.R. 285, 289 (Bankr. S.D.N.Y. 1988) (holding although claims for indemnification are in fact different from claims for contribution, claims for

indemnification seek reimbursement, and therefore also satisfy first element of three−part test); supra text accompanying note 164 (citing In re Dant & Russell 951 F.2d 246, 249 (9th Cir. 1991)) (describing elements of three part test). Back To Text

[181] . See Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.), 126 B.R. 656. (D. Mass. 1991) (consolidating appeals from several bankruptcy court decisions); id. at 661−62 (explaining plaintiff argued that because EPA had not filed proof of claim against defendant, and section 502(e)(1)(B) reads, "is liable" instead of "could be" liable, under a strict reading of the statute plaintiff and defendant would not be co−debtors, and therefore second element of test would not be met. Court held that because EPA has named both plaintiff and defendant as PRPs, both are co debtors even though EPA had not asserted its claim against defendant); see id. at 662 (noting plaintiff argued that it's future response costs were not "contingent," and that therefore third element of test had not been met. Court held that claims were contingent until paid and that therefore, claims for future responses were by nature contingent); see also supra note 164 and accompanying text (citing In re Dant & Russel, 951 F.2d. 246 (9th Cir. 1991) and describing elements of three part test). Back To Text

[182] . See In re Hemingway Transp., Inc., 993 F.2d at 926; see also id. at 923−24 (opining while section 502(e)(1)(B) is "a fair and reasonable measure when applied against a contract guarantor or surety," it can work unjust results when applied to CERCLA claims); id. at 926 (noting because any claim asserted by EPA would be past bar date, possibility of "double dipping" would be very remote). But see Winter, supra note 174 at 565−66 (suggesting applying "contingent claim" concept may be appropriate in discharging environmental tort liability, but inappropriate when used to discharge lease or contract claims). Back To Text

[183] . 11 U.S.C. § 501(b) (1994) (providing "[i]f a creditor does not timely file a proof of such creditor's claim, an entity that is liable to such creditor with the debtor, or that has secured such creditor, may file a proof of claim"). Back To Text

[184] . Id. § 501(c) (providing "[i]f a creditor does not timely file a proof of such creditor's claim, the debtor or the trustee may file a proof of such claim"). Back To Text

[185] . The court in In re Hemingway Transp., Inc. held that if the trustee filed a timely surrogate claim and plaintiff sought allowance of it's "direct" claim, remand court would consider whether plaintiff could assert "innocent landowner" defense under 42 U.S.C. § 9601(35)(B). If such defense is permitted, plaintiff's right to contribution should be considered administrative expense. However if plaintiff's defense fails, claim should not be disallowed unless plaintiff incurs response costs by time claim is considered. If trustee does not to file surrogate claim under section 501(b), it waives any section 502(e)(1)(B) objection to plaintiff's claim against chapter 7 estate. Under this scenario, evidence of plaintiff's anticipated response costs should be admitted and allowed as administrative expense of chapter 11 estate. See In re Hemingway Transp., Inc., 993 F.2d at 936; see also Franklin County Convention Facilities Auth. v. American Premiere Underwriters Inc., 240 F.3d 534, 547 (6th Cir. 2001) (holding sublessee not innocent landowner within meaning of statute). Back To Text

[186] . In Al Tech Specialty Steel Corp. v. Allegheny Int'l, Inc.., the debtor sold steel plants to purchaser. The purchase agreement contained indemnity and non−assignability clauses. The purchaser sold plants to corporation with which purchaser merged, whereby newly formed corporation (claimant) became owner. The claimant then filed proof of claim against debtor's estate alleging past and future response costs for investigation and remediation of hazardous wastes located at plants. Claimant argued that waste accrued during debtor's ownership, and that debtor was liable under CERCLA, New York Oil Spill Prevention, Control and Compensation Act, and indemnity provision of purchase contract. Debtor moved for summary judgment and disallowance of claim. The claimant filed cross−motion stating that part of its claim was not dischargeable because it arose after bankruptcy. The bankruptcy court granted debtor's motion for summary judgment and denied claimant's cross−motion. The court held that non−assignment clause voided indemnity provision, that section 502(e)(1)(B) barred claim, and that claims arose pre−petition and were therefore dischargeable in bankruptcy. Al Tech Specialty Steel Corp. v. Allegheny Int'l, Inc. (In re Allegheny Int'l, Inc.), 126 B.R. 919, 920 (W.D. Pa. 1991), aff'd without op. 950 F.2d. 721 (3d Cir. 1991); see also In re Allegheny Int'l, Inc. 1990 Bankr. LEXIS 2946 * 7−8 (Bankr. W.D. Pa. 1990) (granting debtor's motion for summary judgment). Back To Text

