

In re Chateaugay Corp., SUPERFUND AND THE
BANKRUPTCY CODE - DISCHARGEABILITY OF
RESPONSE COSTS IN BANKRUPTCY

On July 16, 1986, LTV Corporation and its affiliates (collectively LTV) filed for reorganization under Chapter 11 of the United States Bankruptcy Code. As part of its reorganization plan, LTV included a provision discharging itself from liability for all debts originating from violations of federal and state hazardous waste laws prior to filing the petition. The United States and the State of New York had already incurred thirty-two million dollars in response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).¹ According to the proof of claim submitted by the Environmental Protection Agency (EPA), these costs only included the expenses that had been paid at fourteen sites and did not necessarily represent all of the sites nor all of the response costs for which LTV might be "potentially responsible" for within the meaning of CERCLA.

The United States and the State of New York sought a declaration that LTV could not discharge its response costs or any other environmental injunctive obligations incurred after confirmation of its reorganization plan. The government further requested that its claims be accorded administrative priority in the bankruptcy proceedings. The district court partially agreed with LTV, finding that the company could discharge its postconfirmation claims, provided they arose from prepetition releases or threatened releases.² The court also found that LTV could discharge its claims for injunctive relief as long as these claims also created a right of payment when the company failed to comply.³ The district court did, however, grant the government administrative priority for postpetition cleanup costs.⁴

On appeal, the Second Circuit affirmed the lower court's ruling, holding that: (1) CERCLA response costs are discharge-

1. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1988)).

2. *In re Chateaugay Corp.*, 112 B.R. 513, 522 (Bankr. S.D.N.Y. 1990), *aff'd*, 944 F.2d 997, 999 (2d Cir. 1991).

3. *Id.* at 523.

4. *Id.* at 525.

able "claims" if they relate to a release or a threatened release of hazardous substances occurring before the filing of the Chapter 11 petition; (2) injunctive relief (imposing an obligation to end ongoing pollution) does not create a right to payment and, therefore, is not dischargeable; and (3) response costs incurred at sites owned by the debtor are priority claims to be paid before other creditors. *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991).

The district court decision in *In re Chateaugay* addressed the competing objectives of reorganization under Chapter 11 of the Bankruptcy Code⁵ and liability under several state and federal environmental statutes, CERCLA⁶ in particular.⁷ Under CERCLA, Congress intended to provide "for appropriate environmental response action to protect public health and the environment from the dangers posed by . . . [hazardous waste] sites" that present a serious risk to public health.⁸ The Act accomplishes this through provisions for "liability, compensation, cleanup, and emergency response to hazardous substances released into the environment."⁹ When a hazardous or a potentially hazardous release occurs, EPA investigates the site, determines which response measures are necessary, and identifies "potentially responsible parties" (PRPs) who may be liable for cleanup costs.¹⁰ Liability is assessed against (1) the owner and operator of a facility, (2) the owner and operator of a facility at the time of disposal of a hazardous substance, (3) any party arranging for disposal or treatment of a hazardous substance at another party's facility, and (4) any party who accepts a hazardous substance for transport to a disposal or treatment facility.¹¹ CERCLA permits the government to clean up hazardous waste sites first and then proceed against the responsible parties to recover its response costs.¹² EPA is also authorized to enjoin the responsible parties, in federal district courts, to clean up sites

5. 11 U.S.C. §§ 1101-46 (1988). Other parallel bankruptcy provisions may also be involved. See, e.g., Chapter 7, 11 U.S.C. §§ 701-66 (liquidation); Chapter 13, 11 U.S.C. §§ 1301-30 (adjustment of debts of an individual with regular income).

6. 42 U.S.C. §§ 9601-75 (1988).

7. *In re Chateaugay Corp.*, 112 B.R. at 517 (CERCLA was the only statute at issue on appeal).

8. H.R. REP. NO. 1016, 96th Cong., 2d Sess., pt. 1, at 17-18 (1980), reprinted in 1980 U.S.C.C.A.N. 61119, 61119-20.

9. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1111 (D. Minn. 1982).

