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## Bankruptcy, Contempt, and the Durability of Environmental Obligations


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### I. INTRODUCTION

No one likes to see a polluter avoid its obligation to clean up its messes. When a forced cleanup will prevent the polluter from complying with its other obligations, thereby leaving its creditors—employees, trading partners, distributors—high and dry, judgment gets trickier. The very importance of this issue has complicated the development of a rational and consistent approach to how injunctions are treated in bankruptcy. The issue of *how* an injunction should be treated in bankruptcy is often conflated with the issue of whether a cleanup injunction should escape treatment altogether. Injunctions relating to other substantive areas have the potential to raise the identical issue, but

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environmental claims have a strong hold on our imagination, and therefore our analysis, given their particular blend of individual and collective harm, horrific examples of environmental degradation, and readily-identifiable bad guys (at least sometimes). This issue remains vitally important, because 2009 and 2010 saw massive settlements of environmental claims from companies in bankruptcy such as American Smelting and Refining Company LLC, Tronox, Inc., General Motors, and Chemtura Corp.[1]

A quarter century ago, the United States Supreme Court held in *Ohio v. Kovacs* that an individual debtor's obligation to perform an environmental cleanup was a debt that could be handled in his bankruptcy.[2] Prior to the bankruptcy, the State of Ohio had secured a cleanup injunction against the debtor, and then obtained the appointment of a receiver over his assets when he refused to comply.[3] Simply put, the Court held that the State of Ohio was really seeking the payment of money so that the cleanup would get done and that this right to payment was a "claim" in bankruptcy (and therefore could be discharged).[4]

In 2009, Apex Oil Company, Inc., faced with the specter of an extremely expensive forced cleanup, appealed to the United States Court of Appeals for the Seventh Circuit in *United States v. Apex Oil Co.* claiming that its obligation under an environmental statute was discharged in a prior bankruptcy.[5] Recognizing that the relevant statute did not give the government the option of seeking a monetary award—a cleanup injunction was the only option—the Seventh Circuit distinguished *Kovacs* and held that this obligation did *not* give rise to a "claim," and therefore it was not affected by the bankruptcy.[6]

Although these cases can be reconciled in technical terms—one dealt with the seizure of assets, the other with an injunction—Judge Posner's opinion in *Apex Oil* was striking in its failure to even consider that a few steps of civil procedure (in response to stalling) could convert the requirement for performance into the seizure of assets necessary to perform. Under *Kovacs*, the obligation would then be a claim. Posner makes the definition of a claim turn on the timing and procedural posture

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1. *Cases and Settlements*, EPA, http://cfpub.epa.gov/compliance/cases (last visited Mar. 16, 2011).
2. 469 U.S. 274 (1985). Technically, the Court held that the State of Ohio had a *claim* in the individual's bankruptcy. But as *debt* is defined in the Bankruptcy Code as being liability on a *claim*, the holding can permissibly be broadened.
3. *Id.* at 276.
4. *Id.* at 283.
5. 579 F.3d 734 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010).
6. *Id.* at 738.

of the action, rather than the nature of the underlying obligation.[7] *Apex Oil* entirely ignored the function of a claim when it interpreted the statutory definition of a claim.

Congress intended Chapter 7 Bankruptcy (Chapter 7) to fairly distribute debtors' assets to creditors; the Bankruptcy Code provides for "holders of claims" to receive a distribution. A claim, in turn, has a two-part definition: (1) a "right to payment," and (2) a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment."[8] The definition of "claim" needs the second part of the definition in order to ensure that all entities to whom the debtor is obligated can share in the assets of the bankruptcy estate. If an entity can show that it would have a right to payment from the debtor in the event the debtor failed to perform the equitable remedy, it has a claim in bankruptcy.

The correct rule here is actually very straightforward: a claim is a right against the debtor that is capable of sharing in the assets of the bankruptcy estate. In the negative, an obligation does not give rise to a claim if it does not give the obligee a right to the debtor's property.

Posner's opinion provides bizarre incentives to Congress and state legislatures. If something is really important—say, environmental remediation—Congress should be encouraged to give the executive branch numerous remedies to choose from, because the appropriate remedy may vary case-by-case. Oddly, under *Apex Oil*, the way to ensure that a remedy passes through a reorganization unscathed is to *limit* the available remedies, and to limit the remedies to the least flexible; such an injunction, taking *Apex Oil* at its word, would yield the government nothing if a subject corporation filed for liquidation under Chapter 7, even if it had significant assets that would be distributed to creditors.

