

COMMENTS

SEE NO EVIL, SPEAK NO EVIL: DISCHARGING CERCLA CLAIMS IN BANKRUPTCY WITHOUT NOTICE

I. INTRODUCTION	127
II. BACKGROUND	129
A. <i>Federal Bankruptcy Law</i>	129
B. <i>CERCLA</i>	132
III. THE PROBLEM—LACK OF NOTICE	134
A. <i>When Do Dischargeable Claims Arise?</i>	134
B. <i>Union Scrap Iron & Metal—Notice as a Prerequisite to Discharge</i>	136
C. <i>The Conduct-Based Approach—Silent Disapproval</i>	138
IV. SOURCES OF NOTICE REQUIREMENTS.....	140
A. <i>Constitutional Due Process</i>	140
B. <i>Statutory Sources</i>	142
1. <i>The Bankruptcy Code</i>	142
2. <i>CERCLA</i>	143
V. A SOLUTION—WITHOUT BANKRUPTCY.....	145
A. <i>Bankruptcy as a Mirror of Other Rights and Obligations</i>	145
B. <i>Federal Class Action Rules</i>	148
1. <i>The Limited Fund Rationale</i>	149
2. <i>The De Facto Limited Fund</i>	152
C. <i>The “Fresh Start” Policy</i>	154
VI. CONCLUSION	156

I. INTRODUCTION

The potentially substantial liability with which the Comprehensive Environmental, Response, Compensation, and Liability Act (CERCLA)¹ imposes upon parties responsible for hazardous waste releases has prompted substantial litigation during the

1. 42 U.S.C. §§ 9601-75 (1990 & Supp. 1992).

past decade.² Increasingly, the reaction to this potential liability for the cleanup of hazardous wastes has been to look towards sources of secondary liability (*i.e.* insurers, creditors, corporate officials, and others, including the various parties which may be involved in bankruptcy).³ Through bankruptcy, a party may effectively transfer liability to secured and unsecured creditors, federal and state taxpayers, the reorganized company,⁴ or other potentially liable private parties under CERCLA for cleanup of the site. With the potential for so many interests being litigated within the bankruptcy proceeding, concerns have arisen as to whether bankruptcy law may be incapable or inappropriate to adjudicate the ultimate issue presented by most environmental litigation: "*Who pays?*"

The ability to fairly determine issues involving CERCLA claims in bankruptcy court may be aggravated by problems of the timing of these claims within the reorganization process. Upon confirmation of a reorganization plan by a bankruptcy court, the debtor will generally be discharged of all pre-bankruptcy debts or obligations.⁵ Unfortunately, hazardous waste liability may arise from pre-bankruptcy events often unknown or unascertainable at the time of the bankruptcy proceedings, and, therefore, determining when the debt or obligation arises becomes a significant issue. Courts have recently begun to determine when the debtor's CERCLA obligations are discharged,⁶ but, as of yet, have not reached the issue of the debtor's obligation to provide interested parties with notice of releases or threatened releases of hazardous substances before discharging itself from CERCLA liability. It would appear to be an essential

2. See Nancy Firestone, *Government Perspectives on Bankruptcy and Environmental Law Interaction*, 18 ENVTL. L. REP. 10358, 10358 (1988) (approximately 10% of the environmental cases pending at the U.S. Justice Department in 1988 involved bankruptcy law).

3. See Barry Breen, *Environmental Issues in Bankruptcy Litigation*, in HAZARDOUS WASTES, SUPERFUND AND TOXIC SUBSTANCES, ALI-ABA 1992 WL (Oct. 31, 1992).

4. The interests of the reorganized company would be immaterial in the case of a Chapter 7 liquidation proceeding or if the petitioner were an individual. See *infra* notes 13-14 and accompanying text (discussing the difference between liquidation and reorganization proceedings).

5. See *infra* notes 5-19 and accompanying text.

6. *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991) (holding that Environmental Protection Agency response costs for releases or threatened releases which occurred prior to the bankruptcy petition were dischargeable in bankruptcy). *In re Jensen*, 127 B.R. 27 (Bankr. 9th Cir. 1991) (concurring with *Chateaugay*); see also Patrick Shaw, Note, *In re Chateaugay Corp., Superfund and the Bankruptcy Code - Dischargeability of Response Costs in Bankruptcy*, 5 TUL. ENVTL. L.J. 681 (1992).

element of due process⁷ that specific notice be provided to private parties, and the government, of a debtor's attempt to discharge the debtor's claims so that interested parties may assert their claims against the dissolving estate.

This comment first addresses the apparent authoritative dichotomy as to whether specific notice is a prerequisite for discharge of CERCLA claims. The development in this area is unclear due, in part, to the contrasting views of the bankruptcy courts as to whether a claim arises upon the release of hazardous substances, or, upon the expenditure of cleanup costs. Thereafter, the extent of notice required by both due process and statutory sources will be discussed. Finally, this comment concludes by analyzing class action procedures to determine the proper response in bankruptcy to specific notice problems.

II. BACKGROUND

A. *Federal Bankruptcy Law*

It is often stated that bankruptcy and environmental law address nearly opposing policy goals. The Bankruptcy Code (the "Code")⁸ sets forth the following goals: providing a fresh start for debtors, rehabilitating financially unstable businesses, and providing for an equitable distribution of payments among creditors.⁹ A bankruptcy court attempts to achieve these objectives by initially imposing an automatic stay on all other legal actions against the debtor upon the debtor's filing of a petition for bankruptcy.¹⁰ Once the automatic stay is issued, the court may proceed with an orderly, speedy distribution of assets without the complications of more creditors interceding in the proceedings.¹¹

Generally, a bankruptcy petition may involve liquidation under Chapter 7,¹² reorganization under Chapter 11,¹³ or the

7. U.S. CONST. AMEND. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. AMEND. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

8. 11 U.S.C. §§ 1-151326 (1988 & Supp. 1992).

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

10. 11 U.S.C. § 362. There are, of course, exceptions; specifically, certain governmental actions will not be stayed where necessary "to enforce such governmental unit's police or regulatory power." *Id.* at § 362(b)(4), (5).

11. DANIEL R. COWANS, 2 COWANS BANKRUPTCY LAW AND PRACTICE, § 11, at 273 (1987).

12. 11 U.S.C. §§ 701-66.

adjustment of debts of an individual with regular income under Chapter 13.¹⁴ This comment shall focus mainly on the reorganization provisions of Chapter 11. The Chapter 11 filing is the source of an emerging entity, the Reorganized Company, which may be cosmetically identical to the original (potentially liable) corporation, but relieved of its pre-petition liability.¹⁵ Reorganization creates an additional entity, and, therefore, a potential addition to the host of parties attempting to avoid CERCLA liability. The litigation strategies used, however, often differ depending on which petition was filed.¹⁶

Through a bankruptcy plan, a debtor is discharged from all pre-filing debts.¹⁷ A debt represents a "liability on a claim,"¹⁸ and 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.¹⁹

By enacting such a broad definition of claims, Congress intended that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy

13. *Id.* at §§ 1101-46.

14. *Id.* at §§ 1301-30.

15. *See infra* notes 24-25 and accompanying text.

16. *See Ohio v. Kovacs*, 469 U.S. 274, 286 (1985) (O'Connor, J., concurring). Justice O'Connor recognizes that the strategies involved in petitioning for reorganization are not necessarily identical to other petitions, such as Chapter 7 for liquidation:

In a Chapter 7 proceeding under the Bankruptcy Code, a corporate debtor transfers its property to a trustee for distribution among the creditors who hold cognizable claims, and then generally dissolves under state law. Because the corporation usually ceases to exist, it has no post bankruptcy earnings that could be utilized by the State to fulfill the cleanup order. The State's only recourse in such a situation may well be its "claim" to the prebankruptcy assets.

Id. In other words, if no claim existed until after bankruptcy, a party seeking to assert such a claim against a company undergoing liquidation would have no opportunity to do so. This understanding underscored the Supreme Court's broad inclusion of an environmental injunction as a claim which should be adjudicated in the reorganization proceedings. *Id.* at 279-81. *But see* 11 U.S.C. § 523(a)(3) (requiring notice before discharge). Section 523, however, applies only to individual debtors. *See* 11 U.S.C. §§ 727(b), 1141(d)(2).

17. 11 U.S.C. §§ 727, 1141(d), 1328.

18. *Id.* at § 101(11).

19. *Id.* at § 101(4).

case."²⁰ The broad authority of the bankruptcy court to provide the debtor with relief, therefore, requires a predicate determination of whether a claim actually exists.²¹

Claims are brought into the bankruptcy proceeding when the debtor files a schedule of creditors to the estate,²² or, when claimants present their claims by filing a proof of claim.²³ There are deadlines, referred to as bar dates, for when a proof of claim must be filed.²⁴ Failure to file a proof of claim may result in the claim's discharge.²⁵

Bankruptcy seeks to provide the debtor with relief from its debts and accord it a "fresh start."²⁶ In a reorganization plan, this means that a reorganized company will emerge after the confirmation of a bankruptcy plan without any enforceable prepetition debts.²⁷ The bankruptcy plan, however, continues to obligate the debtor and the creditors after the bankruptcy pro-

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

21. LAWRENCE P. KING, 2 COLLIER ON BANKRUPTCY para. 101.04 (15th ed. 1984). Essentially, the definition of "claims" only excludes "rights to an equitable remedy for breach of performance with respect to which such breach does not give rise to a right to payment" *Id.* at 101-16.4.