10. See 42 U.S.C. § 9607(a).

11. *Id.*

12. See *id.* § 9607(a)(4)(A).

where releases pose "imminent and substantial endangerment to the public health or welfare of the environment."¹³

CERCLA is a strict liability rule, requiring the following: (1) Each cleanup site must be a "facility",¹⁴ (2) a "release"¹⁵ or a "threatened release" of a "hazardous substance"¹⁶ must occur at the site, (3) an eligible party must incur "response"¹⁷ costs from the release or threatened release of a hazardous substance, and (4) the defendant must be in the class of persons who may be liable¹⁸ for damages imposed by CERCLA.¹⁹ Whenever these elements are found, the PRP will be liable for response costs incurred by the federal government, a state, or any other party, and for damages to, or loss of, natural resources owned or controlled by the government,²⁰ unless the PRP can demonstrate that the damages resulted from an act of God, an act of war, or the acts or omissions of a third party.²¹ Where the elements of responsibility are found and no affirmative defense is established, courts have imposed joint and several liability among PRPs under CERCLA.²²

The Bankruptcy Code, however, strives to provide a fresh start for debtors, rehabilitate financially unstable businesses, and provide for equal distribution of payments among creditors.²³ Upon the filing of a petition for bankruptcy, the Code imposes an automatic stay on all creditor collections²⁴ to allow the bankruptcy court and the debtor to follow an orderly plan of action. Upon filing for bankruptcy, a debtor may be discharged from debts or any liability on a claim²⁵ arising before the bankruptcy.²⁶ Under the Bankruptcy Code, a "claim" is defined as:

(A) [a] right to payment, whether or not such right is reduced

13. *Id.* § 9606(a).

14. *Id.* § 9601(9).

15. *Id.* § 9601(22).

16. *Id.* § 9601(14).

17. *Id.* § 9601(23), (25).

18. See *supra* note 10 and accompanying text.

19. See *Ancon Properties v. Mobil Oil Co.*, 866 F.2d 1149, 1152-53 (9th Cir. 1989).

20. 42 U.S.C. § 9607(a)(4)(C).

21. *Id.* § 9607(b).

22. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 n.13 (2d Cir. 1985); *United States v. Wade*, 577 F. Supp. 1326, 1338-39 (E.D. Pa. 1983); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809-10 (S.D. Ohio 1983).

23. Richard L. Epling, *Impact of Environmental Law on Bankruptcy Cases*, 26 WAKE FOREST L. REV. 69, 69 (1991).

24. 11 U.S.C. § 362.

25. *Id.* § 101(11), (12).

26. *Id.* §§ 727(b), 1141(d)(1)(A), 1328.

to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

- (B) [a] 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.²⁷

In addition to this definition being broad on its face, legislative intent indicates that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case."²⁸ The Code does provide, however, that certain governmental claims, such as fines and penalties, are exceptions to discharge of liability.²⁹

Generally, in bankruptcy proceedings, secured creditors are paid first and unsecured creditors divide the remaining assets.³⁰ Administrative expenses for "actual, necessary costs and expenses of preserving the estate,"³¹ however, retain priority over unsecured claims.³² Furthermore, all administrative expenses must be paid in full before a bankruptcy plan is confirmed.³³ It is significant, therefore, that courts have begun to give administrative priority for cleanup costs, especially when cleanup is essential to protecting public health and safety.³⁴

27. *Id.* § 101(4).

28. H.R. REP. NO. 595, 95th Cong., 1st Sess. 309 (1977), reprinted in 1978 U.S.C.A.N. 5963, 6266; S. REP. NO. 989, 95th Cong., 2d Sess. 21-22 (1978), reprinted in 1978 U.S.C.A.N. 5787, 5807-08.

29. 11 U.S.C. § 523(a)(7). See also *Ohio v. Kovacs*, 469 U.S. 274, 284 (1985) (environmental fines and penalties not dischargeable); *In re Tinkham*, 59 B.R. 209, 213 (Bankr. D. N.H. 1986) (criminal and noncompensatory civil fines for illegal dumping not dischargeable).