[187] . In In re Allegheny Int'l, Inc., the dispute was based on second factor of three part test. The claimant, relying on 42 U.S.C. § 9607(a)(4)(B), argued that it's claim was direct, and did not involve a mutual creditor. Section 9607(a) provides, in pertinent part that "[t]he owner and operator of a vessel or a facility, [and] 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 . . shall be liable for (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; [and] (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan." In re Allegheny Int'l, Inc., 126 B.R. at 921, 923; see also Syntex Corp v. Charter Co. (In re Charter Co.), 862 F.2d 1500, 1503 (11th Cir. 1989) (stating, in dicta, voluntary actions to reduce or eliminate toxic waste are not within section 502(e)(1)(B)). But see In re Allegheny Int'l, Inc., 126 B.R. at 923 (relying on In re Wedtech Corp., 87 B.R. 279 (Bankr. S.D.N.Y. 1988), debtor contended EPA and New York Department of Environmental Conservation were creditors to whom both parties were liable); In re Wedtech Corp., 87 B.R. 279, 282−84 (Bankr. S.D.N.Y. 1988) (holding accounting firm's claim against debtor's estate for firm's liability to debtor's shareholders resulting from fraudulent misrepresentations made by debtor to be excluded by section 502(e)(1)(B)). Back To Text

[188] . See In re Allegheny Int'l, Inc., 126 B.R at 924 (citing Bitter v. Bourne Chem. Co., 691 F.2d 134 (3d Cir. 1982) and noting "bankruptcy court has broad discretion in estimating contingent claims,"); see also In re A.H. Robbins Co., 88 B.R. 742, 752 (E.D. Va. 1988) (holding court has jurisdiction to order funds in trust to be available for payment of contingent claims), aff'd, 880 F.2d 694 (4th Cir. 1989); C.R. Bowles, Toxins−Are−Us: Norpak v. Eagle−Picher Industries: Rewriting or Summarizing Hemingway Transport?, 1998 ABI JNL. LEXIS 159 *3 (May 1998) (suggesting court strayed from plain meaning of statute in order to reach result more in keeping with rationale behind statute). In In re Allegheny Int'l, Inc., the claimant raised an alternative to its section 502(e)(1)(B) theory. The claimant contended that "numerous distinct areas of contamination" at its plants constituted separate facilities under CERCLA, alleged that no pre−petition response costs accrued at some of these facilities, and contended that therefore as to these facilities future response costs should pass through bankruptcy because no pre−petition CERCLA claim arose. The bankruptcy court dismissed on merits. The district court remanded for further findings of fact because the bankruptcy court did not discuss whether each site incurred response costs, and held that if any costs at given facility were incurred pre−petition, then all costs pertaining to that facility would be dischargeable, but if there were not any pre−petition response costs for facility, then a dischargeable claim would not arise. 126 B.R at 924 Back To Text

[189] . See Fine Organics Corp. v. Hexcel Corp. (In re Hexel Corp.), 174 B.R. 807 (Bankr. N.D. Cal. 1994); see also id. at 809 (stating pertinent claim in this case was not brought under CERCLA, but under New Jersey Spill Compensation and Control Act (the "Spill Act"), N.J.S.A. 58:10−23.11 et seq., as amended by the Industrial Site Recovery Act ("ISRA"), P.L. 1993, c.139); id. at 811 (noting like section 9613(f) of CERCLA, § 58:10−23.11f.a.(2) of Spill Act refers to claims it authorizes as "contribution" claims); id. at 811 (noting § 58:10−23.11g.c.(1) creates private right of action for reimbursement by private party who cleans up contaminated property although not legally obligated to do so similar to that created by section 9607(a) of CERCLA). Back To Text