22. 11 U.S.C. § 521. An objection to a claim may be made in writing. *Id.* at § 502(a). *See* 11 U.S.C. APP. BANKR. R. 3007.

23. 11 U.S.C. § 501. *See* Official Form 19. Bankruptcy Rule 3001. 11 U.S.C. App. (OFFICIAL FORM 19); APP. BANKR. R. 3001(a). Unless an objection is filed, a proof of claim must be considered a claim. 11 U.S.C. § 1111(a).

24. For Chapter 7 petitions, the bar date is 90 days from the first meeting of creditors. 11 U.S.C. APP. BANKR. R. 3002(c). This meeting is required by the Code under Section 341(a). Generally, only unsecured creditors and equity security holders are required to file a proof of claim. 11 U.S.C. APP. BANKR. R. 3002(a).

For Chapter 11 petitions, the bar date is set by the court. Under this Chapter, only parties possessing claims not filed by the debtor, *see supra* note 20 and accompanying text, are required to file a proof of claim. 11 U.S.C. APP. BANKR. R. 3003(a), (c)(2). If a listing by the debtor is disputed, contingent, or unliquidated, then the claimant must file a proof of claim, *id.*, and the claimants proof of claim supersedes the debtor's list. 11 U.S.C. APP. BANKR. R. 3003(c)(4).

25. Arlene Mirsky discusses strategies involved with whether or not a potentially responsible party should file a proof of claim. Arlene E. Mirsky *et al.*, *The Interface Between Bankruptcy and Environmental Laws*, 22 CHEM. WASTE LITIG. REP. 311, 334-35 (1991).

If they fail to file a proof of claim and their rights of contribution are found to constitute claims, the claims could be discharged and the holder of the claim will lose its right to collect from the debtor. On the other hand, if they file they may be waiving their right to argue that in fact no claim existed.

Id. at 334 (suggesting that the appropriate response may be to file a "protective" proof of claim in which rights to contest the existence of a claim are reserved).

26. *See supra* note 8 and accompanying text.

27. 11 U.S.C. § 1141(d)(1)(A).

cess.²⁸ Courts may even require the reorganized company to continue a plan of payments after the bankruptcy confirmation.²⁹

The bankruptcy plan also attempts to treat the creditors equally.³⁰ Classes of claimants are grouped together for similar treatment³¹ and for administrative convenience.³² For a plan to be confirmed, it must: (1) describe how all of the classes will be affected by the plan, (2) treat class members similarly, and (3) provide for the plan's implementation.³³ Generally, a plan will provide payments to the secured creditors first, while unsecured creditors will divide the remaining assets.³⁴ Administrative expenses for "actual, necessary costs and expenses of preserving the estate," however, are given priority over unsecured claims³⁵ and must be paid before a reorganization plan will be confirmed.³⁶ This, for example, would ensure that property would not degenerate in value during hard times for the owner, as creditors would have some protection in loaning the owner money to preserve the property.³⁷

B. CERCLA

This hazardous waste cleanup statute is attributed with essentially two major goals: to allow the federal government to "be immediately given the tools necessary for a prompt and effective response to [hazardous substance] problems"³⁸ and to "impos[e] the costs of the cleanup on those responsible for the

28. *Id.* at § 1141(a).

29. *Id.* at § 1123(b).

30. See *supra* note 8 and accompanying text.

31. 11 U.S.C. § 1122(a).

32. *In re S & W Enter.*, 37 B.R. 153, 159-61 (Bankr. N.D. Ill. 1984).

33. 11 U.S.C. § 1123(a).

34. *Id.* at § 506(b).

35. *Id.* at § 507(a)(1). Such administrative priority has been given for cleanup costs under CERCLA. See *In re Chateaugay Corp.*, 944 F.2d 997, 1009-10 (2d Cir. 1991) (holding that cleanup costs assessed after the bankruptcy petition which resulted from a pre-petition release, or threatened release, have administrative priority); *In re Wall Tube & Metal Prods. Co.*, 831 F.2d 118, 123-24 (6th Cir. 1987). But see *In re Dant & Russell, Inc.*, 853 F.2d 700, 707 (9th Cir. 1988) (holding that administrative priority should only be given in exceptional situations and, where there was no benefit to the estate, the cleanup costs were not administrative expenses).

36. 11 U.S.C. § 1129(a)(9)(A). Additional statutory requirements must also be met. See *id.* at § 1129(a).

37. See LAWRENCE P. KING, 3 COLLIER ON BANKRUPTCY para. 503.94[1][a][i], at 503-18 to 503-23 (15th ed. 1984).

38. *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982).

contamination.”³⁹ To respond to hazardous dangers, EPA investigates the site of a hazardous waste release, determines which response measures are necessary, and identifies “potentially responsible parties” (PRPs) who may be liable for cleanup.⁴⁰ EPA may then cleanup the hazardous waste site itself⁴¹ or give the PRP authority to carry out cleanup.⁴² In addition, EPA can seek injunctive relief to order cleanup⁴³ and can recover any of its response costs against PRPs.⁴⁴

When the government or a private party seeks to recover response costs against a PRP, CERCLA provides for strict liability, requiring only that:

- (1) each waste disposal site is a “facility;”⁴⁵
- (2) a “release”⁴⁶ or a “threatened release” of a “hazardous substance”⁴⁷ occurred at the site;
- (3) “response”⁴⁸ costs have been incurred by a plaintiff from the release or threatened release; and
- (4) the defendant is in the class of persons who may be liable⁴⁹ for damages imposed by CERCLA.⁵⁰

If these elements are found without an affirmative defense,⁵¹ CERCLA allows (and courts have imposed) joint and several liability upon those responsible parties.⁵²

39. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 6-7 (1989).

40. See 42 U.S.C. § 9607(a). PRPs include (1) the owner and operator of the facility, (2) the owner and the operator of a facility at the time of disposal of a hazardous substance, (3) any party arranging for disposal or treatment of the hazardous substance at another party's facility, and (4) any party who accepts the hazardous substance for transport to a treatment or disposal facility. *Id.*

41. 42 U.S.C. § 9604(a)(1).

42. *Id.*

43. *Id.* at § 9606(a).

44. *Id.* at § 9607(a)(4)(A).

45. *Id.* at § 9601(9).

46. 42 U.S.C. § 9601(22).

47. *Id.* at § 9601(14).

48. *Id.* at § 9601(23)-(25).

49. See *supra* note 39 and accompanying text (identifying PRPs).

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

51. The PRP may well be released from liability if the PRP can demonstrate that the response costs resulted from an act of God, an act of war, or the acts or omissions of a third party. 42 U.S.C. § 9607(b).

52. See, e.g., *United States v. Monsanto, Co.*, 858 F.2d 160, 171 (4th Cir. 1988); *United States v. Stringfellow*, 661 F. Supp. 1053, 1059-60 (C.D. Cal. 1987); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 809-10 (S.D. Ohio 1983).

III. THE PROBLEM—LACK OF NOTICE

A. *When Do Dischargeable Claims Arise?*

The issue of whether notice is a prerequisite to the discharge of a CERCLA claim has arisen most often in the context of when a CERCLA claim arises under the Code. Before briefly discussing the recent developments in this area, the contradictory timing provisions located in CERCLA and the Code should be reemphasized.

In an action under the Code, there are essentially three time frames: (a) the period of time prior to the petition for bankruptcy, (b) the period of time from the petition to the confirmation of the bankruptcy plan, and (c) the period of time following confirmation. Pre-petition claims will be discharged, whether the claimant pursues those claims or not.⁵³ During the second period, the bankruptcy proceeding itself, claimants have a period of time prior to the bar date to assert their pre-petition claims.⁵⁴ Otherwise, until confirmation of the plan, no post-petition claims may be brought.⁵⁵ Upon confirmation of the plan, all pre-petition claims become discharged, unless the plan conditions confirmation on satisfying specific pre-petition claims.⁵⁶ These important time limitations ensure a host of litigation seeking to take advantage of which side of the line the claim falls, and, thereby, either assure full payment or none at all.