This Article will examine an alternative—what I call "contempt analysis"—that provides a more coherent analysis for determining how an injunction should be treated in bankruptcy. Under this analysis, a court uses the contempt power as a lens to identify if compliance with an injunction necessarily turns on whether the defendant has assets. If so, the injunction, in essence, gives a plaintiff a right to the debtor's assets and is a "claim" within the meaning of the Bankruptcy Code.

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7. *Id.* at 735-36.
8. 11 U.S.C. § 101(5) (2006).

Although a petition for *certiorari* in the *Apex Oil* case was denied by the Supreme Court,[9] a circuit split remains, leaving ample room for the courts to clarify how a bankruptcy affects a debtor's environmental obligations—and injunctions in general.

## II. BANKRUPTCY: THE IMPORTANCE OF HAVING A CLAIM—OR NOT

A claim is the basic currency of bankruptcy. One way to think of bankruptcy is as a process for gathering up and categorizing all claims against a debtor, and then divvying up the debtor's assets (if a Chapter 7) or the debtor's future income (if a Chapter 11) among the various claims according to a priority scheme. A claim is a creditor's ticket into the bankruptcy proceedings. Without a claim, a creditor has no right to participate in the distribution of the debtor's assets or receive payment through a plan of reorganization.

The Bankruptcy Code throws the doors open wide and defines "claim" very broadly. The definition is found in 11 U.S.C. § 101(5), which states:

> The term "claim" means—
>
> (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.

Of course, creditors may not want to have anything to do with the bankruptcy. As enticing as the potential for sharing in the debtor's assets or earnings may be, claims are often paid out at a fraction of their face value, and the end of the bankruptcy process generally results in those claims being discharged.[10]

This tension is easily illustrated by considering the timing of when a nascent or potential right against the debtor becomes a claim. In the case of a reorganization, a creditor would much prefer to enforce its rights against the reorganized debtor (with other creditors' claims discharged) than have the debtor's obligation discharged in return for partial payment. Therefore, creditors often have an incentive to argue that they do not have a claim *yet*. If a claim arises before the bankruptcy is filed, the

9. Apex Oil Co., Inc. v. United States, 131 S. Ct. 67 (2010) (denying petition for writ of certiorari).

10. Although a corporate entity does not receive a discharge in Chapter 7, 11 U.S.C. § 727(a), only a corporate shell devoid of assets will remain.

claim will be treated according to the terms of a confirmed plan of reorganization, and the claim will be discharged. If a claim does not arise until after a bankruptcy proceeding has concluded, it will be unaffected by the bankruptcy. Such postbankruptcy claims will receive much more favorable treatment than comparable claims that arose earlier, because they will have much less competition for the debtor's assets.[11]

But sometimes a creditor may prefer to be treated in bankruptcy. Without a claim, the creditor has no right to share in the distribution of the estate's assets. A corporate entity in Chapter 7 illustrates this most starkly, because the corporation's assets will be liquidated. There will be nothing left with which to generate future income, and competing claims are not discharged, leaving the creditor in a very poor position indeed. Commentators have long recognized this tension in the environmental arena,[12] and a few courts have as well.[13] Although debtors always want to discharge claims and creditors always want to be paid as much as possible, the timing issue cannot be reduced to a dichotomy along environmental lines.[14]

A usual fact pattern that illustrates this issue of timing involves an entity that caused contamination and then filed for bankruptcy. Because the environmental contamination may not be readily discernable—possibly even to the polluter—the proof of claim deadline passes, and the debtor reorganizes and, upon confirmation of a plan, is discharged from all claims pursuant to 11 U.S.C. § 1141(d). Years later, the government or another entity performs a cleanup and sues the debtor for the cleanup costs. The debtor's defense, of course, is that whatever liability it had for its prebankruptcy conduct was discharged.

Both case law and commentators have developed interesting theories and tests to address this issue of when a claim arises.[15] The line of cases is somewhat in disarray. Many courts, spurred by the notice

11. *See, e.g.*, David Gray Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability, and Toxic-Waste Cleanup*, 50 LAW & CONTEMP. PROBS. 119 (1987) (discussing the fairness of intertemporal inequality in the claims process).

12. *See, e.g.*, Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199 (1984).

13. *See, e.g.*, Ohio v. Kovacs, 469 U.S. 274, 286 (1985) (O'Connor, J., concurring); United States v. Apex Oil Co., 579 F.3d 734, 738-39 (7th Cir. 2009).

14. There is another path, of course. If a claim arises while the bankruptcy case is pending, it may be treated as an administrative expense—those expenses necessary to keep the estate afloat during the proceeding—and given priority status. *See* 11 U.S.C. §§ 503(b), 507(a)(2); *see also In re* Am. Coastal Energy Inc., 399 B.R. 805 (Bankr. S.D. Tex. 2009).

