

NOTE

**TROUBLED WATERS: WHAT THE GULF OIL SPILL  
REVEALS ABOUT THE CONSEQUENCES OF BANKRUPTCY**

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INTRODUCTION

Many unanswered questions have been raised as a result of the devastating oil spill that occurred in the Gulf of Mexico in the summer of

2010. Such questions include concerns over the lack of adequate prevention measures, the ability of the government to regulate industry practice, and the extent that the Gulf will be able to sufficiently recover from the economic and environmental damage that has, and will continue to be, caused by the oil spill. In the midst of these questions lie concerns over British Petroleum's (BP) ability to pay for this disaster and the threat of BP filing for bankruptcy.<sup>1</sup> Whether or not BP files for bankruptcy, this issue illustrates the point that the Gulf States are not adequately prepared for such an event. When adopting oil pollution protection laws, states should be aware that consideration of environmental obligations does not fit easily into bankruptcy proceedings. In addition, states must be aware that bankruptcy has the ability to discharge polluters from their environmental obligations, leaving the states to pick up the tab. Therefore, states must take adequate preparatory measures *before* a disaster happens to ensure that they will be able to hold the polluter fully accountable.

In determining how the Gulf States could better prepare themselves for the event that BP files for bankruptcy, the relationship between environmental laws and the Bankruptcy Code (the Code) is key. The inherent tension between these two sets of laws can be attributed in part to their contradictory goals and objectives.<sup>2</sup> Environmental law aims to hold the polluter responsible for environmental damage caused by the polluter's actions. In contrast, bankruptcy law aims to give the debtor a clean slate, to allow the debtor a chance at a new beginning.<sup>3</sup> Congress created the Code with simple debt obligations in mind, such as basic tort and contract claims.<sup>4</sup> Environmental claims, which are often complex, do not fit easily into this framework. This uneasy fit makes it difficult to determine whether or not an environmental obligation should be defined as a "claim" and be

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1. E.g., John Schwartz, *Weighing the Possibility of Bankruptcy for BP*, N.Y. TIMES, July 9, 2010, <http://www.nytimes.com/2010/07/10/us/10bp.html> (analyzing the potential implications of BP's potential bankruptcy in light of the Gulf Oil Spill).

2. Beth Anne Smith, Comment, *State "Superlien" Statutes: An Attempt to Resolve the Conflict Between the Bankruptcy Code and Environmental Law*, 59 TEMP. L.Q. 981, 984-1005 (1986) (pointing to several conflicts between environmental laws and the Bankruptcy Code); LAWRENCE R. AHERN & DARLENE T. MARSH, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY, § 1:1 (Scott M. Ratcliffe & Elaine Keller-Petryk eds., 2011) (noting that while "environmental obligations sometimes do not fit easily into the existing bankruptcy framework[.] . . . environmental laws do not directly 'conflict' with bankruptcy laws"); ADAM P. STROCHAK ET AL., ENVIRONMENTAL ISSUES IN BANKRUPTCY CASES 3 (Alan N. Resnick & Henry J. Sommer eds., 2009).

3. STROCHAK, *supra* note 2, at 3.

4. Kathryn R. Heidt, *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 FLA. L. REV. 153, 153-55 (1992).

included in the bankruptcy proceeding.<sup>5</sup> Further, if it is determined that an environmental obligation is a “claim,” parties will then run into difficulty in determining when the claim arose.<sup>6</sup> The United States Supreme Court has given little guidance for interpreting these legal definitions and has only decided two cases involving environmental obligations in bankruptcy.<sup>7</sup> Recently, the Court denied a petition for certiorari that would have helped to resolve this confusion.<sup>8</sup> Absent any clear and comprehensive precedent, lower courts have differed in their analysis of environmental obligations under the Code.<sup>9</sup>

Part I of this article discusses the history of American bankruptcy law and how the current Bankruptcy Code affects environmental cleanup obligations. Part II discusses the current jurisdictional split concerning the classification of environmental obligations under the Bankruptcy Code. Part III analyzes how current environmental laws, as applied to environmental cleanup obligations in the Gulf of Mexico, could be classified under the Bankruptcy Code and what remedies a governmental body seeking remediation would likely receive. Finally, Part IV discusses different options to remedy the uncertainties that surround environmental obligations in bankruptcy, including an amendment to the Bankruptcy Code. It also addresses different options that the Gulf States could take to safeguard themselves against a polluter in bankruptcy and assure that a polluter will be held responsible for environmental damage caused to state land.