The bankruptcy schedule effectively handles those claims which can be easily superimposed onto this rigid timetable (such as contractual claims or simple torts). Under CERCLA, however, two significant events must occur for liability to be established: first, there must have been a release or a threatened release, and second, response costs must have been incurred.⁵⁷ Complicating these two prerequisite events are the numerous uncertainties from which CERCLA liability arises. First, *knowledge* of the release is not necessarily coexistent with its occurrence because the sites involved may be too numerous, may have been hidden from view for decades, and EPA is generally not capable of extensive site investigation.⁵⁸ Second, *broad strict liability* ensures that a vast number of PRPs may be involved in

53. See *supra* notes 16-20 and accompanying text.

54. See *supra* notes 21-24 and accompanying text.

55. See *supra* note 10.

56. See *supra* notes 26-28 and accompanying text.

57. See *supra* notes 44-49 and accompanying text.

58. The most expensive part of the Superfund cleanup process is information

any one release and each party may not know or appreciate its potential liability.⁵⁹ Third, CERCLA operates *retroactively*, holding parties liable regardless of when the release occurred or when liability arose.⁶⁰

This is essentially the problem of "springing claims," claims which originate with an early, pre-petition event, but do not culminate into a fully realized claim until after a petition in bankruptcy has been filed. A similar problem arises in many toxic tort and product liability cases where the victim is exposed to the product or substance, the corporation subsequently files bankruptcy, and the injury does not manifest itself until some years later.⁶¹ Generally, three theories have been presented as to when claims arise for purposes of bankruptcy: (a) with the right to payment (or, in other words, with the payment of response costs by the government or a third party),⁶² (b) upon the establishment of the relationship between the debtor and the creditor,⁶³ and (c) when the debtor's conduct giving rise to the alleged liability occurs (or, in other words, upon the release or threatened release of a hazardous substance).⁶⁴ The Second Cir-

gathering. See *ABA Meeting Offers Advice to Attorneys on Clash of Bankruptcy, Environmental Laws*, 5 TOXIC L. REP. 26, 31 (1990).

59. See *supra* notes 37-51 and accompanying text. CERCLA is a strict liability statute premised on status; "liability is conferred as a result of who you are, not what you have done." *Epling*, *supra* note 9, at 82.

60. Retroactive liability is commonly held to be a component of CERCLA, (see, e.g., *United States v. Mottolo*, 695 F. Supp. 615, 621-22 (D.N.H. 1988); *O'Neil v. Picillo*, 682 F. Supp. 706, 729 (D.R.I. 1988)), even where the response costs were incurred prior to CERCLA's enactment. See, e.g., *Mottolo*, 695 F. Supp. at 621-22; *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 668 (D.N.J. 1985); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1072-73 (D. Colo. 1985).

61. See, e.g., *In re Johns-Manville Corp.*, 57 B.R. 680, 686-88 (S.D.N.Y. 1986); *Grady v. A.H. Robins Co.*, 839 F.2d 198, 203 (4th Cir. 1988); *In re UNR Indus., Inc.*, 29 B.R. 741, 744-46 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984).

62. See *In re Frenville*, 744 F.2d 332, 337 (3d Cir. 1984) (The indemnity action arose from pre-petition conduct, but the action was filed post-petition. The court applied state indemnity law which stated that a right to payment does not occur until payment of the judgment by which a party seeks another's indemnification.), *cert. denied*, 469 U.S. 1160 (1985); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 836-37 (D. Minn. 1990) (The lack of response costs incurred by EPA under CERCLA did not create a right to payment and, therefore, no legal obligation.).

63. See, e.g., *In re Edge*, 60 B.R. 690, 699-700 (Bankr. M.D. Tenn. 1986) (The claim was based on negligent dental treatment occurring pre-petition, but the injury was not discovered until post petition. The court, in discharging the claim, held that the claim arose at the earliest moment of the doctor-patient relationship.).

64. See, e.g., *In re Jensen*, 127 B.R. 27, 32 (Bankr. 9th Cir. 1991) (considering all three theories in adopting a conduct approach to ensure a fresh start for debtors); *In re Chateaugay Corp.*, 112 B.R. 513, 521 (Bankr. S.D.N.Y. 1990) (discharging a CERCLA claim based on pre-petition conduct, while also noting that the relationship between the

cuit Court of Appeals (in *In re Chateaugay*), the highest court to have decided which approach is the most desirable for CERCLA claims, has chosen to follow the latter, conduct-based approach.⁶⁵

B. Union Scrap Iron & Metal—Notice as a Prerequisite to Discharge

Following the bankruptcy court's decision in *Chateaugay*, which chose to follow a conduct-based approach in determining when claims arise,⁶⁶ some district courts have sought to lessen the harshness of such a rule by requiring specific notice to claimants before discharging the environmental liability.⁶⁷

In *Union Scrap Iron & Metal*,⁶⁸ Taracorp Industries ("Taracorp") was in the business of recovering lead from used batteries through its smelting processes. Taracorp received its supply of processed spent automobile batteries from Union Scrap Iron & Metal, who stored the recovered lead plates and broken battery cases at the Washington Avenue site. In 1982, Taracorp filed for reorganization under Chapter 11. The bankruptcy court set a bar date of July 5, 1983 for filing claims against Taracorp. The bankruptcy plan was confirmed on July 1, 1985.⁶⁹

At the same time in 1983, however, the Minnesota Pollution Control Agency (MPCA) began investigating the Washington Avenue site. The MPCA recommended placing the site on the National Priorities List (NPL), upon which it was placed on September 21, 1984.⁷⁰ In March 1985, EPA conducted a site assessment and began response actions with the state of Minnesota. While EPA did negotiate with Taracorp involving its lead smelting facilities during Taracorp's bankruptcy, EPA did not know of Taracorp's relationship with the Washington Avenue site until 1989.⁷¹

regulated and the regulator create some awareness of the release), *aff'd*, 944 F.2d 997, 1005 (2d Cir. 1991).

65. 944 F.2d at 1005.

66. *Chateaugay*, 112 B.R. at 521.

67. *Waterville Indus. v. First Hartford Corp.*, 124 B.R. 411, 413 (D.Me. 1991); *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 130 B.R. 521, 524 (N.D. Ill. 1991); *see United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 836-37 (D. Minn. 1990).

68. *Union Scrap Iron & Metal*, 123 B.R. at 831.

69. *Id.* at 833.

70. *Id.*

71. *Id.* at 833-34.

The issue before the court was whether EPA could recover response costs arising from the Washington Avenue site when the activity (the used battery agreement) lasted only until 1982. Taracorp had petitioned for bankruptcy in 1983, and the response costs were incurred from 1985 to 1990.⁷²

The court did not find that a pre-petition claim existed, as all the elements required for a legal obligation under CERCLA were not present (especially expenditures of response costs).⁷³ The court further explained that, for a claim to exist, it would have to be a contingent claim, but those claims depend on the mutual contemplations of the parties involved.⁷⁴ The court found no such presumed knowledge on the part of EPA regarding Taracorp's involvement with the site: "[t]hat . . . EPA can imagine hazards at Taracorp's many facilities does not give rise to a presumption of knowledge of the hazards at the Washington Avenue Site."⁷⁵ While the court, in effect, rejected a conduct-based approach to claim determination, it distinguished those cases which have adopted that approach. Specifically, it was recognized that those plaintiffs were presented with an opportunity to enter the ongoing bankruptcy proceedings, whereas, in this case, EPA had no knowledge of Taracorp's potential responsibility at the site until after confirmation and, therefore, had no opportunity to file a claim.⁷⁶ The court decidedly favored the environmental goals of CERCLA over any goals of the Code.⁷⁷

72. *Id.* at 833.

73. *Union Scrap Iron & Metal*, 123 B.R. at 835-36. See also *supra* notes 45-50 and accompanying text (listing elements of CERCLA liability).

74. The *Union Scrap Iron & Metal* decision utilized the following definition of "contingent claims:" "The debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created." *Union Scrap Iron & Metal*, 123 B.R. at 836 (quoting *In re All Media Properties, Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd mem.*, 646 F.2d 193 (5th Cir. 1981)).

75. *Id.* The court also stated that it need not decide whether Taracorp's argument would have been stronger if it had "made a more complete disclosure of its liabilities, including the present claim, during its bankruptcy proceedings — or if . . . EPA had had knowledge of its involvement in the site," since Taracorp did not allege any knowledge on the part of EPA. *Id.*

76. *Id.* at 836-37 (discussing *Chateaugay*, 112 B.R. at 513). This distinction has been noted by the Second Circuit: "[I]n *Union Scrap*, the dispute arose years after confirmation, rather than in a declaratory judgment action filed during the pendency of Chapter 11 proceeding." *Chateaugay*, 944 F.2d at 1005 n.2.

77. *Union Scrap Iron & Metal*, 123 B.R. at 838. "[T]he Supreme Court . . . ha[s] judged environmental needs outweigh bankruptcy code provisions." *Id.* (citing *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986)). The district

The *Union Scrap Iron & Metal* decision provides a specific notice rationale which requires "actual or presumed knowledge" to discharge claims where full CERCLA liability is absent.⁷⁸ This analysis requires knowledge of three elements: (a) knowledge of the debtor's status as a PRP, (b) knowledge of the PRP's bankruptcy, and (c) knowledge of the relationship between the PRP-debtor and the particular site.⁷⁹

C. The Conduct-Based Approach—Silent Disapproval

Chateaugay, the seminal opinion in support of the conduct-based approach for CERCLA claims did not address *Union Scrap Iron & Metal*⁸⁰ or other legal precedents requiring notice as a prerequisite to discharge,⁸¹ as the issue of notice was not raised on appeal. In determining that a contingent claim did exist, however, the Second Circuit appears to be unwilling to require specific notice:

[T]here does not yet exist between EPA and LTV the degree of relationship between claimant and debtor typical of an existing though unmatured contract claim [However,] EPA is acutely aware of LTV and vice versa. The relationship between environmental regulating agencies and those subject to regulation provides sufficient "contemplation" of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of "claims." True, EPA does not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon LTV, and it does not yet even know the location of all the sites at which such wastes may yet be found.⁸²

Simply stated, knowledge of the two key events resulting in CERCLA liability against LTV may not yet have been ascertained (*i.e.* the existence of releases or threatened releases and recovery costs).⁸³ The Second Circuit, however, relies on the relationship between regulated industry and the regulating

courts ruling was also enforced by congressional goals of not burdening EPA with spending its minimal resources in maintaining its ability to sue PRPs "before . . . EPA had spent any resources investigating, evaluating, and implementing a remedy for those sites." *Id.* at 837-38.