30. 11 U.S.C. § 507(b).

31. *Id.* § 503(b)(1)(A).

32. *Id.* § 507(a)(1).

33. *Id.* § 1129(a)(12).

34. See, e.g., *In re Smith-Douglas, Inc.*, 856 F.2d 12, 17 (4th Cir. 1988) (holding cleanup costs were administrative expenses in Chapter 7 bankruptcy); *In re Wall Tube & Metal Prod. Co.*, 831 F.2d 118, 123-24 (6th Cir. 1987) (finding that government's interest in protecting public health and safety gives response costs priority status); *In re FCX, Inc.*, 96 B.R. 49, 55 (Bankr. E.D. N.C. 1989) (holding that costs reasonably required to remove the immediate threat to public health are administrative expenses); *In re Peerless Plating Co.*, 70 B.R. 943, 948 (Bankr. W.D. Mich. 1987) (allowing expenses based on trustee's postpetition liability as site owner under CERCLA); *In re Stevens*, 68 B.R. 774, 783 (Bankr. D. Me. 1987) (reasoning that imminent and identifiable danger to the public justifies giving cleanup costs administrative priority). But see *In re Dant & Russell, Inc.*, 853 F.2d 700, 706-07 (9th Cir. 1988) (holding that the need to minimize claims entitled to administrative priority required a narrow interpretation of administrative expenses; because

The difficulty that arises in assessing CERCLA claims in the bankruptcy context lies in deciding which environmental liabilities constitute claims under the Bankruptcy Code. This determination, in turn, questions whether the policy goals promoting public health and the protection of the environment against hazardous substances should modify the traditional commercial policies of treating like creditors similarly and restoring the solvency of individuals and businesses. The Supreme Court made its most significant decision on these issues in *Ohio v. Kovacs*,³⁵ where the court held that a debtor's obligation was discharged under a state injunction ordering the cleanup of a hazardous waste disposal site.³⁶ After Kovacs failed to comply with a cleanup order, the state appointed a receiver to take possession of the site and initiate cleanup. Kovacs subsequently filed for bankruptcy and Ohio sought a declaration that Kovacs could not discharge his obligations. The Supreme Court reasoned that where the debtor no longer had possession of the site and, therefore, could not comply with the injunction, the injunction is "converted into an obligation to pay money" and is, therefore, dischargeable.³⁷ Because Kovacs could not perform his obligation "except by paying money,"³⁸ the Supreme Court found that the injunction had been converted and that Kovacs' debt was dischargeable. Some courts have expanded upon this holding to discharge any obligation in bankruptcy that requires any monetary expenditures.³⁹

The Supreme Court considered another significant conflict between the Code and CERCLA in *Midlantic National Bank v. New Jersey Department of Environmental Protection*.⁴⁰ The *Midlantic* Court limited the debtor's ability to utilize provisions of the Code that allow a debtor to abandon either burdensome

the court found no actual benefit to the estate, the cleanup costs were not administrative expenses).

35. *Ohio v. Kovacs*, 469 U.S. 274, 274-75 (1985).

36. *Id.* at 283.

37. *Id.*

38. *Id.* at 282 (quoting *In re Kovacs*, 717 F.2d 984, 987-88 (6th Cir. 1983)).

39. See *United States v. Whizco, Inc.*, 841 F.2d 147, 150-51 (6th Cir. 1988) (discharging mine operator from obligation to reclaim site if obligation would require payment of money, but not if it required use of own equipment in order to comply); *In re Robinson*, 46 B.R. 136, 139 (Bankr. M.D. Fla. 1985) (discharging an injunction to restore wetlands which would require monetary expenditures), *rev'd on other grounds*, 55 B.R. 355 (Bankr. M.D. Fla. 1985).