[190] . See In re Hexel Corp., 174 B.R. at 812 (suggesting court in Key Tronic indirectly questioned holding in Dant & Russell); see also Dant & Russell, Inc. v. Burlington N. R.R. Co. (In re Dant & Russell, Inc.), 951 F.2d 246, 248 (9th Cir. 1991) (refusing to disallow claim relating to future remediation expenses absent compulsion). Cf. Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1966 (1994) (stating, in dicta, that potentially co−liable parties that perform non−compulsory remediations may have claims for implied and express contribution under section 9607(c) and 9613(f)(1), respectively). Back To Text

[191] . See In re Hexel Corp., 174 B.R. at 812 (opining that if debtor had not been ordered to perform clean−up, claimant's contention that it was not co−liable might prevail); see also id. at 812 n. 14 (noting court in Dant & Russell held that section 9607(a) of CERCLA "did not permit a monetary judgment for future expense costs, that it only permitted declaratory relief, establishing and apportioning liability for costs that have not yet been incurred," and opining that claimants cause of action under Spill Act should be disallowed for same reason); In re Dant & Russell, Inc., 951 F.2d at 248 (refusing to disallow claim relating to future remediation expenses absent compulsion). Back To Text

[192] . See In re Hexel Corp., 174 B.R. at 813 (noting Allegheny had been criticized); see also In re Cottonwood Canyon Land Co., 146 B.R. 992, 996 (Bankr. D. Colo. 1992) (criticizing Allegheny); cf. In re Eagle Pitcher Indus., 164 B.R. 265, 270−71 (Bankr. W.D.Ohio 1994) (following In re Cottonwood Canyon Land Co.). Back To Text

[193] . See In re Hexel Corp., 174 B.R. at 813 (citing In re Cottonwood Canyon Land Co) (criticizing Allegheny's potential in subjecting debtor to double liability); see also In re Cottonwood Canyon Land Co., 146 B.R. at 996 (concluding that, absent co−liability, need for such trust would not arise). But see John C. Ryland, When Policies Collide: The Conflict Between the Bankruptcy Code and CERCLA, 24 Mem. St. U.L. Rev. 739, 771 (1994) (opining "Cottonwood Canyon represents the far end of the dischargeability approaches favoring debtors."). Back To Text

[194] . See Fine Organics Corp. v. Hexcel Corp. (In re Hexel Corp.), 174 B.R. 807, 813 (Bankr. N.D. Cal. 1994); see also Al Tech Specialty Steel Corp. v. Allegheny Int'l, Inc. (In re Allegheny Int'l, Inc.), 126 B.R. 919, 923−24 (W.D. Pa. 1991) (focusing on liability to contractors as opposed to liability to government), aff'd without op. 950 F.2d. 721 (3d Cir. 1991); Stanley M. Spracker & James D. Barnette, The Treatment of Environmental Matters in Bankruptcy Cases, 11 Bank. Dev. J. 85, 122 (1994−95) (alleging Allegheny court "circumvented § 502(e)(1)(B)"). Back To Text

[195] . In re Allegheny Int'l, Inc., 126 B.R. at 923 (distinguishing cost owed to or incurred from third party); see Dant & Russel, Inc. v. Burlington N.R.R. Co. (In re Dant & Russell, Inc.), 951 F.2d 246, 248−49 (9th Cir. 1991) (holding claims future cleanup not ordered by the EPA can not be disallowed); Cottonwood Canyon Land Co., 146 B.R. 992, 994 (Bankr. D.Colo. 1992) (disallowing claims for future remediation costs). Back To Text

[196] . See In re Allegheny Int'l, Inc., 126 B.R. at 923; see also 42 U.S.C. § 9607(a)(4)(B) (1994) providing in pertinent part:

The owner and operator of a vessel or facility,[and] 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 . . . shall be liable for

(B)any other necessary costs of response incurred by any other person consistent with the national contingency plan.