78. *Id.* at 836.

79. *See id.*

80. *See supra* notes 66-74 and accompanying text.

81. *See Jensen*, 127 B.R. at 32-33; *Chateaugay*, 112 B.R. at 521.

82. *Chateaugay*, 944 F.2d at 1005.

83. *See supra* notes 45-50, 56 and accompanying text.

agency in holding that these claims are merely contingent.⁸⁴ The regulator-regulatee relationship rationale would not be appropriate for private-party claimants, as they are not parties to the regulatory relationship.⁸⁵ Of course, presuming that EPA is acutely aware of all releases or threatened releases which occur in regulated industry is, in itself, an optimistic assumption.

The Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals has also followed *Chateaugay*.⁸⁶ The lower court was influenced heavily by the lack of knowledge between the Department of Health Services⁸⁷ and the PRP-debtor in refusing to discharge the claims for cleanup costs.⁸⁸ On appeal, however, the Bankruptcy Appellate Panel adopted a conduct-based approach in discharging the CERCLA claims.⁸⁹

In adopting the conduct rule, the *Jensen* court was convinced that this view was supported by the majority of bankruptcy precedent.⁹⁰ When confronted with the argument that there was no pre-petition relationship between the debtor and the regulator in *Jensen* (as had existed in *Chateaugay*), the court declined to withdraw from its conduct-based approach.⁹¹ The court stated that, attempting to distinguish based upon the lack of a regulator-regulatee relationship, "overlook[ed] the plain

84. *Chateaugay*, 944 F.2d at 1005. Here, the Second Circuit adopted the same definition of "contingent claims" used by the court in *Union Scrap Iron & Metal*. See *Union Scrap Iron & Metal*, 123 B.R. at 836; *Chateaugay*, 944 F.2d at 1004. But the *Chateaugay* opinion expressed distrust in transferring a contractual term into the context of tort and statutory claims. *Chateaugay*, 944 F.2d at 1005.

85. See Peter M. Gillon, *One Round for the Debtors: The Second Circuit's Decision in In re Chateaugay*, 22 CHEM. WASTE LITIG. REP. 1339, 1341 (1991).

86. *Jensen*, 127 B.R. at 32-33 (citing *Chateaugay*, 112 B.R. at 513).

87. The suit was brought by the state equivalent to EPA, the Department of Health Services (DHS). See *In re Jensen*, 114 B.R. 700, 701 n.1 (Bankr. E.D. Cal. 1990).

88. *Id.* at 700. With reasoning similar to that of the court in *Union Scrap Iron & Metal*, the court opined:

The dilemma is that there was never any prepetition contact, let alone relationship, between the Jensens and the [Department of Health Services]. The DHS never communicated or even heard of the Jensens until after the filing of their petition. Thus, how could the parties have actually or presumably contemplated prepetition, that at some future time postpetition the DHS would have a claim for costs incurred in cleaning up and removing toxic waste at the Site?

Id. at 705-06.

89. See *Jensen*, 127 B.R. at 32-33.

90. *Id.* at 32. The Court specifically noted two famous mass tort cases, *In re Johns-Manville Corp.*, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) (timing claims on factors other than debtor's conduct should not determine existence of a claim) and *In re A.H. Robins Co.*, 63 B.R. 986, 993 (Bankr. E.D. Va. 1986) (same). *Jensen*, 127 B.R. at 32.

91. *Jensen*, 127 B.R. at 33.

holding of [*Chateaugay*] that a claim arises for purposes of discharge upon the actual or threatened release of hazardous waste by the debtor."⁹² The court also refused to grant any preferred status for environmental claims in bankruptcy.⁹³ The *Jensen* decision is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit and will likely bring the next significant development in this area.⁹⁴

IV. SOURCES OF NOTICE REQUIREMENTS

A. *Constitutional Due Process*

As previously discussed, the claimant (or potential claimant) who does not file a proof of claim may possibly lose the ability to present that claim forever.⁹⁵ This is apparently true regardless of whether the claimant (or potential claimant) had knowledge of the claim or petition.⁹⁶ The notion that a party can lose its ability to pursue a claim without its knowledge appears highly questionable in light of constitutional precedents which require notice before interests can be extinguished.⁹⁷

Generally, it has been held that "[t]he fundamental requisite of due process is the opportunity to be heard."⁹⁸ It is not sufficient that the opportunity exists, however, if knowledge of the opportunity to be heard is denied.⁹⁹ The fullest expression of these general principles can be found in *Mullane v. Central Hanover Bank & Trust Co.*:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise inter-

92. *Id.*

93. *Id.*

94. See Gillon, *supra* note 85, at 1341 n.5.

95. See *supra* note 24 and accompanying text.

96. It has been stated that:

[I]n the name of ensuring that the debtor will have a "fresh start", sections 1141(c) and (d) appear to permit secured and unsecured claims and equity interests to be extinguished notwithstanding the fact that the holder of such a claim or interest has not received notice of the case and no effort has been made to inform the holder of the claim or interest of . . . the [reorganization] plan.

LAWRENCE P. KING, 5 COLLIER ON BANKRUPTCY para. 1141.01, at 1141-12 (15th ed. 1984).

97. U.S. CONST. AMEND. V; U.S. CONST. AMEND. XIV, § 1; *New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

98. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

99. *Mullane*, 339 U.S. at 314.

ested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information

....¹⁰⁰

In *Mullane*, the use of publicized notice was deemed adequate to inform the beneficiaries of a trust, who might have an interest in the accounting of the trust, so long as their "interests or addresses are unknown to the trustee."¹⁰¹

The *Mullane* opinion was followed within the bankruptcy context by *New York v. New York, N.H. & H.R. Co.*,¹⁰² which held that, even if New York City had knowledge of the railroad company's reorganization through publicized notice, the city had "a right to assume that statutory 'reasonable' notice" would be provided before their claim could be adversely affected.¹⁰³ The city's claim, therefore, was not discharged through the reorganization plan of the debtor.¹⁰⁴

The due process requirement of personal notice only extends to the identifiable creditor or claimant; otherwise, notice by publication is adequate.¹⁰⁵ Unfortunately, this delineation does not address the problems of future, non-contractual claimants who are more than likely unascertainable. Under *Mullane* and its progeny, parties with established relationships with the debtor prior to a bankruptcy petition are at a distinct advantage over the unknowing victim of the debtor's tortious or otherwise injurious conduct.¹⁰⁶ Ironically, it might be argued that the existence of a "regulator-regulatee" relationship, which brought EPA's claims against LTV "within the definition of 'claims,'" ¹⁰⁷ may also establish the ascertainable relationship which would require personal notice.

In any case, the due process notice requirement is somewhat limited in its application to unascertainable parties. How-

100. *Id.* at 314 (citations omitted).

101. *Id.* at 318.

102. *New York, N.H. & H.R. Co.*, 344 U.S. at 293.

103. *Id.* at 297.

104. *Id.*

105. See, e.g., *In re Intaco Puerto Rico, Inc.*, 494 F.2d 94, 99 (1st Cir. 1974); *In re Harbor Tank Storage Co.*, 385 F.2d 111, 115 (3d Cir. 1967).

106. But, where the bankruptcy judge has knowledge of a potential future tort claim, the court is permitted to condition the discharge of the claim on a later final adjudication of the claim. See *Bittner v. Borne Chem. Co., Inc.*, 16 B.R. 509 (Bankr. D.N.J. 1980), *aff'd*, 16 B.R. 514 (Bankr. D.N.J. 1981), *aff'd*, 691 F.2d 134 (3d Cir. 1982).