## I. THE BANKRUPTCY CODE AND ENVIRONMENTAL LAW

### *A. History of Bankruptcy Law in the United States*

The history of the Bankruptcy Code, and what it aims to achieve, helps explain the difficulty in fitting environmental obligations within the Code. This history sheds light on the evolving purpose behind bankruptcy law and how environmental obligations fit, or do not fit, into the overall structure of

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5. *Id.* at 154–55.

6. *Id.*

7. *Id.* at 154 (citing *Midatlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494 (1986); *Ohio v. Kovacs*, 469 U.S. 274 (1985)).

8. David Bledsoe, *Supreme Court Lets Stand Seventh Circuit Ruling On Discharging RCRA Cleanup Orders In Bankruptcy*, PERKINS COIE (Oct. 15, 2010), [http://www.perkinscoie.com/news/pubs\\_detail.aspx?publication=2824&op=updates](http://www.perkinscoie.com/news/pubs_detail.aspx?publication=2824&op=updates).

9. *See infra* Part II.B (giving a detailed analysis of the jurisdictional split in the Federal Circuit Courts).

the Code. One of the primary goals, stated in 1915, was the idea that bankruptcy law should “relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh . . . .”<sup>10</sup> This idea paved the way for the inception of modern bankruptcy law and was part of the evolving nature of bankruptcy. Changing societal views about the nature of bankruptcy spurred the desire to create a better system for dealing with debt.

The Constitution gives the federal government the power to establish laws relating to bankruptcy.<sup>11</sup> When the Founding Fathers included this power in the Constitution they understood the general need for federal regulation of this field.<sup>12</sup> However, there was no consensus among early lawmakers as to the exact role the federal government should play.<sup>13</sup> A few short-lived bankruptcy laws were passed in response to financial crises, but no permanent federal bankruptcy law was passed until 1898.<sup>14</sup> Commercial trade groups, then newly formed, have been attributed as one of the driving forces behind the successful passage of the law.<sup>15</sup> However, despite their influence in the process, the Bankruptcy Act of 1898 was not overly creditor-friendly due to strong opposition by agrarian and populist groups.<sup>16</sup> In the end, the Act was passed with provisions that left some authority with the states, minimized the administrative machinery, and offered discharge provisions that were more lenient than in previous acts.<sup>17</sup> This 1898 Act was the first permanent federal bankruptcy law and, perhaps most influentially, spurred the creation of the Bankruptcy Bar.<sup>18</sup> This group of professionals would prove to be the “single most important influence on the development of bankruptcy law” since 1898.<sup>19</sup>

The next big shift in American bankruptcy law came in the wake of the Great Depression.<sup>20</sup> In 1938 Congress passed the Chandler Act, which essentially revised nearly all of the 1898 Act, including provisions

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10. *Williams v. U.S. Fidelity & Guaranty Co.*, 236 U.S. 549, 554–55 (1915).

11. U.S. CONST. art I, § 8, cl. 4.

12. DAVID A. SKEEL, *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 23 (2001).

13. *Id.*

14. Charles Jordan Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13–14 (1995). Prior to 1898, the Federal government passed three bankruptcy laws in response to financial upheaval. *Id.* at 14.

15. SKEEL, *supra* note 12, at 37.

16. *Id.* at 38–39.

17. *Id.* at 46.

18. *Id.* at 45–46.

19. *Id.* at 47.