40. *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986).

property or property of inconsequential value to the estate.⁴¹ In *Midlantic*, the bankruptcy court had allowed the trustee in a liquidation proceeding to abandon facilities containing PCB-contaminated oil, after which the trustee terminated security measures intended to prevent vandalism and fire at the facilities.⁴² The Supreme Court reversed the decision, however, holding that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."⁴³ This decision reflected Congress' repeated concerns over the prevention of improper disposal and storage of hazardous and toxic substances.⁴⁴

Because most hazardous substance leaks involve continuous (or perhaps hidden) releases of wastes, special difficulties ensue where claims arise after a bankruptcy plan has been confirmed. In general, bankruptcy law discharges debts arising before the bankruptcy,⁴⁵ regardless of whether a proof of claim was filed.⁴⁶ However, the Tenth Circuit has held that debts will not be discharged where the creditor did not receive notice of the bankruptcy.⁴⁷ As a result, lower courts are split over the question of whether the right to payment arises with the initial environmental impact⁴⁸ or when the cleanup action occurs.⁴⁹

Before discussing the specific issues presented by the facts of *In re Chateaugay*, the Second Circuit ruled on the parties' conflicting arguments as to which of Congress' policy objectives should be pre-eminent in resolving the issues in the case. While

41. 11 U.S.C. § 554(a).

42. *Midlantic Nat'l Bank*, 474 U.S. at 497-98.

43. *Id.* at 507.

44. *Id.* at 505-06.

45. See *supra* note 26 and accompanying text.

46. 11 U.S.C. § 1141(d)(1)(A)(i).

47. *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) (holding that even where there was notice of the bankruptcy, due process did not allow a debt to be discharged where there was no notice of the confirmation hearing).

48. See *In re Penn Cent. Transp. Co.*, 92 B.R. 605, 609-11 (E.D. Pa. 1988) (discharging claims from contamination known about before confirmation); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1316 (9th Cir. 1986) (finding an injunctive claim ripe upon receipt of a notice of a pending claim for response costs even if costs had not been incurred).

49. See *In re Combustion Equip. Assoc., Inc.*, 67 B.R. 709, 713 (Bankr. S.D. N.Y. 1986) (receiving an EPA request for information regarding a spill does not ripen into a claim because the EPA could choose not to file an action); *In re Charter Co.*, 81 B.R. 644, 647 (Bankr. M.D. Fla. 1987) (holding private contribution claims for contingent indemnification premature), *aff'd*, 862 F.2d 1500 (11th Cir. 1989).

noting the different policies behind the Bankruptcy Code and CERCLA,⁵⁰ the court did not find these differences to be necessarily dispositive.⁵¹ Instead, the Second Circuit found that, where the two statutes expressly conflict, the Bankruptcy Code controls.⁵² The court reasoned that the Code is a comprehensive act that applies broadly to many unique circumstances where other statutes would normally apply.⁵³ Accordingly, the court deferred to Congress to determine whether environmental policies should indeed be favored in bankruptcy proceedings.⁵⁴

Keeping these initial considerations in mind, the Second Circuit divided the case into three issues for consideration: (1) whether unincurred CERCLA response costs for prepetition releases are "claims," (2) whether injunctive remedies are "claims," and (3) whether administrative priority should be given to response costs.⁵⁵

The *In re Chateaugay* court noted that the definition of a "claim" under the Bankruptcy Code is quite broad⁵⁶ and specifically includes debts which may be contingent upon further findings and debts which have not yet matured.⁵⁷ The court found that, while EPA could not ascertain the precise sum of the future response costs assessed against LTV, "EPA will unquestionably have what can fairly be called a 'right of payment.'"⁵⁸ The court held that LTV was a PRP within the meaning of CERCLA and that its debts at the time of the proceedings were merely unmatured and contingent.⁵⁹

Traditionally, claims for contingent debts have been considered obligations, dependent upon a future occurrence which was "within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created."⁶⁰ The court of appeals reasoned, however, that this contract argu-

50. See *supra* notes 5-7 and accompanying text.

51. *In re Chateaugay*, 944 F.2d 997, 1002 (2d Cir. 1991).

52. See *id.*

53. *Id.*

54. "The remedy is for Congress to make exceptions to the Code to achieve other objectives that Congress chooses to reach." *Id.*

55. *Id.* at 1002-10.