15. *E.g.*, Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy*, 12 AM. BANKR. INST. L. REV. 331, 380 (2004).

requirements of due process, ask whether the parties could "fairly contemplate" the liability at the time of the bankruptcy.[16]

Other than being the context in which this issue has frequently arisen (and been litigated), there is nothing particularly "environmental" about this issue of when a claim arises. It shares more in common with latent mass tort claims[17] than it does with what I want to discuss here.

The line of cases beginning with *Kovacs* and traveling right up to *Apex Oil* deals with whether an obligation is a "claim" in bankruptcy; but it goes a step further and asks whether a particular environmental obligation gives rise to a claim at all—*ever*—or whether the environmental obligation, regardless of when it comes into being, is immune from bankruptcy. Although everyone agrees that the relevant criterion is found right in the statute—whether the debtor's failure to perform an equitable remedy "gives rise to a right to payment"—the cases tend to frame the issue in three ways.

## III. FRAMING THE ISSUE

### A. *Focus on the Claimant*

The first and most predominant way to frame the issue is the one taken by both *Kovacs* and *Apex Oil*: does the claimant have the option to obtain money? Although the facts of *Kovacs* were briefly sketched out above, greater detail is warranted. In 1976, the State of Ohio sued Chem-Dyne Corp. and Chem-Dyne's chief executive officer, William Kovacs, for violating state environmental laws.[18] Chem-Dyne and other business entities operated an industrial and hazardous waste disposal site twenty miles north of Cincinnati, Ohio. Chem-Dyne and Kovacs settled: The court entered a stipulated order enjoining additional disposal, requiring a site cleanup, and ordering the payment of $75,000.[19] After Kovacs and the other defendants failed to comply with the injunction, the State of Ohio obtained the appointment of a receiver who took

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16. This line of cases begins with *In re Nat'l Gypsum Co.*, 139 B.R. 397 (Bankr. N.D. Tex. 1992).

17. Indeed, the leading case in the United States Court of Appeals for the Eleventh Circuit on this issue (which is used in most bankruptcy text books) involves Piper Aircraft Corporation's future liability for design flaws in the propellers of its airplanes (adopting a "relationship" test). Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp. (*In re* Piper Aircraft Corp.), 58 F.3d 1573 (11th Cir. 1995); *accord* JELD-WEN, Inc., f/k/a Grossman's Inc. v. Gordon Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114 (3d Cir. 2010).

18. *Kovacs*, 496 U.S. at 276.

19. *Id.*

possession of all property.[20] Kovacs filed a bankruptcy petition before the receiver completed its charge.[21]

The State of Ohio sought a declaration from the bankruptcy court that Kovacs' obligation to comply with the injunction was not a "claim," and therefore, it would not be affected by the bankruptcy. The bankruptcy court, the district court, the court of appeals, and the Supreme Court all held that it *was* a claim, and therefore dischargeable in bankruptcy, primarily because the State of Ohio "was seeking no more than a money judgment as an alternative to requiring Kovacs personally to perform the obligations imposed by the injunction."[22] The receiver had been charged with seizing assets and using them to pay for the cleanup.[23] In essence, the State of Ohio had chosen its remedy, which payment of money could satisfy. Because the State could choose to obtain money, the debtor's failure to perform an equitable remedy "[gave] rise to a right to payment."[24]

*Apex Oil* also used this same approach to framing the issue, asking whether the statute at issue gave the claimant the right to seek money.[25] In 1967, Clark Oil and Refining Corporation (Clark Oil) purchased an oil refinery in Hartford, Illinois, a town just upriver from East St. Louis.[26] Using a typical corporate maneuver, Apex Oil Company, a Missouri partnership, created a subsidiary, Apex Acquisition, Inc., which merged with Clark Oil in 1981 and took its name.[27] Both Apex Oil Company (the parent) and Clark Oil (the subsidiary that owned the Hartford refinery) filed for bankruptcy in 1987, along with over fifty affiliates.[28]

As part of the reorganization, the Hartford refinery was sold in a court-approved sale.[29] Clark Oil emerged from bankruptcy without the Hartford refinery and merged with a newly formed entity coincidentally called Apex Oil Company, Inc.[30] Although Apex Oil Company, Inc. was a brand new corporation, this new entity took on whatever liabilities of

20. *Id.*
21. *Id.*
22. *Id.* at 281.
23. *Id.* at 276.
24. *See* 11 U.S.C. § 101(5) (2006) (defining a claim).
25. *See* United States v. Apex Oil Co., 579 F.3d 734, 736 (7th Cir. 2009).
26. United States v. Apex Oil Co., No 05-CV-242-DRH, 2006 WL 2945402 (S.D. Ill. July 28, 2008).
27. *Id.* at *1. From a liability point of view, the substance of this transaction was that Clark Oil became a subsidiary of Apex Oil Company through a stock purchase. This is in contrast to an asset deal, in which a purchaser buys only the assets of a company (leaving behind the seller's liabilities in most cases).
28. *Id.*
29. *Id.*
30. *Id.* at *2.