20. Tabb, *supra* note 14, at 23.

regarding liquidation, administration, and, most significantly, corporate reorganization.<sup>21</sup> This legislation dramatically changed corporate reorganization by introducing government oversight to the process and taking control away from private interests.<sup>22</sup>

The most recent federal law is the Bankruptcy Reform Act of 1978, more commonly known as the Code.<sup>23</sup> The 1978 legislation transformed bankruptcy law in the United States, reforming its treatment of consumer credit and corporate bankruptcy.<sup>24</sup> One particularly relevant debate leading up to the passage of the Code was between creditors and pro-debtor advocates.<sup>25</sup> This conflict highlights an inherent tension within bankruptcy law: balancing creditor protection against the debtor's fresh start.<sup>26</sup> In the end, compromises satisfied both sides, largely as a result of political pressures.<sup>27</sup>

The history of bankruptcy law illustrates the evolving nature of this field of law. Although changes may not come quickly or frequently, reform has the power to fix problematic aspects involved in the bankruptcy process. The conflict between environmental laws and the Bankruptcy Code is one such problematic area. The intersection between these two areas of law is murky and the boundaries are undefined. The current Bankruptcy Code was created when environmental laws were in their infancy; therefore, it is no surprise that the Code does not have an adequate mechanism to address them.<sup>28</sup> The murkiness of this area has allowed some corporations to evade environmental responsibilities through bankruptcy proceedings.<sup>29</sup> An amendment to the current Bankruptcy Code is one

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21. *Id.* at 29–30.

22. SKEEL, *supra* note 12, at 119, 125.

23. Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101–1532 (2006)

24. SKEEL, *supra* note 12, at 131.

25. *Id.* at 154–57.

26. *Id.* at 155.

27. *Id.* at 155.

28. The passage of the National Environmental Policy Act of 1969 was the first in a series of new environmental legislation enacted in the 1970s. Zygmunt J.B. Plater, *From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 1002–03 (1994). In the years to follow, Congress enacted over two dozen environmental laws. *Id.* at 1002 n.87.

29. The most infamous example of this is the bankruptcy proceeding of the mining giant American Smelting and Refining Company (Asarco). When Asarco filed for bankruptcy in 2005, there were over 80 Superfund sites with contamination from its former mining operations. Recently, the EPA won an unprecedented \$1.79 billion bankruptcy settlement for cleanup obligations. This result was unexpected when Asarco filed for bankruptcy, with most fearing that the large environmental debt would be borne by taxpayers. Leslie Kaufman, *Asarco Pays \$1.79 Billion to Fix Sites*, N.Y. TIMES, Dec. 10, 2009, <http://www.nytimes.com/2009/12/11/science/earth/11settle.html>.

solution to this abuse. However, absent such an amendment, states should understand how courts treat environmental obligations in bankruptcy in order to amend their laws to reflect such interpretations.

### *B. The Bankruptcy Process*

A corporation has two options when filing for bankruptcy. One option is to file under Chapter 11, allowing the corporation to restructure its debts according to a reorganization plan and emerge after the culmination of bankruptcy proceedings.<sup>30</sup> Under Chapter 11, all of the pre-bankruptcy debts included in the plan are discharged.<sup>31</sup> Thus, if a corporation wishes to remain viable after bankruptcy it will file a petition under Chapter 11. Reorganization requires the debtor to file a plan that specifies the treatment of each claim, including the classification of the claim and a proposed settlement.<sup>32</sup> The court must confirm this plan provided that “the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.”<sup>33</sup> The second option is to file under Chapter 7, which, rather than giving the corporation a discharge, liquidates all of the corporation’s assets and the corporation then “go[es] out of business and may formally dissolve under state law.”<sup>34</sup>

Any government, person, or business who has an outstanding debt against a debtor must file their claim in the bankruptcy proceeding. Any person or governmental unit who has an “allowed claim” may participate in a bankruptcy proceeding and in the distribution.<sup>35</sup> Whether a claim gets paid back in full and what level of priority is assigned to it is determined under Chapter 5 of the Code.<sup>36</sup> A secured claim receives the highest priority.<sup>37</sup> Depending on the specific details of the secured claim, the claim will be paid in full as long as there is enough money in the estate or on the particular property securing the claim to cover the amount owed.<sup>38</sup> After the secured claims are paid, the unsecured claims, which are prioritized in

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30. AHERN, *supra* note 2, § 1.11.