107. *Chateaugay*, 944 F.2d at 1005. Such an argument, however, may be limited where, as in *Jensen*, there was no such relationship. See *Jensen*, 127 B.R. at 33.

ever, due process is not the only means by which adequate notice may be required but it does serve as a constitutional minimum. To the extent that applicable statutes or rules do not provide this minimum of opportunity and notice, the statute or rule is unconstitutional.¹⁰⁸

B. Statutory Sources

1. The Bankruptcy Code

Under bankruptcy law, notice requirements are controlled primarily by Bankruptcy Rule 2002, which generally requires that notice of the bankruptcy proceedings be given to creditors¹⁰⁹ so that all creditors have an equal opportunity to assert their claims against the debtor's estate.¹¹⁰ This notice requirement is generally limited to those who are "creditors;"¹¹¹ interested parties who do not fit the statutory definition have been denied the opportunity to have notice.¹¹²

From this rule, it would appear that notice should always be required whenever a claim can be discharged. Since a "creditor" is one who possesses a claim,¹¹³ and since a bankruptcy court can only discharge claims,¹¹⁴ a determination that a prepetition claim exists resolves both the issues of dischargeability and notice requirement. A creditor who is not provided adequate notice is not bound by the confirmed plan, and, therefore,

108. See *Reliable Elec. Co., Inc., v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) (although the Code may have been complied with, failure to provide adequate due process notice made the confirmed plan unenforceable against the creditor); *In re Middle Plantation of Williamsburg, Inc.*, 36 B.R. 873, 875-76 (Bankr. E.D. Va. 1984) (holding that, to the extent that a bankruptcy rule barred certain claims if a proof of claim was not timely filed without requiring that persons holding such claims be notified of the deadline, such a rule was unconstitutional as it violated due process).

109. 11 U.S.C. APP. BANKR. R. 2002(a) (requiring 20 days notice to be given to "the debtor, the trustee, all creditors and indenture trustees . . . of . . . the time fixed for filing proofs of claims pursuant to Rule 3003(c)").

110. *In re DeSoto Crude Oil Purchasing Corp.*, 35 F. Supp. 1 (W.D. La. 1940).

111. 11 U.S.C. APP. BANKR. R. 2002(a) (also notifying debtor, trustee, and indentured trustees). A creditor is defined as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(9)(a). Therefore, the definition of a "claim" is the key element of determining who is a creditor. See *supra* text accompanying note 19 (defining "claim").

112. See *In re Republic Trust & Sav. Co.*, 897 F.2d 1041, 1045-46 (10th Cir. 1990) (although the court distinguished parties with contingent claims).

113. 11 U.S.C. § 101(9)(A) (A "creditor" is defined as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor.").

114. See *supra* notes 17-19 and accompanying text.

the claim is not discharged.¹¹⁵

The difficulty for many debtors upon petitioning is that they may be facing potential CERCLA liability in the future for unknown conduct arising prior to the bankruptcy petition. How can notice be given to unidentified creditors? The solution under Rule 2002, for unascertainable creditors or unidentifiable claims, is to permit the judge to provide for notice by publication as an alternative, if the court determines that notice by mail would be "impracticable."¹¹⁶ Augmented by the due process decisions following *Mullane*,¹¹⁷ notice to unascertainable parties possessing claims can arguably be fulfilled through notice by publication. Unfortunately, publicized notice in many CERCLA actions may only be a mere legal hoop, providing no real opportunity for future creditors.¹¹⁸

2. CERCLA

In seeking "to encourage early reporting of violations of the statute,"¹¹⁹ CERCLA requires that "[a]ny person in charge [of a vessel or facility] shall, as soon as he has knowledge of any release of a hazardous substance . . . in [reportable] quantities, . . . immediately notify the National Response Center."¹²⁰ Failure to give notice of a release is considered a criminal felony and can result in fines and imprisonment for up to three to five years.¹²¹ EPA has set up regulations which determine the appropriate reportable quantities for any given hazardous substance.¹²²

This felony provision of CERCLA has rarely been used, being warranted only for "egregious" offenses.¹²³ The govern-

115. *Reliable Elec. Co., Inc., v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984).

116. 11 U.S.C. APP. BANKR. R. 2002(k).

117. See *supra* notes 95-104 and accompanying text.

118. Notice must be able to reasonably convey "the required information." *Mullane*, 339 U.S. at 314.

119. *Chemical Waste Management v. Armstrong World Indus.*, 669 F. Supp. 1285, 1290 n.6 (E.D. Pa. 1987).

120. 42 U.S.C. § 9603(a). Congress established the National Response Center under the Clean Water Act. 33 U.S.C. § 1251 et seq. (1986).

121. 42 U.S.C. § 9603(b) (the five year maximum is for non-first time offenders).

122. 40 C.F.R. § 302.4 (1991). These regulations were promulgated under the authority of 42 U.S.C. § 9602(a).

123. *Grand Jury Indicts Demolition Contractor for Violating CERCLA, Asbestos Regulations*, 4 TOXIC L. REP. 157 (1989) (quoting Assistant U.S. Attorney Richard Dennis regarding *United States v. Donahoo*, No. CR89-0057-01-L(j) (D.C.W.Ky. June 5, 1989)). Here, the operator of a demolition company was indicted by a grand jury for failure to

ment, however, has been willing to utilize the full extent of the "in charge" language, even attaining the conviction of a civilian employee of relatively low rank at a military institute.¹²⁴ Other significant developments for interpreting CERCLA notice requirements are recent Supreme Court rulings interpreting the "knowledge" requirement for public welfare offenses.¹²⁵

CERCLA does not expressly mandate notice of a release or threatened release as a prerequisite to discharging claims arising from the release or threatened release. In fact, bankruptcy is not a factor anywhere in CERCLA. However, important policy considerations, evidenced by Congress in passing CERCLA, support an interpretation which requires notice. For example, retroactive liability is premised on strong congressional intent to hold responsible parties liable, regardless of how long ago the conduct occurred.¹²⁶ CERCLA policies also encourage cleanup costs to be imposed on responsible parties, not taxpayers,¹²⁷ particularly when those parties have failed to assist the government by providing timely notice.¹²⁸ Moreover, considering the broad strict liability which CERCLA imposes,¹²⁹ Congress clearly did

provide notice of the release of reportable quantities of asbestos while attempting to remove asbestos from a structure. *Id.* The defendant was also indicted for falsifying records, failing to use approved asbestos removal methods, and ignoring EPA's repeated warnings as to his responsibilities under federal asbestos regulations and CERCLA. (Ironically, the defendant was not aware that he was being indicted). *Id.*

124. *United States v. Carr*, 880 F.2d 1550, 1554 (2d Cir. 1989) (holding that the legislative history intended for those "in charge" to be defined as those "in a position to detect, prevent and abate a release of hazardous substances").

125. *Liparota v. United States*, 471 U.S. 419, 421 (1985) (construing a criminal statute prohibiting a person from "knowingly" acquiring or possessing food stamps "in a manner not authorized by statute or regulations"). See also Note, *Mens Rea Requirements under CERCLA: Implications for Corporate Directors, Officers, and Employees*, 6 SANTA CLARA COMPUTER & HIGH TECH. L.J. 378, 382, 392-96 (1991). Knowledge required for CERCLA notice violations would consist of: (1) knowledge of the existence of a release; (2) knowledge that the substance is hazardous, but not necessarily knowledge that the substance is defined as hazardous by CERCLA; and (3) knowledge that no notice was given to the government. *Id.* at 394-5.

Under the Public Welfare Statutes doctrine, there would be no requirement that the prosecutor prove that the individual had knowledge of all of the above elements. *Id.* at 395-96.

126. *Mottolo*, 695 F. Supp. at 621-22. See also *supra* notes 45-50 and accompanying text.

127. See *supra* note 118 and accompanying text.

128. Notice of a release is a prerequisite to the entire Superfund scheme and section 103(a)-(b) contains the only affirmative duty currently imposed by CERCLA. However, the ability to easily ascertain applicable regulating agencies may, arguably, create a mandate that such agencies be informed when a regulated industry petitions for bankruptcy. See *supra* notes 105-106 and accompanying text.

129. See *supra* notes 45-51 and accompanying text.

not intend for responsibility to be easily evaded, nor did it intend to support a policy which discouraged notice and encouraged nondisclosure of releases to the extent that ignorance permitted.

Overall, the notice required by due process and the relevant statutes does not appear to be extensive enough to contemplate future claimants. Due process extends notice only to the limitations of ascertainability,¹³⁰ while notice under the Code is also bound by impracticality.¹³¹ Where unidentified claimants are given less than personal notice due to the impracticality of notice or the unascertainability of the claimants, no real notice has been provided for them. Conversely, CERCLA does require that notice of releases be given immediately under threat of its felony provisions.¹³² Even where a felony can be proven,¹³³ however, the Code does not exempt from discharge those claims relating to felonious conduct.¹³⁴ While due process and the statutes provide the necessary starting point for evaluating the need for notice, imposing such an obligation must derive from outside of bankruptcy law.

V. A SOLUTION—WITHOUT BANKRUPTCY

A. *Bankruptcy as a Mirror of Other Rights and Obligations*

While due process and statutory notice do not provide easy answers to the notice dilemma, a reevaluation of bankruptcy's role is essential for a complete understanding of the relationship between the Code and other law. A conflict between the goals of the Code and CERCLA need not necessarily arise. First, CERCLA's goal of imposing costs on responsible parties does not operate contrary to the Code, as bankruptcy does not operate to

130. See *supra* notes 95-104 and accompanying text. Providing unidentifiable claimants only with notice by publication of the bankruptcy proceeding, however, is arguably a denial of "the opportunity to be heard" before their interests are discharged. See *supra* note 96 and accompanying text.

131. See *supra* notes 116-18 and accompanying text. However, that all "creditors" must be given notice does imply that the Code does not discharge any claim without the knowledge of the possessor of that claim. See *supra* notes 109-15 and accompanying text.