Clark Oil that survived the bankruptcy, including any that arose from owning and operating the refinery from 1967 to 1988.[31] If one is tempted to think that no liabilities associated with owning and operating the refinery survived the bankruptcy—and this is a plausible position—consider what happened next.

This "New Apex Oil" concentrated its business on the marketing side of the oil and gas industry—wholesale sales, storage, and distribution of petroleum products—and remained a private company based in Missouri, with operations throughout the United States. Meanwhile, a hydrocarbon plume beneath the Hartford refinery continued to seep down into groundwater and to emit fumes into the surrounding neighborhoods.[32]

Later, the United States Environmental Protection Agency (EPA) brought an action against New Apex Oil under the Resource Conservation and Recovery Act (RCRA) seeking a cleanup injunction.[33] RCRA allows a suit against anyone who is responsible for contamination that poses a public health risk.[34] Such a suit can be against a current or former owner or operator of a site—anyone who is "responsible" for the problem.[35] As it pertains to suits by the United States, the statute provides:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.[36]

For present purposes, let us assume that Clark Oil was at least partially responsible for the contamination both before and after becoming a subsidiary of Apex Oil Company. Clark Oil owned and operated the refinery for over two decades, and the EPA presented

31. *See id.*
32. *Id.* at *9.
33. 42 U.S.C. § 6901 (2006).
34. *Id.* § 6972.
35. *Id.*
36. *Id.* § 6973(a).

evidence that at least some of the contamination occurred between 1967 to 1988. And remember, Clark Oil (after merging with Apex Acquisition, Inc.) merged with Apex Oil Company, Inc. The domino-row of corporate responsibility led right to Apex Oil Company, Inc., the "New Apex Oil." But for the intervening bankruptcy, this would have been an easy case.

There was, of course, an intervening bankruptcy, and at a time perfectly designed to tee up the precise issue I want to address in this Article. All activity necessarily took place prebankruptcy and the property was sold during bankruptcy. Neither New Apex Oil nor its corporate predecessors-in-interest owned or operated the refinery postbankruptcy. Did the bankruptcy have any effect on this legacy liability?

The Seventh Circuit held that it did not.[37] Although the court noted the necessity of looking beneath the surface—some equitable claims entitle the holder to obtain a money judgment in the event the equitable remedy is unobtainable, and some equitable remedies are actual orders to pay[38]—it looked only as far as the statutory language of RCRA:

> But [RCRA], which is the basis of the government's equitable claim, does not entitle a plaintiff to demand, in lieu of action by the defendant . . . payment of clean-up costs. It does not authorize *any* form of monetary relief. . . . Thus the government's equitable claim . . . entitles the government only to require the defendant to clean up the contaminated site at the defendant's expense.[39]

*Apex Oil* framed the issue around what the government could seek right out of the gates. It stopped short of appreciating the lifecycle of the government's right to an equitable remedy. Although the government's only remedy under RCRA was an injunction, this decision failed to inquire what would happen if New Apex Oil—like William Kovacs—had failed to comply. Instead, the decision focused on New Apex Oil's argument that its compliance was a purely economic affair. It did not own the property and it did not have the necessary cleanup experts on staff. Compliance would essentially consist of writing a very large check.

Unpersuaded, the Seventh Circuit noted that all injunctions impose some cost, and there was no sound basis to distinguish between a check written to an employee and one written to a contractor.[40] It failed to even

37. *See* United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009).
38. *Id.* at 736.
39. *Id.* at 736-37.
40. *Id.* at 738.

ask for what purpose that cost is imposed on the defendant, and whether the cost is incidental or central to the purpose of the equitable remedy.[41]

*Apex Oil* is not alone in failing to consider the lifecycle of an equitable remedy. In fact, it follows another Seventh Circuit case that dealt with, among other things, a RCRA injunction. Although the facts underlying *AM International, Inc. v. Datacard Corp.* are quite involved, they can by stylized for present purposes as follows: AM International, Inc. (AMI) contaminated property in Holmesville, Ohio, sold that property to another entity, and filed for bankruptcy.[42] Datacard Corporation purchased that other entity, thereby inheriting the contaminated property.[43] It pursued AMI, demanding that AMI remediate the property.[44] One of Datacard's legal bases was the citizen suit provision of RCRA, which allows a member of the public to seek an injunction requiring a responsible party to remedy environmental contamination that causes an imminent and substantial danger.[45]