Id. Back To Text

[197] . 144 B.R. 765 (Bankr. S.D. Ohio 1992). Back To Text

[198] . See id. at 768−69; see also 11 U.S.C. § 502(e)(1)(B) (1994) providing in pertinent part:

Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured, the claim of a creditor, to the extent that−

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution[.]

Id. Back To Text

[199] . See In re Eagle−Picher Indus. Inc., 144 B.R. at 769−70. Back To Text

[200] . See In re Charter, 862 F.2d. 1500, 1503−04 (11th Cir. 1989) (holding contribution claims contingent during pendency of bankruptcy will be disallowed). Back To Text

[201] . 4 Collier on Bankruptcy ¶ 502.06, at 502−58−66 (15th ed. rev. 1996) (comparing goal of 11 U.S.C. § 502(e)(1)(B) to disallow contingent claims with 11 U.S.C. § 502(c), which provides for estimation of contingent claims). Back To Text

[202] . See In re Eagle−Picher, 144 B.R. at 770 (disallowing claims for future cleanup costs); In Re Nat'l Gypsum Co., 139 B.R. 397, 405 (N.D. Tex. 1992) (holding all future response and natural resource damage costs based on pre−petition conduct can be fairly contemplated by parties). Back To Text

[203] . See In re Eagle−Picher Indus., Inc., 164 B.R. 265, 272−73 (S.D. Ohio 1994) (holding double liability precluded allowance of reimbursement claims, creditors were not entitled to claims estimation and denied establishment of trust for debtor's future response costs). Back To Text

[204] . 11 U.S.C. § 502(e)(1)(B) (1994) provides in pertinent part:

Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured, the claim of a creditor, to the extent that−

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution[.]

Id. Back To Text

[205] . See In re Eagle−Picher Industries, Inc., 131 F.3d 1185, 1188−89 (6th Cir. 1997) (remanding since government inaction should not permit debtor's to escape from liability of environmental cleanup laws) Back To Text

[206] . See Norpak Corp. v. Eagle−Picher Indus. Inc. (In re Eagle−Picher Indus., Inc.), 235 B.R. 876, 879 (6th Cir. BAP 1999) (stating bankruptcy courts are courts of equity with broad powers to fashion creative resolutions to balance interests of affected parties). Back To Text

[207] . Id. at 879−80 (referring to In re Eagle−Picher Indus., Inc., 144 B.R. 765 (Bankr. S.D. Ohio 1992)), aff'd, 164 B.R. 265 (S.D. Ohio 1994)). Back To Text

[208] . 11 U.S.C. § 502(e)(1)(B) (1994). Back To Text

[209] . See Notes of Committee on the Judiciary, S. Rep. No. 95−989. Back To Text

[210] . See Al Tech Specialty Steel Corp. v. Allegheny Int'l, Inc. (In re Allegheny Int'l, Inc.), 126 B.R. 919 (W.D.Pa. 1991). Back To Text

[211] . See, e.g., In re Eagle−Picher Indus., Inc., 131 F.3d 1185 (6th Cir. 1997). Back To Text

[212] . 11 U.S.C. § 502(e)(1)(B) (1994). Back To Text

[213] .Id. § 503(b) (explaining under 11 U.S.C. § 507 expenses and claims are assigned priority in order in which they are listed, first of which are administrative expenses allowed under 11 U.S.C. § 503(b)). Back To Text

[214] . See 11 U.S.C. § 502(c) (1994) (stating "[t]here shall be estimated for purpose of allowance under this section – (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or (2) any right to payment arising from a right to an equitable remedy for breach of performance."); see also In re Mitchell, 255 B.R. 345, 359 (Bankr. Mass. 2000) (holding decided claims are neither contingent nor unliquidated and therefore not within Court's estimation powers); In re Nat'l Gypsum Co., 139 B.R. 397, 405 (Bankr. N.D.Tex. 1992) (stating Bankruptcy Code requires estimation of all contingent and unliquidated claims which would unduly delay case administration). Back To Text