56. See *supra* note 28 and accompanying text.

57. See *supra* note 27 and accompanying text.

58. *In re Chateaugay*, 944 F.2d at 1004.

59. *Id.* at 1004-05.

60. *Id.* at 1004 (quoting *In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981)).

ment does not necessarily apply to tort and statutory claims,⁶¹ and that even if it does, public regulation creates a similar degree of awareness between the regulator and the regulated as to how future findings will affect response costs.⁶² EPA's right of payment arose not from future injuries, such as those found in asbestos litigation,⁶³ but from an ascertainable prepetition event—the release or threatened release of hazardous waste—which created subsequent liability for the PRP, even if the actual costs were not yet incurred.⁶⁴

The costs of remedying a prepetition release or threatened release may be particularly difficult to identify where, as in the noted case, EPA does not yet know the full extent of the costs to remove the hazardous waste, and where EPA may not be aware of all the sites where those wastes may be found.⁶⁵ EPA, however, would not be forced, under this decision, to liquidate all its claims against LTV and establish those postconfirmation costs in bankruptcy court⁶⁶ since the Bankruptcy Code expressly permits estimations of contingent claims where fixing the costs "would unduly delay the administration of the case."⁶⁷ The court suggested that EPA make a "speedy and rough estimation" of its claims in order to determine its voice in the proceedings and the appropriate degree of the court's broad equitable powers. A later proceeding to enforce the response costs may determine the actual share for which the government is entitled against the estate of LTV and the manner by which payment will be assured.⁶⁸

The court was also persuaded by the argument that finding postconfirmation response costs to be claims may limit the gov-

61. *In re Chateaugay*, 944 F.2d at 1005.

62. *Id.*

63. See *Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 944 (3d Cir. 1985), *cert. denied*, 474 U.S. 864 (1985); *In re Forty-Eight Insulations*, 58 B.R. 476, 477 (Bankr. N.D. Ill. 1986); *In re Amatex Corp.*, 30 B.R. 309, 315 (Bankr. E.D. Pa. 1983), *rev'd on other grounds*, 755 F.2d 1034 (3d Cir. 1985); *In re Gladding Corp.*, 20 B.R. 566, 567-68 (Bankr. D. Mass. 1982) (holding that exposure to a hazardous product does not create a "claim" prior to the manifestation of an injury).

64. *In re Chateaugay*, 944 F.2d at 1004.

65. *Id.* at 1005.

66. *Id.* at 1005-06. CERCLA prohibits pre-enforcement review of removal or remedial actions. 42 U.S.C. § 9613(h). Because these actions were not being reviewed, the Second Circuit did not decide whether this prohibition, "if applicable, would constitute an implied repeal of the authority otherwise conferred on federal courts by the Bankruptcy Code." *In re Chateaugay*, 944 F.2d at 1006.

67. 11 U.S.C. § 502(c)(1).

68. *In re Chateaugay*, 944 F.2d at 1006.

ernment's ability to recover damages from the reorganized company in Chapter 11 proceedings.⁶⁹ In Chapter 7 liquidation cases, however, the government may still recover from the estate by asserting a claim. If EPA did not possess a claim at the time of the petition, it would be unable to collect any payment at all from the liquidating entity. Moreover, the court was persuaded that allowing these debts to remain attached to a reorganized company would create incentives for companies to liquidate rather than reorganize.⁷⁰

The *In re Chateaugay* court noted that whether an injunction may be discharged depends upon whether the injunction creates a "right to payment"⁷¹ under the Bankruptcy Code. Commentators have argued that an injunctive obligation should be analyzed under one of two categories: (1) obligations which result from prepetition acts or omissions, the consequences of which continue regardless of the continued existence of the debtor; and (2) obligations which result from the debtor's continued existence which would end if the debtor ceased to exist.⁷² Under this theory, only the first category, which includes orders to clean up an existing waste site, includes claims which may be discharged. However, orders seeking to halt ongoing pollution are not claims, because such orders pertain to future activities.⁷³ The court of appeals carefully rejected this argument for two reasons. First, the distinctions are not helpful in most environmental actions where injunctions typically combine elements of both types of obligations, and second, the language of the Code does not encourage such an interpretation.⁷⁴