The dispute eventually came before the Seventh Circuit, which framed the issue as being whether a RCRA injunction was an order that gives rise to a right to payment.[46] It held that it does not, because, citing Supreme Court precedent, RCRA does not authorize a suit "for response costs in lieu of seeking an injunction."[47] Interestingly, it articulated the right issue—whether the injunction "could be converted" into a money judgment—but entirely failed to consider how such conversion would take place. It considered whether the claimant had the option of obtaining a money judgment *instead* of the injunction, rather than considering the lifecycle of that injunction. Regardless of how the injunction came into being, can it be converted into a money judgment? *AM International*, presaging *Apex Oil*, is silent on this issue.

The most surprising aspect of this line of cases is that it misreads the Bankruptcy Code. The statute asks whether the failure to perform gives rise to a right to payment. The failure to perform what? According to *Apex Oil*, the relevant failure is the failure to comply with the obligation created by RCRA to not create an environmental hazard.

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41. For the position that incidental nature of costs would not convert an equitable remedy into one able to be satisfied by money, but suggesting that an equitable remedy that required substantial direct expenditure would always be treated as a claim, see *In re Robinson v. United States*, 46 B.R. 136 (Bankr. M.D. Fla. 1985).

42. *See* AM Int'l, Inc. v. Datacard Corp., 106 F.3d 1342 (7th Cir. 1997).

43. *Id.* at 1346.

44. *Id.*

45. 42 U.S.C. § 6972(a) (2006).

46. *See AM Int'l*, 106 F.3d 1342.

47. *Id.* at 1348 (citing Meghrig v. KFC W., Inc., 516 U.S. 479 (1996)).

Apex Oil Company's failure in that regard did *not* give rise to a right to payment. It gave rise to an injunction. But under a proper reading of the Bankruptcy Code's definition of a claim, the entity has a claim if the failure to perform *the injunction* gives rise to a right to payment. The statutory definition itself requires that we look at the lifecycle of the equitable remedy.

### *B. Focus on Prevention of Future Harm*

Still other cases frame the issue as whether the injunction is backward-looking or forward-looking. Several years before filing for bankruptcy, Torwico Electronics, Inc., contaminated a site at which it was operating and then moved to a different property.[48] Apparently alerted to Torwico Electronics's Chapter 11 Bankruptcy by the notice that is sent out to all creditors, the New Jersey Department of Environmental Protection and Energy inspected the site where Torwico Electronics had previously operated.[49] It found the contamination and issued several notices of violation to the debtor.[50] After the deadline to file a proof of claim had passed, the agency then issued an administrative order, which required the debtor to submit a cleanup plan and pay a penalty.[51] The administrative order also stated:

> No obligations imposed [by this order] . . . are intended to constitute a debt, damage claim, penalty or other civil action which should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment.[52]

Just as would later be repeated in *Apex Oil*, the debtor was no longer in possession of the contaminated property and only prebankruptcy actions were at issue. Focusing almost exclusively on the fact that the demanded action would "ameliorate [an] ongoing hazard,"[53] the United States Court of Appeals for the Third Circuit held that the cleanup obligation was not a claim.[54] It reached this conclusion without even discussing whether the statute only authorized an injunction or whether the state had the option to perform the cleanup and sue to recover its response costs.

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48. Torwico Elecs., Inc. v. New Jersey (*In re* Torwico Elecs., Inc.), 8 F.3d 146 (3d Cir. 1993).
49. *Id.* at 147.
50. *Id.* at 147-48.
51. *Id.* at 148.
52. *Id.*
53. *Id.* at 150.
54. *Id.* at 151.

*Torwico* recognizes that the social value of an injunction is likely, at least in part, tied to the prevention of future harm. The weakness with this way of framing the issue is that an injunction can almost always be couched as forward-looking. Any change in the status quo affects the future, even as it redresses the past. And presumably, an injunction is the appropriate remedy for that very reason.