132. See *supra* notes 118-22 and accompanying text.

133. The difficulty in proof is that knowledge of the release of hazardous substances is required, see *supra* note 125, and the threat is that parties may seek to insulate themselves from such knowledge.

134. But see 11 U.S.C. § 523(a)(6) (Debts will not be discharged "for willful and malicious injury by the debtor to another entity or to the property of another entity."). Proof of willfulness and malice do not naturally comport with strict liability statutes such as CERCLA. Although such *mens rea* may be provable at times, legislative action may be more appropriate than extending the use of this exception to most CERCLA claims.

permit a debtor to act in contravention of public health and safety laws.¹³⁵ While the question posed by CERCLA may be "who pays?," if the answer is a corporation undergoing bankruptcy proceedings, the Code only imposes bankruptcy's additional dilemma: "Who gets the money?"¹³⁶ The ability to seek recompense from the PRP, therefore, is only subject to the limitations of that party's ability to pay; it is not related to any ability of a company to avoid criminal or civil liability.¹³⁷ Second, CERCLA's goal of providing quick relief to protect health and the environment is completely compatible with bankruptcy's fast pace.¹³⁸ Ensuring speedy property cleanup also assists in the distribution of the debtor's assets and prevents further deterioration of the debtor's estate from ongoing releases and spills.¹³⁹

Essential to any understanding of bankruptcy is that a debtor's legal obligations are not affected by bankruptcy law.¹⁴⁰ In *Butner v. United States*, the Supreme Court denied that any substantive rights were created by the enactment of the Bankruptcy Code: the Code itself does not permit "a windfall merely by reason of the happenstance of bankruptcy."¹⁴¹ More specifically, "when no special bankruptcy policy is implicated, the court will simply respect whatever rights exist outside of bankruptcy, and mirror them in bankruptcy."¹⁴²

To fully appreciate this last statement, Professor Baird suggests that a legal analysis in bankruptcy should always begin with the assumption that bankruptcy does not exist.¹⁴³ In fact,

135. See *Midlantic Nat'l Bank v. New Jersey Dep't Envtl. Protection*, 474 U.S. 494, 507 (1986) (holding that a debtor could not abandon property in contravention of the state's hazardous waste laws).

136. Douglas G. Baird, *Environmental Regulation, Bankruptcy Law, and the Problem of Limited Liability*, 18 ENVTL. L. REP. 10352, 10353 (1988).

137. *Id.*

138. See, e.g., 11 U.S.C. § 502(c)(1). This section allows for the speedy fixing or liquidation of contingent and unliquidated claims which "would unduly delay the administration of the case." *Id.*

139. Compare *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985) (CERCLA's basic purpose is "to promptly eliminate the sources of danger to health and environment.") with *In re Nova Real Estate Inv. Trust*, 23 B.R. 62 (Bankr. E.D. Va. 1982) (estimating claims are mandatory to ensure that the liquidation and closing of an estate proceeds without delay).

140. Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 189 (1987).

141. 440 U.S. 48, 55 (1979) (quoting *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961)).

142. Baird, *supra* note 136, at 10353.

143. Baird, *supra* note 140, at 174. For the moment we lay aside the problems of reorganization.

that is presently the case to a certain extent. There is no requirement that a debtor ever file for bankruptcy; the Code only provides a procedure for paying off creditors if the debtor so chooses to utilize that procedure. For example, a PRP-debtor could attempt to avoid paying off its debts and contributing its share of cleanup costs by discharging, without notice, in a liquidation proceeding or the manager could flee the country without telling EPA or other creditors. Essentially, the result would be the same: various creditors would sue the bank to reach the PRP-debtor's remaining assets. If EPA (or another PRP) did not know that the party had fled the country, or that it was liable for cleanup costs, EPA would likely be left out.¹⁴⁴ The question of whether this is a desirable outcome or if some protection should be provided for CERCLA claims is, then, a question of non-bankruptcy law. One solution might be for EPA to attempt to exercise a priority claim against the other creditors who are now in possession of the PRP-debtor's money and property. The government could assert an equitable lien on the seized property and demand compensation from its current owner or owners.¹⁴⁵ If such a theory is permitted outside bankruptcy, surely a bankruptcy court cannot ignore the legally acknowledged "right" to assert an equitable lien, just as a debtor in a bankruptcy proceeding could not steal money from a bank with the court's blessing at any time. The above example also applies to a situation analogous to liquidation, not reorganization. Do policies exist which create a substantive right for companies to discharge, without notice, their environmental liabilities, and, if so, do they exist within or without bankruptcy?

The difficulty in evaluating what a debtor's rights and obligations would be, absent the Code, is due to the inconceivability outside of the unique circumstances of bankruptcy for a situation to arise in which a debtor's future claims could be accelerated.¹⁴⁶ That such claims could arise without the plaintiff's

144. See Baird, *supra* note 136, at 10353.

145. *Id.* (The expenditures utilized by government in improving the estate from environmental damage could be utilized as an equitable lien which would survive any sale of the property and, therefore, the owner of the property would be forced to reimburse the government for cleanup costs.) This comment does not theorize as to the ability or the problems involved with using equitable liens to force payment of cleanup costs. This example only shows that substantive law is created outside of bankruptcy and provides for issues such as priority. "Once this nonbankruptcy priority question is resolved, the bankruptcy result follows." Baird, *supra* note 136, at 10353.

146. EPA or any other private party cannot sue the PRP until a release or threatened release has occurred and response costs have been incurred. See *supra* notes 45-51 and

knowledge and also be disposed of without her knowledge would appear to be nocuous to concepts of jurisprudence and has, in fact, been rejected in the area of mass torts (which generally require an injury to be discovered before the claim can arise).¹⁴⁷ Certain "expedited" procedures permit the *temporary* circumvention of notice requirements, but these provide opportunity for the eventual reassertion of property or liberty interests.¹⁴⁸ Bankruptcy proceedings revolve around the dissolution of a company (or the attempt to save that company from dissolution) and only proceedings which emphasize the limited economic feasibility of a party to pay its debts have any analogous support for the proposition that the debtor need not give notice that a right to payment has been voided.

B. *Federal Class Action Rules*

One situation of special note involves those cases permitted under a theory of representation, in which absentee parties may be foreclosed from the opportunity to pursue their claims against a party who lacks the opportunity to participate or know of the proceedings.¹⁴⁹ This is best exemplified by the class

accompanying text. Therefore, foreclosing a claim *prior* to both of these events is, in effect, an acceleration of that claim.

147. Traditional "exposure" or "injury" rules, which set the time of the cause of action (for purposes of the statute of limitations) upon occurrence of the injury, have been steadily rebuffed in favor of a "discovery" rule, which sets the time of the cause of action when the plaintiff develops knowledge of the injury. See, e.g., *Urie v. Thompson*, 337 U.S. 163, 168-71 (1949) (A railroad worker developed silicosis years after exposure to silica dust. The Supreme Court refused to dismiss the case as being barred and inaugurated a "discovery rule."). By the early 1980s, about forty states had also adopted some version of a "discovery rule." See *Developments in the Law — Toxic Waste Litigation*, 99 HARV. L. REV. 1458, 1606 n.20 (1986).

148. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (permitting writs of seizure where the showing of facts required for the issuance of the writ is minimal or "narrowly defined"); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606-07 (1975) (utilizing the *Mitchell* standard, but declaring Georgia's law unconstitutional).

Where pre-hearing seizures of property are permitted, an early hearing is still required to ascertain the rightful owner. See *North Georgia Finishing*, 419 U.S. at 605-06. This is unlike spring claims in bankruptcy, which may be completely foreclosed without notice or opportunity for a later hearing. See *Jensen*, 127 B.R. at 33.

149. See *Hansberry v. Lee*, 311 U.S. 32 (1940). In this historical case, the Court noted that one cannot be bound by judgments in "which he has not been made a party by service of process." *Id.* at 40 (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)). The Court, however, noted one exception:

To these general rules there is a recognized exception that, to an extent not precisely defined by judicial opinion, the judgment in a "class" or "representative" suit, to which some members of the class are parties, may bind members of the class or those presented who were not made parties to it.

action.¹⁵⁰ The class action has many similarities to the typical bankruptcy proceeding, as both procedures seek to achieve *aggregate* resolutions of problems.¹⁵¹ "Bankruptcy proceedings are already capable of handling group claims [and] operate essentially as statutory class actions."¹⁵² It is not suggested, however, that class action suits are exactly analogous to Chapter 11 bankruptcy proceedings, but class actions also provide binding results without requiring notice in certain circumstances. Thus, exploring the rationale for not requiring notice or opportunity to be heard in class actions should prove instructive as to the jurisprudence of notice requirements outside of bankruptcy.

1. The Limited Fund Rationale

Putting aside (for the moment) the preliminary requirements of Rule 23(a),¹⁵³ we will assume a world without bankruptcy in which a plaintiff, acting as the class representative, wishes to sue, as a class action, the defendant PRP. This class shall be defined as: "[t]hose who have or will have cleanup cost claims against the PRP under CERCLA, now or in the future."¹⁵⁴ The significant point to this definition is that it seeks to have resolved all current and prospective potential cleanup liability. The benefit of this definition is that it determines, without considerable relitigation, the PRP's liability, providing all parties with a good degree of certainty. The problem, of course, remains in determining what future liability might exist for which there is not present liability. Any class definition must

Id. at 41.