[215] . See 11 U.S.C. § 1123(a)(5)(B) (1994) (providing "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall – (5) provide adequate means for the plan's implementation, such as – (B) transfer of all or any part of the property of the estate, to one or entities, whether organized before or after the conformation of such plan."); see

also United States v. Energy Resources Co., Inc., 495 U.S. 545, 549 (1990) (holding courts can create trusts if it determines it is necessary to ensure reorganization plan succeeds); Maryland v. Antonelli Creditors' Liquidated Trust, 123 F.3d 777, 785 (4th Cir. 1997) (stating any adequate means of distribution may be used as long as it is appropriate and not inconsistent with Bankruptcy Code). Back To Text

[216] . 11 U.S.C. § 1129(a)(7)(A) (1994) (providing "[t]he court shall confirm a plan only if all of the following requirements are met: (7) With respect to each impaired class of claims or interests – (A) each holder of a claim or interest of such class – (i) has accepted the plan; or (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date."); see In re Daniel B. Zaleha, 1995 Bankr. LEXIS 2167,*3−4 (Bankr. Idaho 1995) (rejecting several proposed plans because they would allow payments to debtor prior to full payment of qualified creditors); In re Becker, 38 B.R. 913, 916 (Bankr. Minn. 1984) (rejecting proposed plan because it would allow payments to creditors barred by Bankruptcy Code). Back To Text

[217] . 11 U.S.C. §§ 1129(a)(1)−(3) (1994) setting forth:

[t]he court shall confirm a plan only if all of the following requirements are met: (1) The plan complies with the applicable provisions of this title. (2) The proponent of the plan complies with applicable provisions of this title. (3) The plan has been proposed in good faith and not by any means forbidden by law.

Id.; see In re EBP, Inc., 172 B.R. 241, 243 (Bankr. N.D. Ohio 1994) (stating section 1123 requires each particular class of claims is treated equally); see also In re S & W Enterprise, 37 B.R. 153, 157 (Bankr. N.D. Ill. 1984) (stating court has obligation to examine all prerequisites listed in section 1123 prior to approving reorganization plan). Back To Text

[218] . 11 U.S.C. § 502(e)(1)(B) (1994) providing:

Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, that court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that – (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution

Id.; see In re Cresent Lending Corp., 1990 U.S. Dist. LEXIS 12563,*1 (Bankr. AZ 1990) (disallowing claim pursuant to section 502); see also In re Ace Finance Co., 59 B.R. 667, 670 (Bankr. N.D. Ohio 1986) (stating section 502 requires proper debtors filing proof of claim on behalf of creditor have surety nexus with debtor). Back To Text

[219] . 11 U.S.C. § 502(j) (1994) (providing "[a] claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case."); see Turney v. Federal Deposit Ins. Corp., 18 F.3d 865, 866−67 (10th Cir. 1994) (discussing reconsideration of claim which was increased by over $400,000); see also Gardner v. Schiro, 1997 U.S. Dist. LEXIS 18640,*9 (N.D. Tex. 1997) (restating court's authority to reconsider orders pursuant to section 502). Back To Text

[220] . See In re Harvard Indus., Inc., 138 B.R. 10, 14 (Bankr. D. Del. 1992) (agreeing with parties that establishing trust fund was best solution). Back To Text

[221] . See Al Tech Specialty Steel Corp. v. Allegheny Int'l., Inc. (In re Allegheny Int'l., Inc.), 126 B.R. 919, 921 (Bankr. W.D. Pa. 1991) (adopting three elements for valid contingent claims: (1) must be for reimbursement or contribution, (2) party asserting must be liable with debtor, and (3) claim must be contingent when allowed or disallowed); see also In re A & H, Inc., 122 B.R. 84, 85 (Bankr. W.D. Wis. 1990) (adopting three rules used by In re Provincetown court); In re Provincetown−Boston Airlines, Inc., 72 B.R. 307, 309 (Bankr. M.D. Fla. 1987) (stating three elements necessary for application of 11 U.S.C. § 502(e)(1)(B)). Back To Text