31. 11 U.S.C. § 1141(d)(1)(A).

32. *Id.* §§ 1121–23 (2006).

33. *Id.* § 1129(b)(1).

34. AHERN, *supra* note 2, § 1:10.

35. 11 U.S.C. §§ 501–502, 508; Heidt, *supra* note 4, at 161.

36. §§ 501–562.

37. § 507(b).

38. § 506.

Section 507, are addressed.<sup>39</sup> In a Chapter 11 proceeding claimholders can vote on the plan of reorganization, affording them some protection during the proceeding and the ultimate distribution.<sup>40</sup> In a Chapter 7 proceeding claimholders merely share in the distribution without participating in the decision making.<sup>41</sup>

Whether a government wants the debtor's environmental obligation treated as a claim depends on the corporation's assets and type of bankruptcy proceeding involved.<sup>42</sup> For example, if treated as a claim, the environmental obligation is part of the bankruptcy proceeding and a government is precluded from pursuing enforcement measures after the bankruptcy.<sup>43</sup> Therefore, what is in a government's best interest depends in great part whether the corporation is likely to survive a Chapter 11 reorganization and have the assets necessary to pay the government back post-bankruptcy.<sup>44</sup> Unfortunately, there is no way to predict which path a bankruptcy proceeding will take. A corporation could begin the bankruptcy proceeding under Chapter 11 and convert the proceeding to a Chapter 7. If a bankruptcy court has ruled that the outstanding environmental obligation is not a "claim," then the government would not be part of the distribution and would be left with no one to pursue once the Chapter 7 proceeding concludes.

### C. Key Bankruptcy Provisions

In addition to the definition and subsequent treatment of claims, states should be aware of a few key provisions of the Code when enacting environmental legislation.<sup>45</sup> These sections help define when a debtor can receive an automatic stay (§ 362) and discharge a debt (§ 1141). A state may be able to avoid these actions in an environmental case, if they frame the polluter's environmental obligation in the proper context.<sup>46</sup>

Section 362 of the Code handles the automatic stay, a mechanism in the Code that postpones certain actions against the debtor, including "any act to

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39. § 507(a).

40. § 1126.

41. Heidt, *supra* note 4, at 158–59.

42. *Id.* at 159–60.

43. *See id.* at 159–60 (stating that if the government does not treat the environmental obligation as a claim, the government would not be precluded from enforcing the obligation after bankruptcy).

44. *Id.* at 159–61.

45. *See generally* Smith, *supra* note 2, at 984–1005 (examining §§ 727, 362, and 554 of the Bankruptcy Code in relationship to environmental litigation).

46. *See generally* AHERN, *supra* note 2, at §§ 3.10–3.18 (detailing how to determine whether an environmental obligation is a claim).

collect, assess, or recover a claim against the debtor that arose before the commencement of the case.”<sup>47</sup> Under an exception to this provision, a government action to enforce its police and regulatory powers does not operate as a stay, as long as this action is not to enforce a money judgment.<sup>48</sup> This exception includes “action[s] to force the debtor to cease polluting,” because such an action is equitable and is a clear example of a government enforcing its police powers to protect the health and safety of the public.<sup>49</sup> In contrast, actions by the government to determine the amount of damages and recover expenses from the polluter should be stayed because they are actions to enforce a money judgment.<sup>50</sup> A government action enforcing an order to clean up a contaminated site may fall under the exception, but is not as easily determined.<sup>51</sup> Generally, bankruptcy law respects other laws, allowing the government to enforce a state environmental law.<sup>52</sup> However, the ultimate determination depends on whether the presiding court determines that a government is enforcing a money judgment.<sup>53</sup> “[A]llowing the government to enforce a cleanup order can affect the priorities in the distribution,” and a deciding court must contemplate such effect when considering the applicability of a stay.<sup>54</sup>