150. FED. R. CIV. P. 23. Here, we will utilize the federal class action rule for convenience, as it is beyond the scope of this comment to comparatively discuss the class action rules utilized by various states.

151. See Mark A. Peterson & Molly Selvin, *Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures*, at 13 (RAND/N 2805-ICJ) (1988) (Courts have developed many procedures to circumvent the need to litigate hundreds or thousands of similar claims, such as consolidation, class actions, multidistrict litigation, bankruptcy, and alternative dispute resolution.).

152. HERBERT B. NEWBERG, 3 NEWBERG ON CLASS ACTIONS § 20.01, at 581 (2d ed. 1985).

153. FED. R. CIV. P. 23. Especially significant would be the requirement of fair and adequate representation of the interests of the class. *Id.* at 23(a)(4).

154. More specifically, this hypothetical might involve private parties who have incurred response costs for cleaning up a site previously owned by the PRP-debtor. In the future, more hazardous substances are found to have been released than originally imagined and this future private party seeks indemnification from the PRP-debtor for its response costs. The PRP-debtor will respond that this issue has already been litigated.

pass the scrutiny of the trial court, which determines whether the class definition would fall into one of the three types of class actions maintainable: necessity or unitary class actions,¹⁵⁵ injunctive class actions,¹⁵⁶ and damages class actions.¹⁵⁷ Of these three types of classes, our example concentrates on the necessity or unitary class action, as the class representative is not seeking injunctive relief under Rule 23(b)(2) and a damages class must give notice to class members and provide an opportunity for each member to opt out.¹⁵⁸

The necessity class action is an action which must proceed or the interests of class members will be impaired:

[t]he prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest¹⁵⁹

The most prevalent use of this type of action is where the defendant is a limited fund, unable to pay off multiple claims to a smaller pool of assets.¹⁶⁰ A limited fund action is the class action parallel to a bankruptcy proceeding under Chapter 7 for

155. FED. R. CIV. P. 23(b)(1).

156. FED. R. CIV. P. 23(b)(2).

157. FED. R. CIV. P. 23(b)(3).

158. FED. R. CIV. P. 23(c)(2). Of course, notice is only "the best notice practicable under the circumstances," clearly exemplifying the *Mullane* standard. See Official Comment to Rule 23(d)(2), citing *Mullane*, 339 U.S. at 306 ("[M]andatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject."). This notice, however, must be to the individuals and is not satisfied by publicized notice unless the individuals cannot "be identified with reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). While it may be conceivable that a court would decline a notice requirement to absent parties, "the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether." Official Comment to Rule 23(c)(2). As far as a situation analogous to bankruptcy is concerned, nondisclosure of the proceedings is supported by the same rationale as in Rule 23(b)(1) mandatory class actions where individual adjudications threaten to make the defendant insolvent or impair the creditor's ability to pursue an individual action. See FED. R. CIV. P. 23(b)(1)(B).

159. FED. R. CIV. P. 23(b)(1)(B). Rule 23(b)(1)(A) is not discussed within the context of the necessity class here because its application is fairly limited, such as taxpayer suits to invalidate municipal actions or shareholder suits to compel dividends. See Official Comment to Rule 23(b)(1)(A); *Sultan v. Bessemer-Birmingham Motel Assocs.*, 322 F. Supp. 86 (S.D.N.Y. 1970) (securities action); *Mertz v. Harris*, 497 F. Supp. 1134 (S.D. Tex. 1980) (injunction for government benefits).

160. See Official Comment to Rule 23(b)(2)(B) (appropriate "... when claims are made by numerous persons against a fund insufficient to satisfy all claims").

liquidation, as, in both situations, there are more liabilities claiming a pool of limited assets than can be reconciled.¹⁶¹

Notice is not required for a Rule 23 "necessity" class action¹⁶² and, therefore, a debtor's limited fund should provide a reasonable argument in bankruptcy for dispensing with the notice requirement. The absence of notice requirements for Rule 23(b)(1) and (b)(2) classes has been attributed to the group cohesiveness of those actions.¹⁶³

Since there is no notice requirement for these necessity classes, Professor Baird would recognize this general result in bankruptcy proceedings or, more specifically, liquidation proceedings.¹⁶⁴ Of course, claimants without knowledge of a liquidation would lose their claim when the fund is depleted, but nonbankruptcy law has permitted this result. An alternative to this result would be to amend nonbankruptcy law and give priority to private parties seeking CERCLA cleanup costs and permit them to sue those who are currently in receipt of the PRP's former assets.¹⁶⁵

Permitting liquidating PRPs to dissolve without notice, however, is not necessarily adverse to CERCLA policies. First of all, liquidating companies generally lack the deep pockets to compensate the government or other private parties for expensive cleanup.¹⁶⁶ Second, CERCLA's felony statute provides for

161. See HERBERT B. NEWBERG, 1 NEWBERG ON CLASS ACTIONS § 4.09, at 288-89 (2d ed. 1985). Limited fund cases represent the most common necessity class and are similar to bankruptcy: "[c]reditor's committees in bankruptcy proceedings represent statutory classes of claimants to the debtor's assets in traditional bankruptcy practice." *Id.* at 288.

162. FED. R. CIV. P. 23(b)(1). It is within the court's discretion, however, to require notice of the action. FED. R. CIV. P. 23(d)(2).

163. Arthur R. Miller, PROBLEMS OF GIVING NOTICE IN CLASS ACTIONS, 58 F.R.D. 313, 315 (1973).

164. See Baird, *supra* note 136, at 10353 ("[C]ourts [should] respect whatever rights exist outside of bankruptcy, and mirror them in bankruptcy.").

165. See Baird, *supra* note 140, at 186. Professor Baird makes numerous suggestions as to how congressional goals could be implemented by laws and regulations. If social policy dictates a different result than that which would result naturally from nonbankruptcy law, then the social policies of nonbankruptcy law should be amended to more clearly achieve those goals. *Id.*

Bankruptcy law already applies a notice requirement for the special situation of individual debtors. See 11 U.S.C. § 523(a)(3) (requiring notice before discharge); 11 U.S.C. § 727(b); 11 U.S.C. § 1141(d)(2) (applying Section 523 only to individual debtors).

166. See Richard P. Krasnow, *Environmental Issues in a Bankruptcy or Reorganizational Proceeding: A Bankruptcy Lawyer's Perspective*, 18 ENVTL. L. REP. 10355, 10356 (1988) ("Typically, liquidations occur where the assets are relatively de

both fines and *jail sentences*,¹⁶⁷ thereby engendering a substantial deterrence for most liquidating PRPs. A liquidating organization, unlike a reorganizing company, can have little preference for which claimants are reimbursed, as the company will retain no assets upon the completion of the proceedings.¹⁶⁸ Thus, the need for notice in a Chapter 7 liquidation does not create significant concerns and, therefore, should not be required for truly limited funds.

2. The De Facto Limited Fund

A reorganization proceeding does not involve a limited fund, however, as the debtor is asking to be given a "fresh start."¹⁶⁹ In reorganization, full payment of the company's debts would so substantially endanger the debtor that it may be unable to operate as an ongoing, income producing entity. This is merely a "de facto" limited fund situation in which the debtor attempts to sell its ongoing concern value to shareholders and creditors in exchange for not making good fully on all of its debts and liabilities.¹⁷⁰

The use of a class action to adjudicate the rights of absent parties where there is only a "de facto" limited fund has not found approval under a Rule 23(b)(1) necessity class action.¹⁷¹ In *In re School Asbestos Litigation*, the court was asked to certify a necessity class for punitive damage claims in an action involving a large number of plaintiffs with potentially enormous liabilities.¹⁷² It was argued that the potentially enormous and unpredictable punitive awards arising out of asbestosis injuries

minimus. Thus, the question of whether the government's claim for recovery is dischargeable in Chapter 7 cases is somewhat academic.").

167. See *supra* note 121 and accompanying text.

168. Unless, of course, the debtor is a corporation whose shareholders have made substantial loans to the corporation and may now be forced to take a back seat to the government's administrative priority. This, however, questions the appropriateness of piercing the corporate veil (which is out of the scope of this comment).

169. See *supra* note 9 and accompanying text.

170. Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. LEGAL STUD. 127, 139 (1986) ("The difference between a liquidation and a reorganization is that the first involves an actual sale of all the assets of a business to a third-party buyer and the second involves a hypothetical one.").