### *C. Focus on Effect on the Debtor*

A few cases have framed the issue in yet another way, asking whether a debtor is able to perform the required action personally, or whether the equitable remedy requires the debtor to spend money. The most prominent case in this line is *United States v. Whizco, Inc.*,[55] which involved a suit by the United States under the Surface Mining Control and Reclamation Act.[56] Whizco mined for coal in Tennessee. Upon failure, it abandoned its mines, failed to comply with a number of administrative orders requiring it to reclaim the mines, and filed for bankruptcy.[57] The United States sued Whizco and Donovan Lueking—its vice president who had also filed for bankruptcy—seeking an order requiring them to reclaim the mines and enjoining them from mining anywhere in the United States.[58] Like the provision of RCRA at issue in *Apex Oil*, the Surface Mining Control and Reclamation Act did not provide the government with an alternate remedy.[59] The government could not reclaim the mines and then sue Lueking for the costs; an injunction was its only option. The government prevailed against the corporate defendant, but this victory was hollow because the corporate entity was defunct and claims against it were not discharged anyway.

The district court declined to issue the injunction against Lueking, who by that time had received a discharge.[60] It found that Lueking could not comply with the injunction "other than by payment of money" because he could not personally perform the reclamation work because his mining equipment had been sold off through the bankruptcy.[61] Rather than focusing on the relief the government formally sought (or could seek), the court looked at what the debtor would be required to do. The Third Circuit affirmed, holding that "although the terms of the injunction

55. 841 F.2d 147 (3d Cir. 1988).
56. 30 U.S.C. § 1201 (2006).
57. *Whizco*, 841 F.2d at 148.
58. *Id.*
59. *See* 30 U.S.C. § 1271.
60. *Id.*
61. *Id.*

would not require the payment of money, to the extent that the injunction were to be effective, it would."[62]

Then, almost as an aside, the court engaged in an interesting analysis—it looked to the lifecycle of the injunction:

> The injunction could only be enforced by contempt and then only if Lueking sometime in the future has funds either from future earnings, inheritance or gifts, etc. To hold him in contempt a court would have to find that he had the ability to pay others to perform the reclamation work. To the extent, therefore, that the injunction would have purpose or value it would require the payment of money.[63]

The *Whizco* court distilled the essence of an injunction by determining how a court would enforce that injunction. Using this analysis almost to check its work, the court was satisfied that the true effect of the injunction would be the payment of money, which was a claim within the meaning of the Bankruptcy Code.

Another case in this vein is *United States v. Robinson (In re Robinson)*.[64] In this case, the United States sued Garland Robinson in bankruptcy court, seeking specific performance of Robinson's statutory obligation, which had been converted into an injunction, to restore an area of salt marsh that he had intentionally destroyed.[65] Over a year after the deadline for compliance, Robinson still had not restored the area, and instead filed for bankruptcy.[66]

Interpreting *Kovacs*, the bankruptcy court thought it was relevant that "the debtor would [not] be able to perform the obligation through his own labor."[67] Indeed, even if he had the skill to restore the salt marsh, the court focused on the fact that he would have to spend money in order to buy the replacement vegetation, stating, "We do not know from the record whether the plaintiff would be satisfied by the tender by the defendant of the money necessary to perform the restoration, but we do know that the restoration cannot be performed without the expenditure of money."[68] While *Kovacs* found the obligation to be a claim because the

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62. *Whizco*, 841 F.2d at 150.
63. *Id.*
64. 46 B.R. 136 (Bankr. M.D. Fla. 1985).
65. *Id.* at 137.
66. *Id.* at 137-38.
67. *Id.* at 139. See also *In re Cottonwood Canyon Land Co.*, 146 B.R. 992 (Bankr. D. Colo. 1992), which states (without analysis) that a right to a citizen's injunction under RCRA (42 U.S.C. § 6972 (2006)) was discharged because the debtor was not in possession of the property. "In order to comply with any such injunctive relief, [the debtor] can do nothing but pay someone else to do the work. Thus, while [the claimant] asserts its claim in the guise of an equitable remedy, it is in fact a monetary claim which was discharged." *In re Cottonwood*, 146 B.R. at 999.
68. *In re Robinson*, 46 B.R. at 139.

claimant was seeking money, *Robinson* found the obligation to be a claim because the debtor could not comply without spending money (although the court backed off this position somewhat, cautioning that the result might not be the same if the costs were "incidental" to the compelling activity, rather than "substantial" and "direct").[69] Although the reasoning is not entirely coherent, this case is best categorized with *Whizco* in its focus on whether the debtor was able, on his own, to comply with the injunction.

Judge Posner recognized that this conclusion is at odds with the holding of *Apex Oil*.[70] One should not make too much of this inconsistency, as they confronted different situations. It is more troubling that *Apex Oil* failed to consider *Whizco*'s "deep" analysis and ask how a contempt proceeding would have played out against Apex Oil Company. An individual will not be held in contempt for failing to do something that is not in his or her power.[71] And if the difference between being capable and not being capable of complying with an injunction is whether the individual has money, *Whizco* holds that the injunction is really focused on money, and is therefore a claim dischargeable in bankruptcy.