The *In re Chateaugay* court recognized that a "right to payment" exists where EPA is able to fulfill the obligation it seeks to place upon the PRP and receives reimbursement from that party later.⁷⁵ However, the court stated that if the PRP must take an action, the order does not create a "right to payment."⁷⁶ The

69. *Id.* at 1005. See *Ohio v. Kovacs*, 469 U.S. 274, 286 (1985) (O'Connor, J., concurring) (arguing that treating an injunction for cleanup as a "claim" would be beneficial in Chapter 7 proceedings).

70. *In re Chateaugay*, 944 F.2d at 1005.

71. *Id.* at 1006; see also *supra* note 27 and accompanying text.

72. Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1204 (1984).

73. *Id.*

74. *In re Chateaugay*, 944 F.2d at 1007.

75. *Id.*

76. *Id.* at 1008.

court further noted that an order requiring removal of accumulated wastes, and cessation of ongoing pollution emanating from those wastes, exemplifies an obligation that is not a "claim" because EPA "has no authority to accept a payment from a responsible party as an alternative to continued pollution."⁷⁷ The court recognized, however, that if it does not require the end of continuing, ongoing pollution, the order is dischargeable to the extent that CERCLA allows EPA to conduct the cleanup itself and sue the PRP later for payment.⁷⁸

The lower court believed that the ongoing nature of most releases of hazardous substances will mean "that most environmental injunctions will fall on the non-'claim' side of the line."⁷⁹ The Second Circuit agreed that considering orders seeking to remedy ongoing pollution as non-"claims" rather than "claims" may be somewhat arbitrary.⁸⁰ However, in *Ohio v. Kovacs*, the Supreme Court decided that property owners have no right to maintain sources of pollution,⁸¹ and that the Code does not permit the abandonment of property to the detriment of "public health or safety."⁸² The *In re Chateaugay* court found that, taken together, the *Kovacs* and *Midlantic* opinions expressed the Supreme Court's intention to prevent ongoing pollution. Therefore, the Second Circuit's decision to draw the line in favor of preventing ongoing pollution was not arbitrary.⁸³ Thus, the Second Circuit ruled that, to the extent that an order ends or ameliorates continued pollution, the order cannot be discharged, as the Code does not permit a debtor to endanger public health.⁸⁴

Finally, the court of appeals held that the postpetition

77. *Id.*

78. *Id.*

79. *Id.* at 1008.

80. *Id.* "[T]he line between 'claim' injunctions and non-'claim' injunctions could arguably be drawn somewhat differently, for example, by placing on the non-'claim' side only those injunctions ordering a defendant to stop current activities that add to pollution . . . , while leaving on the 'claim' side all other injunctions, including those that direct the clean-up of sites . . . currently contributing to pollution." *Id.*

81. *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985). The court of appeals construed *Kovacs* narrowly to its specific facts. Because *Kovacs* was precluded from performing his obligation after the site went into receivership, and because EPA was only seeking to recover money, the majority's determination of how a "right to payment" arose was confined to those unusual circumstances. *In re Chateaugay*, 944 F.2d at 1008-09; see also *supra* notes 30-32 and accompanying text.

82. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 506-07 (1986).

83. See *In re Chateaugay*, 944 F.2d at 1009.

84. *Id.*

response costs incurred in cleaning up prepetition releases or threatened releases of hazardous wastes at a site owned by the debtor are entitled to administrative priority.⁸⁵ In support of its position, the court cited numerous recent decisions that relied on public safety needs in determining that cleanup costs for post-confirmation cleanup should be given priority.⁸⁶ In light of the Supreme Court's holding that the Bankruptcy Code does not allow a property owner to abandon property that endangers public health and safety,⁸⁷ the court of appeals agreed with the district court that cleanup costs become expenses that are "necessary to preserve the estate."⁸⁸ The *In re Chateaugay* court disagreed with LTV's argument that such a result would permit EPA to gain administrative priority for contingent claims by allowing EPA to fix cleanup costs.⁸⁹ Instead, the court found that EPA was merely acting as an administrator of the estate while it remedied the ongoing consequences of hazardous releases.⁹⁰