171. FED. R. CIV. P. 23(b)(1).

172. 789 F.2d 996, 1000-01 (3d Cir. 1986). This case arose following the discovery of asbestos in several school districts in Pennsylvania and one in South Carolina, all of which filed a class action against approximately fifty defendants involved in the asbestos industry. The Eastern District of Pennsylvania certified a nationwide class under Rule 23(b)(1)(B) based upon a theory of "substantial possibility" of the defendants. *Id.* at 999.

could result in the "substantial possibility of [an] overkill scenario" in which late-coming plaintiffs might be denied their opportunity to receive punitive damages.¹⁷³ The court denied certification of the necessity class, as certification under Rule 23(b)(1) would be mandatory against all members of the class (thus leaving no opportunity for opt-out).¹⁷⁴ Forcing a "bottle-neck" of adjudications in one court at one time was not preferred over trying the claims as individual cases as they arose.¹⁷⁵ The court found that the prejudicial nature of a mandatory class action outweighed any other dangers without evidence of a truly limited fund.¹⁷⁶ This high level of proof required to authenticate the existence of an actual limited fund has been followed by many courts.¹⁷⁷

Absent a limited fund, a party would need to seek the less binding damages class action of Rule 23(b)(3),¹⁷⁸ which would invariably fail to meet the requirements of a bankruptcy class action hypothetical where notice would not be required to dispose of an absent party's claims. First, damages class actions require that the "best notice practicable" be given to claimants,¹⁷⁹ which is individual notice.¹⁸⁰ Second, nonbankruptcy courts have refused to certify a damages class including future claimants where to do so would adversely affect the interests of the future claimant.¹⁸¹ While classes have been certified which

173. *Id.* at 1003.

174. *Id.* at 1002.

175. *Id.* at 1007.

176. *School Asbestos Litigation*, 789 F.2d at 1007.

177. See, e.g., *In re Northern Dist. of Cal., Dalkon Shield, Etc.*, 693 F.2d 847, 851-52 (9th Cir. 1982), *rev'd on other grounds*, *In re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir. 1989) (requiring a showing of inescapable impairment to the future claimant's rights to a fund); *Payton v. Abbot Labs.*, 83 F.R.D. 382, 389 (D. Mass. 1979) (insufficient showing of likelihood of insolvency); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182 (8th Cir. 1982) (uncertain punitive damages against the defendant who had not yet conceded liability could not substantiate a limited fund such as that in interpleader cases); *In re Rail Collision Near Chase, Md.* on Jan. 4, 1987, 9 Fed. R. Serv. 3d (Callaghan) 1045 (D. Md. Dec. 8, 1987) (rejecting a "limited generosity" or de-facto limited fund theory); *Pruitt v. Allied Chem. Corp.*, 85 F.R.D. 100, 108 (E.D. Va. 1980) (factual support of claims asserted against a fund cannot be based on imaginary figures or necessarily the exorbitant funds "requested" by the plaintiffs); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 470 (5th Cir. 1986) (finding existence of a limited fund to be too speculative).

178. FED. R. CIV. P. 23(b)(3).

179. FED. R. CIV. P. 23(c)(2).

180. *Eison v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

181. See, e.g., *Lerma v. Stokely-Van Camp, Inc.*, 504 F. Supp. 1313, 1318 (N.D. Ill. 1981); *Avagliano v. Sumitomo Shoji America, Inc.*, 103 F.R.D. 562, 577 (S.D.N.Y. 1984); *Strong v. Arkansas Blue Cross & Blue Shield, Inc.*, 87 F.R.D. 496, 508 (E.D. Ark. 1980). The Rule 23(b)(3) class was developed from the "spurious" class action," which only

include future or potential claimants, the certification has relied on the commonality of interests between the representation and the future parties and the advantage to the future plaintiffs in having their future interests litigated in the present action.¹⁸²

There is no logical benefit for the government or for another PRP to lose their opportunity to proceed against a reorganized company. If the reorganized company is solvent at the time a claim arises, no bankruptcy policy should prevent compensation for cleanup of hazardous wastes. Adjudication of a claim without representation of the potential claimant in the proceedings cannot be substantiated under nonbankruptcy law. Since discharge of a claim without notice is not permitted under nonbankruptcy law, the result should be mirrored within the bankruptcy proceeding.¹⁸³

C. *The "Fresh Start" Policy*

While nonbankruptcy law should control the rights and obligations of the PRP-debtor, it is the reorganizing company's argument that bankruptcy's edict - to give companies a fresh start - somehow provides a "right" to reorganize. That a company has a right to avoid its cleanup responsibilities is ludicrous and untrue.¹⁸⁴

More specifically, the debtor may complain that forcing a company into a financially hazardous position is detrimental to a broad range of interests, such as those of owners, employees, and the national economy as a whole. However, closer examination reveals that these concerns are overstated and simply inappropriate to raise in defending reorganization to the detriment of environmental laws.¹⁸⁵ Protecting debt-ridden corporations is not necessarily "good business;" market economies prosper just as well with the dissolution of economically troubled businesses,

bound intervenors into the adjudication. *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3d Cir. 1975). The harshness of binding parties to a Rule 23(b)(3) determination was to be tempered by an opportunity for every potential member to opt out of the class and to provide notice before final determination of a class member's interests. *Id.* at 249.

182. See, e.g., *Dixon v. Bowen*, 673 F. Supp. 123, 127 (S.D.N.Y. 1987); *Ibarra v. Texas Employment Comm'n*, 598 F. Supp. 104, 108-10 (E.D. Tex. 1984).

183. See *supra* note 130 and accompanying text.

184. See *supra* notes 140-42 and accompanying text (discussing *Butner*, 440 U.S. at 55).

185. Indeed, an insolvent or financially troubled company need not file in bankruptcy, see *supra* notes 135-68 and accompanying text, and, therefore, all true policies which attempt to protect the worker or the economy would need to operate in the absence of a bankruptcy petition.

as new, productive, non-debt ridden companies will emerge in their place.¹⁸⁶ Owners and shareholders are also allowed to reinvest their capital more efficiently after their investments in troubled companies are liquidated.¹⁸⁷ If, on the other hand, concerns for unemployment and long-term job security for the company's employees are preeminent, permitting certain businesses the advantage of not paying off their debts fully does not produce employment. At most, permitting such infractions may maintain current levels of employment, but at the risk of endangering worker's safety and increasing public health costs. Allowing a new business to take its place, however, may likely produce more employment than the indebted company.¹⁸⁸ In short, "the idea that a 'fresh start' for the corporation is a good idea in itself is nonsense."¹⁸⁹

It is paramount that the responsibilities and obligations imposed by our legal system do not become inessential and encumbering when discussing policies of bankruptcy law. Reorganization itself is not a right, nor does bankruptcy permit persons or corporations to ignore the law.¹⁹⁰ The limitations of our legal and financial systems have, at times, permitted responsible parties to dishonor their debts and liabilities, even without the opportunity for the creditor or claimant to learn about the disposal of the claim. However, once outside the constraints of the limited fund rationale, nonbankruptcy law does not permit the debtor to nullify liability without the "opportunity to be heard."¹⁹¹ Common sense requires the same result in bankruptcy. Notice is a prerequisite to the discharge of claims, a requirement already adopted (with little concern for explanation) by some courts.¹⁹²

186. See *Dauid*, *supra* note 140, at 182-83. "[The] crucial question to be considered is whether the set of legal rules outside of bankruptcy law are wanting, whether they fail to ensure that firms that should survive do survive and that those that should not, . . . do not." *Id.* at 183.

187. *Id.* at 182-83.

188. *Id.* at 184. Remember that an employee could lose her job regardless of a bankruptcy petition or the company's ability to pay its creditors. "If the law forces those with rights to a firm's assets to consider the interests of workers who might lose their jobs, it should not matter whether the owners of the firm choose to take advantage of the bankruptcy laws." *Id.* at 185.

189. See *id.* at 182.

190. See *Midlantic Natl Bank*, 474 U.S. at 507.

191. See *Grannis*, 234 U.S. at 394.

192. See *supra* note 67.

VI. CONCLUSION

The PRP-debtor confronted with potential liability has no ability, pursuant to nonbankruptcy law, to avoid its legal obligations. The PRP-debtor does not escape liability by merely litigating a potential claim before the claimant is aware of its adjudication. The non-bankruptcy result should be sustained within bankruptcy proceedings as well.

The result that appears to follow from *Chateaugay*¹⁹³ and *Jensen*,¹⁹⁴ however, promotes corporate behavior which can best be described as evasive and treacherous; see-no-evil, smell-no-evil, and bleed our environmentally liable companies into bankruptcy are the strategies of future PRPs. It is unlikely, however, that EPA or the government will pay these costs. Either CERCLA will buckle under the limited financial underpinnings of the Superfund or other PRPs increasingly will have to shoulder more of the burden of cleanup on behalf of the less responsible PRPs. When CERCLA was enacted, Congress was silent as to the relationship between bankruptcy laws and CERCLA, creating a backdoor which should probably be closed by Congress, as the judiciary appears to be prepared to let PRPs remove themselves from the courts of law and foreclose their CERCLA debts without providing notice to anyone. Currently, the definitive word on specific notice awaits decision by the Ninth Circuit Court of Appeals.¹⁹⁵

PATRICK D. SHAW

193. See *supra* notes 82, 84 and accompanying text.

194. See *supra* notes 86-93 and accompanying text.

195. The Ninth Circuit is expected to rule on an appeal from *Jensen* sometime soon. See Gillon, *supra* note 85 and text accompanying note 94.