Section 1141 applies to Chapter 11 reorganization cases, determining which claims may be discharged in the reorganization process.<sup>55</sup> A “discharge” of a debt in a bankruptcy proceeding does not extinguish the debt; rather, it protects the debtor from any personal liability on the debt and enjoins all legal actions to collect the debt.<sup>56</sup> Section 1141 provides that “the confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation.”<sup>57</sup> A state must consider two factors when looking at this provision.<sup>58</sup> First, only “claims” can be discharged; therefore, if an environmental obligation is not classified as a claim it will

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47. 11 U.S.C. § 362(a)(6) (2006); Courts have often overlooked § 362(a)(6) and allowed governments to pursue environmental obligations. AHERN, *supra* note 2, § 4:1–4:2.

48. § 362(b)(4).

49. AHERN, *supra* note 2, § 4:13.

50. *Id.* § 4:13.

51. Smith, *supra* note 2, at 990 (describing how bankruptcy courts must first determine what a state desires when seeking a debtor’s compliance with its environmental statutes).

52. AHERN, *supra* note 2, § 4:13.

53. Smith, *supra* note 2, at 990.

54. AHERN, *supra* note 2, § 4:13.

55. 11 U.S.C. § 1141 (2006). Individuals are entitled to discharge under § 727 of the Code, which does not apply to corporations. *Id.* § 727(a)(1).

56. BLACK’S LAW DICTIONARY 530 (9th ed. 2009).

57. § 1141(d)(1)(A).

58. STROCHAK, *supra* note 2, at 46–47.

survive reorganization.<sup>59</sup> Second, only claims that arose before the date of confirmation will be discharged, so a state must also consider defining when an environmental claim arose.<sup>60</sup>

#### *D. Environmental Obligation as a Claim*

A court's first step in determining whether an environmental obligation is a claim is to look at the language of the Code. The Code defines a "claim" 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.<sup>61</sup>

Congress intended this provision to be broad and only exclude purely equitable remedies.<sup>62</sup> The Code defines two of the three basic cleanup remedies a government can pursue. First, if the government cleans up a polluted area and seeks monetary reimbursement for its expense from the debtor, such an obligation would fall under the definition of a claim because the government clearly has a "right to payment."<sup>63</sup> Second, if a government seeks an injunction ordering a debtor not to pollute in the future, such an obligation would be equitable and not fall under the definition of a claim.<sup>64</sup> The third type of remedy, ordering the debtor to clean up a site, is more complex. The Supreme Court has upheld Congress's broad interpretation of a claim, but has not spoken directly to whether environmental cleanup

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59. *Id.*; AHERN, *supra* note 2, § 1:17.

60. See STROCHAK ET AL., *supra* note 2, at 47–55 (analyzing when environmental claims arise); AHERN, *supra* note 2, § 1:17.

61. 11 U.S.C. § 101(5) (2006).

62. AHERN, *supra* note 2, § 3:10 (referencing the legislative history behind the Bankruptcy Code which "makes clear that . . . Congress intended the definition of 'claim' to exclude the purely equitable obligation"); *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985) (citing H. Rep. No. 95-595, at 309 (1977) *reprinted in* 1978 U.S.C.C.A.N. 5787, 6266; S.Rep. No. 95-989, at 21–22 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5787, 5807–08).

63. AHERN, *supra* note 2, § 3:12.

64. *Id.* § 3:13.

orders fit this broad definition.<sup>65</sup> Thus, the third type of remedy does not fit readily into the Code.