Yet, these cases do not address the point raised by *Apex Oil*: why should it matter whether the debtor is required to write a check to an employee or to contractors (or, in the case of individuals, incur the opportunity costs of lost wages)? In-house capability is irrelevant to whether failure to perform an equitable remedy gives rise to a right to payment.

## IV. CONVERTING AN INJUNCTION: THE CONTEMPT POWER

The contempt power is the power inherent in a court to enforce its orders. As it relates to disobedience of a court order outside the presence of the court (as opposed to regulating the code of conduct in the courtroom), any particular exercise of the contempt power is categorized as either civil or criminal depending on the purpose of the sanction.[72] An exercise of civil contempt levies a coercive sanction to force future behavior, while an exercise of criminal contempt aims to punish for past

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69. *Id.*

70. United States v. Apex Oil Co., 579 F.3d 734, 738 (7th Cir. 2009).

71. 17 C.J.S. *Part Payment of Debt* § 124 (1999) [hereinafter *Payment of Debt*].

72. *See* F.T.C. v. Trudeau, 579 F.3d 754 (7th Cir. 2009). As noted by the Seventh Circuit, this distinction matters because persons subject to criminal punishment are afforded greater protections than persons subject to civil sanctions.

disobedience.[73] Although this entire framework has been criticized,[74] a shorthand way to distinguish between civil and criminal contempt is to ask whether the person subject to the sanction could avoid or abbreviate the sanction; a civil contemnor "carries the key of his prison in his own pocket."[75] For present purposes, there is no need to distinguish between civil and criminal contempt. In no case will a person be found in contempt for something outside of his or her control, as an inability to comply provides ground to discharge the order finding contempt.[76]

*Kovacs* shows how the contempt power can "convert" a cleanup injunction into what a bankruptcy court will then view as, in effect, a money judgment—the seizure of assets, the appointment of a receiver, or some coercive measure such as imprisonment—until money is expended. Similarly, *Whizco* shows how the contempt power can expose a cleanup injunction to have the same effect as a money judgment, because a court will not hold a person in contempt for failing to do what he cannot do. If the injunction indirectly gives the plaintiff a right to assets, the court will find the debtor to be in contempt if it has available assets but does not apply them. The finding of contempt depends on whether the debtor has assets. If the injunction does not give the plaintiff a right to assets, the finding of contempt will turn on some other fact.

Imagine an officer and director of an insolvent corporation on the stand at a hearing on an order to show cause arising out of the corporation's failure to comply with a cleanup injunction. Echoing the individual debtor in *Whizco*, the officer would state that the corporation did not have the funds to hire a cleanup contractor, the corporation's technical staff had quit two months ago due to unpaid wages, and he (the officer) was the only remaining employee and did not have the necessary expertise to oversee, let alone conduct, the cleanup. Given the basic rule that one cannot be held in contempt for failing to do the impossible, the court, if it credited the officer's testimony, would have no basis to find the corporation in contempt.[77] The corporate impossibility derives from the corporation's lack of assets—its inability to hire people to comply with the injunction.

Although not mentioned in *Whizco*, a court would likely take a hard look at the claim of impossibility. A more complete contempt analysis

73. *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821 (1994).

74. *E.g.*, Earl C. Dudley, *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025 (1993).

75. *In re* Nevitt, 117 F. 448, 451 (8th Cir. 1902).

76. *See Payment of Debt*, *supra* note 71.

77. As long as the corporation did not cause the impossibility. *See* Sec. & Exch. Comm'n v. Solow, 682 F. Supp. 2d 1312 (S.D. Fla. 2010).

would consider two additional points. First, a corporation may be "balance sheet" insolvent and yet be able to cobble together a web of contracts to perform a cleanup. It may need to borrow at a high rate of interest, but a present lack of funds does not mean that additional capital is unattainable—just look to the market for debtor-in-possession financing. Second, the corporation may not need to expend additional resources to form new relationships in order to act. It may have existing rights against others who would enable or carry out the corporate action, such as insurance. The underlying conclusion is the same under this hard look analysis, even if particular cases come out differently. Either this is *Kovacs* and the corporation is refusing to apply assets that it has (or could obtain), or this is *Whizco* and the corporation does not have any assets. In either case, a finding of contempt turns on whether the corporation has assets.

Under the contempt analysis, it becomes clear that the injunction makes a claim on the corporation's assets such that if a corporation refused to apply its assets to comply with the injunction, the plaintiff would have recourse to those assets through the court's contempt power. Put more strongly, the essence of the injunction is to give the plaintiff a call option with respect to the corporation's assets.