[222] . See 11 U.S.C. § 502(e)(1)(B) (1994) providing:

Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, that court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that – (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution

Id.; see also In re Harvard Indus., 138 B.R. at 13 (citing three step analysis used by Allegheny court). Back To Text

[223] . See id. at 14 (establishing trust fund for distribution); see also In re Allegheny Int'l., Inc., 126 B.R. at 921 (discussing three requirements). Back To Text

[224] . See In re Harvard Indus., 138 B.R. at 14; see also Menard−Sanford v. Mabey (In re A.H. Robins Co., Inc.), 880 F.2d 694, 699 (4th Cir. 1989) (stating district court properly used expert witnesses to establish claim estimates during estimation hearing); Bittner v. Borne Chemical Co., Inc., 691 F.2d 134, 135 (3d Cir. 1982) (directing bankruptcy court to hold estimation hearing). Back To Text

[225] . 11 U.S.C. § 502(e)(1)(B) (1994) providing in pertinent part:

Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, that court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that – (B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution

Id.; see In re Cresent Lending Corp., 1990 U.S. Dist. LEXIS 12563, *1 (Bankr. Ariz. 1990) (disallowing claim pursuant to section 502); see also In re Ace Finance Co., 59 B.R. 667, 670 (Bankr. N.D. Ohio 1986) (stating section 502 requires proper debtors filing proof of claim on behalf of creditor have surety nexus with debtor). Back To Text

[226] . See 11 U.S.C. § 502(e)(1)(B) (1994). Back To Text

[227] . See H.R. Rep. No. 253, 99th Cong., 1st Sess. 100, reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2882−83 stating:

This section established a series of provisions designed to encourage and facilitate negotiated private party cleanup of hazardous substances in those situations where negotiations have a realistic chance of success. The Committee believes that encouraging such negotiated cleanups will accelerate the rate of cleanup and reduce its expense by tapping the technical and financial resources of the private sector.

Id.; see also Syntax Corp. v. Charter Co. (In re Charter Co.), 862 F.2d 1500, 1503 (11th Cir. 1989) (stating purpose behind CERCLA to promote expeditious and thorough cleanup). Back To Text

[228] . 11 U.S.C. § 502(e)(1)(B) (1994). Back To Text

[229] . See Syntax Corp. v. The Charter Co. (In re Charter Co.), 86 F.2d 1500, 1504 (11th Cir. 1989) (concluding prohibition of contingent claims by 11 U.S.C. § 502(e)(1)(B) promotes expeditions cleanup, pursuant to CERCLA). See generally J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 264 (6th Cir. 1985) (explaining CERCLA's essential function is "the prompt cleanup of hazardous waste sites" (quoting Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985)). Back To Text

[230] . See, e.g., In re Dow Corning Corp., 211 B.R. 545, 599 (Bankr. E.D. Mich. 1997) (outlining plan adopted in previous mass tort cases for estimating total liability amount, creating trust and determining individual tort claim value); Menard−Sanford v. Mabey (In re A.H. Robins Co.), 880 F.2d 694, 696−97 (4th Cir. 1989) (upholding bankruptcy court decision creating trust for Court's total claims estimation amount and waiving claims against Robins whether estimated amount paid creditors' full amount or not); MacArthur Co. v. Johns−Manville Corp., 837 F.2d 89, 93 (2d Cir. 1988) (holding bankruptcy court had authority to channel claims arising under insurance policies to settlement fund in asbestos actions). Back To Text

[231] . See 11 U.S.C. § 363(f) (1994) providing:

The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if – (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is a bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

Id.; see also 11 U.S.C. § 1123(a)(5)(D) (1994) stating:

Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall – (5) provide adequate means for the plan's implementation, such as – (D) sale for all or any part of the property of the estate, either subject to or free from any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate

Id.; 11 U.S.C. § 1141(c) (1994) explaining:

Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

Id. Back To Text

[232] . See U.S. Conference of Mayors, Recycling America's Land: A National Report on Brownfields Redevelopment, Volume III, February, 2000. Back To Text