The language of the state or federal environmental statute at issue is key when determining whether a governmental order to clean up a polluted site can be defined as a claim.<sup>66</sup> Some statutes, both state and federal, specifically require a responsible party to clean up a polluted site.<sup>67</sup> Other statutes provide alternatives, such as allowing the government to clean up the site and then seek reimbursement from a debtor.<sup>68</sup> If an environmental statute provides such an alternative, some courts will consider the environmental obligation a claim, because the “equitable right” to specific performance (the cleanup) can be transformed into a right of payment.<sup>69</sup>

Federal appellate courts are split on the issue of how to define environmental obligations. For example, the Second, Third, and Seventh Circuits limited the definition of a claim, holding that a government must actually seek a monetary remedy in order for the obligation to be considered a claim.<sup>70</sup> It is not enough that the statute merely allows for the government to seek money as an alternative to cleanup.<sup>71</sup> In contrast, the Sixth Circuit has expanded the definition of a claim, holding that if a debtor has to spend money to comply with the order, the obligation will be considered a claim.<sup>72</sup>

#### *E. Determining When the Claim Arose*

Once a court has classified an environmental obligation as a claim, its next step is determining when the claim arose.<sup>73</sup> This determination establishes whether the claim is part of the bankruptcy proceeding and

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65. *F.C.C. v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 302 (2003) (“We have said that ‘[c]laim’ has ‘the broadest available definition.’”) (quoting *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991)); *Pa. Dep’t of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990) (“The plain meaning of a ‘right to payment’ is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation.”).

66. *See* Heidt, *supra* note 4, at 171 (discussing how the Second Circuit has defined what constitutes a “claim” under CERCLA).

67. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9606 (2006).

68. Heidt, *supra* note 4, at 171.

69. *Id.* CERCLA has such a provision and many courts have found that this alternative defines a cleanup order issued under CERCLA to be a claim. *Id.*

70. AHERN, *supra* note 2, § 3.15.

71. *Id.* § 3:17.

72. *Id.*

73. Heidt, *supra* note 4, at 177–78.

whether it will be discharged.<sup>74</sup> In a Chapter 11 bankruptcy proceeding, debts that arose before the confirmation of the plan can be discharged. The Supreme Court has not spoken to this issue and there is no dispositive test for determining when a claim arises.<sup>75</sup> There are many factors that can be considered, including: when the acts causing the pollution were committed, when the hazardous materials were released, when the right to bring the action became viable under applicable law, and when the creditor knew or should have known of the potential obligations.<sup>76</sup> A court has discretion to base its decision on the factors it thinks best fit the facts of the case.<sup>77</sup> However, it should be noted that many courts considering this question have held that determining when the claim arose will *not* depend on the timing of government expenditures.<sup>78</sup> Thus, the government cannot argue that, even though the act causing the pollution occurred pre-petition, the claim did not arise until it incurred the cost of cleanup.<sup>79</sup>

## II. JUDICIAL PRECEDENT

### A. *The Supreme Court*

The Supreme Court has decided only two cases concerning the intersection between bankruptcy and environmental law. The first of these cases, decided in 1985, was *Ohio v. Kovacs*.<sup>80</sup> This case, discussed further below, concerned how courts should interpret certain environmental obligations under the Code, and specifically addressed whether or not such obligations could be defined as claims.<sup>81</sup> The second case, *Midatlantic National Bank v. New Jersey Department of Environmental Protection*, questioned whether a debtor could abandon contaminated property under the Code.<sup>82</sup> This case is of little relevance in the Gulf oil spill bankruptcy scenario because the majority of polluted property does not belong to BP, therefore the question of abandonment is not relevant. However, in the

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74. *See id.* at 178 (noting that “[t]he government argues that there can be no liability until it incurs expenses in cleaning up or investigating the site.”).

75. *In re Conesco Life Ins. Co. Cost of Ins. Litigation*, 2005 WL 2203150, at \*6 (C.D. Cal. Apr. 13, 2005).

76. AHERN, *supra* note 2, § 3:19.

77. *Id.*

78. Heidt, *supra* note 4, at 179.

79. *Id.* at 178–79.

80. *Ohio v. Kovacs*, 469 U.S. 274 (1985).

81. *Id.* at 275.