While the court of appeals preserved the "fresh start" goals of the Bankruptcy Code,⁹¹ it relied on the Supreme Court's prescription, set forth in the *Midlantic* opinion, against using bankruptcy to circumvent environmental regulations.⁹² First, the court held that injunctions to stop ongoing pollution are not "claims," and may not be discharged under the Code, because a debtor may not maintain dangerous conditions.⁹³ Second, it found that cleanup costs for releases on sites owned by the debtor were significant threats that should be given administrative priority.⁹⁴ This apparently contradictory approach may only represent the court's reluctance to engage in lengthy considerations of the regulatory schemes and purposes of CERCLA. Nevertheless, establishing such a default preference in favor of the Bankruptcy Code can in no way be deemed insignificant.⁹⁵

85. *Id.* at 1009-10.

86. See *supra* note 39 and accompanying text.

87. See *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 507 (1986).

88. *In re Chateaugay*, 944 F.2d at 1010.

89. See *id.*

90. *Id.*

91. *Id.* at 1002.

92. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 507 (1986).

93. *In re Chateaugay*, 944 F.2d at 1008-09.

94. *Id.* at 1010.

95. Congress has expressed its specific intent in the past when it wished to override

The significance of the *In re Chateaugay* decision may be best expressed by assessing its impact upon the numerous parties that are affected by the discharge of environmental liabilities in bankruptcy and observing how the costs of hazardous waste cleanup are distributed among them. For EPA, federal and state governments, and other parties who may wish to seek redress against a PRP petitioning for bankruptcy, *In re Chateaugay* imposes a significant burden to make a "speedy and rough estimation" of claims,⁹⁶ regardless of whether or not the sites have been identified.⁹⁷ Expeditious decisionmaking may cost the government, and consequently the public, millions of dollars due to imprecise estimates and additional administrative expenses. If EPA fails to present response costs in the bankruptcy proceeding, because it does not know about a prepetition release of hazardous wastes or the true extent of the release, *In re Chateaugay* prevents recovery of response costs if EPA failed to present those costs. This creates a substantial burden on the regulator to promptly and thoroughly investigate property owners petitioning in bankruptcy.

Beyond this initial hurdle, *In re Chateaugay* permits EPA to proceed against the reorganized company to enforce regulations mandating the abatement of ongoing pollution.⁹⁸ Perhaps of more significance is the potential control that parties seeking to recover postpetition response costs for administrative expenses may have over bankruptcy proceedings. *In re Chateaugay* gives priority to the cleanup costs incurred on property owned by the debtor.⁹⁹ Reorganization under Chapter 11 requires that such administrative expenses be paid before allowing the reorganization to be confirmed.¹⁰⁰

For unsecured creditors, when environmental liabilities are also considered to be unsecured debts, administrative priority reduces the return substantially. Generally, unsecured creditors will recover from debtors when potentially enormous environ-

Bankruptcy Code provisions. See, e.g., 11 U.S.C. § 523(a)(1), (8) (exempting from discharge certain taxes and educational loans). But see WARREN FREEDMAN, HAZARDOUS WASTE LIABILITY § 12.6, at 338 (Supp. 1991) (suggesting that CERCLA's mandate that responsible parties must pay supports a removal of those parties from the relief offered by bankruptcy).

96. *In re Chateaugay*, 944 F.2d at 1006.

97. *Id.* at 1005.

98. See *id.* at 1008.

99. See *id.* at 1010.

100. 11 U.S.C. § 1129(a)(12).

mental claims are not discharged and are carried over against the reorganized company. Because creditors that are secured by the property where the release is located are paid before unsecured creditors, they may wish to delay filing their claims in order to allow the monies contributed by other parties to pay for the cleanup of the estate first.¹⁰¹ To the extent that *In re Chateaugay* treats most environmental liabilities as claims,¹⁰² secured creditors receive a more favorable holding than unsecured creditors. Giving administrative priority to postpetition response costs,¹⁰³ however, may be detrimental to both classes of creditors.