As noted above, most injunctions against a corporation will behave this way. Although some argue (as Posner does) that this is a fatal flaw in this analysis, this conclusion makes sense when a corporation is viewed through the "nexus of contracts" paradigm, generally attributed to the scholarship growing out of the work of Michael C. Jensen and William H. Meckling.[78] There are many ways of conceptualizing the corporation.[79] A corporation is capable of doing many things: some of its more important functions are that it can sue and be sued, own property, enter into contracts, and speak.[80] But on a more fundamental level, a corporation is only capable of doing those things if there is some actor who can act on its behalf. This duty to act on the corporation's behalf—to cause it to own property, enter into contract, sue and be sued, or speak, as the situation demands—traces back to the corporation's directors. And they set it in motion by hiring people who are then contractually obligated to act on the corporation's behalf. Reduced to its

78. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

79. *See, e.g.*, Susanna Kim Ripken, *Corporations Are People Too: A MultiDimensional Approach to the Corporate Personhood Puzzle*, 15 FORDHAM J. CORP. & FIN. L. 97 (2009).

80. *E.g.*, DEL. CODE ANN. tit. 8, § 122 (2000); Citizens United v. Fed. Election Comm'n, 130 U.S. 876 (2010) (discussing speech rights).

simplest form, the corporation acts by pulling on these legal levers. As a legal matter, these capabilities do not change when a corporation becomes insolvent. But as a practical matter, the corporation may have a difficult time getting things done. Without assets, the corporation is capable of doing very little. Take away the assets and the contract rights soon run out of steam. Nearly every action of a corporation is dependent on assets. Therefore, it makes sense that most injunctions would give a plaintiff some degree of control over the corporation's assets.

Theoretically, there are several classes of injunctions that depend on corporate decisions rather than the availability of assets. While these give a plaintiff some degree of control over how the corporation uses its assets, they do not give the plaintiff recourse to the assets themselves. The first such class is comprised of injunctions that specify the manner in which a corporation must act if it chooses to act. For example, an injunction may require a corporation to change its hiring practices. A second class is comprised of injunctions that prohibit a corporation from directing assets in a certain way. For example, an injunction may prohibit a corporation from making certain claims in its advertising. A similarity among these classes of injunctions is that a lack-of-assets defense makes no sense. If the corporation had no assets, it could not violate the injunction. While there may be other such classes of injunctions, the point I want to make here is that such injunctions exist, and the injunction in *Apex Oil* is not one of them. The ability to comply with the cleanup injunction in *Apex Oil* undoubtedly turns on whether Apex Oil has assets.

A second criticism of this analysis may be that, while it nicely illustrates the role of capital in the actions of a corporation, it may fail to appreciate an important aspect of an injunction. Even if the contempt analysis renders the unsurprising conclusion that the main point of a cleanup injunction is the cleanup of the contamination (which is an expensive proposition), there may be other values at play. For example, the remedy may also be intended to punish or make an example. We may also believe that the remediation of environmental contamination ought to be performed by a responsible party as a form of community service. It seems plausible that a cleanup order achieves more than just a clean site. In those cases, the remedy has separate, additional value—even though a corporation's ability to comply depends entirely on whether it has sufficient assets to do so. A cleanup injunction may not *only* control and direct the use of the debtor's assets.

But this proves too much. Money judgments may also serve additional purposes besides compensation; the most obvious example of this is punitive damages. Yet, there is no question that a punitive damage award is a claim.[81] Why treat such social values differently when attached to injunctive relief?

## V. Conclusion

Under *Apex Oil*, a RCRA injunction did not give rise to "a right to payment," and therefore did not fall within the definition of a claim found in 11 U.S.C. § 101(5), because the government could not seek a money judgment in the first instance. As discussed above, this fails to consider that a few steps of civil procedure could convert the injunction into a *Kovacs*-style remedy, which the Supreme Court has held to be within the definition of a claim. A more coherent approach recognizes that a claim is a right against the debtor that is capable of sharing in the assets of the bankruptcy estate. The court's contempt power provides an interesting lens through which to assess whether a right against a debtor should be dealt with in the bankruptcy process. In the context of a corporation, the answer will likely be that such obligations should be dealt with in the bankruptcy process. Any social discomfort with this result should be directed at modifying the bankruptcy outcome, not with sidestepping the process entirely.

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81. It is important to keep in mind that this analysis is not about the discharge at all. This analysis focuses on whether injunctive remedies are included in the bankruptcy process at all. Congress can and does treat different claims differently within the bankruptcy process.