82. *Midatlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 499–500 (1986).

context of environmental obligations in bankruptcy as a whole, it is important to note that the Court held that a debtor cannot abandon property in contravention of state, federal, and local laws designed to protect public health and safety.<sup>83</sup> By recognizing a key purpose of environmental law, the court allowed the environmental law to trump bankruptcy law. Such analysis may be useful in future environmental cases outside of the abandonment context.

The question before the Court in *Kovacs* was, “whether, in the circumstances present . . . [the debtor’s] obligation under the injunction [was] a ‘debt’ or a ‘liability on a claim’ subject to discharge under the Bankruptcy Code.”<sup>84</sup> In *Kovacs*, the debtor had operated a hazardous waste disposal facility and had been sued by the state of Ohio for “polluting public waters, maintaining a nuisance, and causing fish kills” in violation of Ohio state law.<sup>85</sup> The state and the debtor settled the lawsuit. As part of this settlement the debtor agreed to clean up the site, but subsequently failed to do so.<sup>86</sup> The state obtained an order appointing a receiver for the debtor’s property due to the debtor’s failure to comply.<sup>87</sup> After the receiver had taken control of the debtor’s property, the debtor filed a petition for bankruptcy under Chapter 7 of the Code.<sup>88</sup> In the case before the Supreme Court, the state of Ohio sought to have the debtor’s post-bankruptcy income applied against the cost of the environmental cleanup, arguing that such an obligation did not fall under the Code’s definition of a claim.<sup>89</sup>

The Court examined the plain language of the definition of a claim in Section 101 of the Code to determine how the debtor’s environmental obligation fit into the Code.<sup>90</sup> The Court also looked to the legislative history, noting that Congress intended the definition of a claim to be broad, basing this conclusion on the different definitions proposed in the House

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83. Ryan M. Murphy, *Revisiting Treatment of Environmental Cleanup Obligations Under the Bankruptcy Code: Using Chapter 11 to Create a Clean Slate*, 19 J. BANKR. INST. L. & PRAC. 4, art. 4, 1 (2010).

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

85. Rudi Grueneberg, *Clash of the Titans: United States Bankruptcy Code Versus Environmental Protection Legislation*, 2 J. BANKR. INST. L. & PRAC. 3, 7 (1993).

86. Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331, 372 (2004).

87. *Id.* at 372. A receiver is “[a] disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims” (e.g., property that is subject to litigation). BLACK’S LAW DICTIONARY 1383 (9th ed. 2009).

88. *Kovacs*, 469 U.S. at 276. Mr. Kovacs, the debtor, had originally filed a petition under Chapter 11 of the Code, but converted the petition to a Chapter 7 proceeding. *Id.* at 276 n.1.

89. Grueneberg, *supra* note 85, at 7.

90. *Kovacs*, 469 U.S. at 278–80.

and Senate versions compared with the final version of the Act.<sup>91</sup> The Court found that, in this case, “there [was] little doubt that the State had the right to an equitable remedy under state law and that the right [had] been reduced to judgment in the form of an injunction ordering the cleanup.”<sup>92</sup> The Court further reasoned that, because the debtor’s property was in receivership, he was unable to “personally tak[e] charge of and carry[] out the removal of wastes from the property.”<sup>93</sup> Thus, the only way for the debtor to comply with the state’s cleanup request would be to pay the receiver for the cost of cleanup.<sup>94</sup> Based on the circumstances, the Court held that the obligation was a liability on a claim and therefore could be discharged.<sup>95</sup> The Court made clear that its decision in this case was not broad, specifically pointing out that it did *not* decide “what the legal consequences would have been had [the debtor filed for] bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee.”<sup>96</sup> Also, the Court made clear that it did *not* hold that the “injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State’s waters [would be] dischargeable in bankruptcy . . . .”<sup>97</sup>

The Court’s decision in *Kovacs* is limited to an instance where a state is seeking payment from a debtor.<sup>98</sup> The Court’s decision also suggests that an injunction against a debtor from further polluting in the future would not be a claim.<sup>99</sup> This decision left lower courts with the task of interpreting whether, absent an appointment of a receiver, an environmental obligation to clean up a site is definable as a claim under the Code.<sup>100</sup>

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91. *Id.* at 280. “The definition of ‘claim’ in H.R. 8200 as originally drafted would have deemed a right to an equitable remedy for breach of performance a claim even if it did not give rise to a right to payment. The initial Senate definition of claim was narrower, and a compromised version, § 101(4) [the current version of the Code has been amended so that § 101(4) is now § 101(5)], was finally adopted. In that version, the key phrases ‘equitable remedy,’ ‘breach of performance,’ and ‘right to payment’ are not defined.” *Id.*

92. *Id.* at 278–79.