The final interested party is the reorganized company itself, whose economic well-being is afforded special protection by the Bankruptcy Code.¹⁰⁴ Under *In re Chateaugay*, a PRP petitioning for bankruptcy does not appear to have any incentive to disclose dangerous releases, because those releases that become known after confirmation appear to be dischargeable, regardless of EPA's prior knowledge of the discharge.¹⁰⁵ It is difficult to resolve the court's support for public health and safety interests with its creation of this new regime insofar as it creates adverse incentives for responsible parties to disclose dangerous releases.

The Bankruptcy Code's broad interpretation of "claims" and its "fresh start" approach do not necessarily conflict with the congressional intent to require private parties to pay for hazardous waste site cleanup¹⁰⁶ because estate monies would still be available at the expense of other creditors without priority claims. Where cleanup is likely to be prolonged and expensive, *In re Chateaugay* will prevent discharges of cleanup orders, as such releases will almost certainly present a continuous and ongoing threat to public health and safety. By giving administrative priority to future claims, *In re Chateaugay* also limits the

101. Unsecured creditors become unlikely allies of the government. See Epling, *supra* note 23, at 81-82. However, if the unsecured creditor expects to receive securities in exchange for its claims, the unsecured creditor's interest parallels other owners of the reorganized company.

102. 11 U.S.C. § 507(b); see Epling, *supra* note 23, at 82.

103. *In re Chateaugay*, 944 F.2d at 1010.

104. *Id.* at 1010.

105. See *supra* note 65 and accompanying text.

106. *In re Chateaugay*, 944 F.2d at 1005. But see *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 836-38 (Bankr. D. Minn. 1980) (finding that environmental claims that EPA did not know about could not be discharged). Due process considerations which were not subject to discussion by the court in *In re Chateaugay* may require that EPA receive some form of notice of releases. See *supra* note 98 and accompanying text.

strategic use of bankruptcy to the detriment of restoring contaminated property by effectively holding creditors liable where the company's disposable assets are insufficient.¹⁰⁷ Administrative priority should also be used more extensively to prevent the unjust enrichment of the debtor¹⁰⁸ and others who may benefit from the enhanced value of restored property.¹⁰⁹

Regarding EPA's burden to find prepetition releases, *In re Chateaugay* should not be read as contradicting the due process requirements that adequate and substantial notice be given prior to claim foreclosure. The debtor's self-interest should be used to promote full awareness of all potential releases¹¹⁰ so as to protect the public health and safety from being seriously jeopardized through the protection of the Bankruptcy Code.¹¹¹

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107. It may be argued that the government's goal should only be to make the responsible party pay cleanup costs. However, "[e]nvironmental law is keyed to *status*—liability is conferred as a result of who you are, not what you have done," Epling, *supra* note 23, at 82. Statutory liability, therefore, confers no governmental interest in making any certain party pay.

108. See Linda Johannsen, Note, *United States v. Whizco, Inc.: A Further Refinement of the Conflict Between Bankruptcy Discharge and Environmental Cleanup Obligations*, 20 ENVTL. L. 207, 225 (1990) (arguing that obligations for environmental cleanup should not be discharged since noncompliance is encouraged by the debtor's unaccountability).

109. See Epling, *supra* note 23, at 77-78, 94 (arguing that administrative priority should not necessarily be granted for continuous releases, but should be limited to the enhanced value of the property after cleanup).

110. This could possibly be accomplished by an expansive reading of 11 U.S.C. § 523(a)(6), which prevents "any debt which arises from conduct which is willful and malicious [from being] discharged under Title 11." *In re Clayburn*, 67 B.R. 522, 525 (Bankr. N.D. Ohio 1986) (malicious conduct need not be found against a specific victim).

111. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 506-07 (1986).