93. *Id.* at 283.

94. *Id.* at 281 n.9, 283.

95. *Id.* at 283.

96. *Id.* at 284.

97. *Id.* at 284–85.

98. Hillinger & Hillinger, *supra* note 86, at 373–74; *Kovacs*, 469 U.S. at 285 (“[W]e here address . . . only the affirmative duty to clean up the site and the duty to pay money to that end.”).

99. Hillinger & Hillinger, *supra* note 86, at 374–75; *Kovacs*, 469 U.S. at 284–85 (“[W]e do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State’s waters is dischargeable in bankruptcy.”).

100. Hillinger & Hillinger, *supra* note 86, at 374–75.

*B. Jurisdictional Split—How Courts Define Environmental Obligations*

Lower courts have varied approaches to determining whether environmental obligations qualify as claims under the Code. This variation is a result of the limited Supreme Court precedent.<sup>101</sup> Four federal appellate courts have spoken to this issue, which is a helpful guide for bankruptcy and district courts in the respective circuits; however, because the appellate courts have taken different approaches, no unified national guideline exists.<sup>102</sup>

A recent case addressing this issue is *United States v. Apex Oil Company*.<sup>103</sup> The Seventh Circuit ruled that an injunction ordering a debtor to clean up a contaminated site should be considered an equitable remedy under the Code, despite the fact that the debtor would have to spend money in order to comply with the injunction. Because the obligation is equitable, it is not a claim and not dischargeable under the Code.<sup>104</sup> The Court reasoned that because most equitable remedies require a debtor to expend money in some form, allowing the discharge of equitable remedies that impose a cost on the debtor, which includes most equitable remedies, would be inconsistent with the Code's definition of a claim, which only allows limited discharge of equitable claims.<sup>105</sup>

The Seventh Circuit relied in part on previous decisions from other circuits, noting that its decision complied with the "near consensus" of these cases on this question.<sup>106</sup> Like *Apex Oil*, these cases all concerned the question of when an environmental obligation should be treated as a claim under the Bankruptcy Code.<sup>107</sup> The Second and Third Circuits followed a similar line of reasoning as the Seventh Circuit, concluding that environmental obligations are not claims under the Code unless the state

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101. Murphy, *supra* note 83, at 2–4 (outlining four approaches taken by lower courts: a right to payment approach, an underlying act approach, a debtor-creditor relationship approach, and a fair contemplation approach).

102. *United States v. Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009); *Torwico Elec., Inc. v. N.J. Dep't of Env'tl. Prot.*, 8 F.3d 146 (3d Cir. 1993); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991); *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988).

103. *Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009).

104. *Id.* at 737.

105. *Id.* at 736–37. The Code defines a claim as "a . . . right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5)(B) (2006) (emphasis added).

106. *Apex Oil Co.*, 579 F.3d at 737–38.

107. *Torwico Elec., Inc. v. N.J. Dep't of Env'tl. Prot.*, 8 F.3d 146 (3d Cir. 1993); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991); *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988).

actually seeks payment from the debtor. In *Torwico v. New Jersey Department of Environmental Protection*, the Third Circuit read the *Kovacs* decision narrowly, stating that:

The state can exercise its regulatory powers and force compliance with its laws, even if the debtor must expend money to comply. . . . [W]hat the state cannot do is force the debtor to pay money to the state; at that point, the state is no longer acting in its role as regulator, it is acting as a creditor.<sup>108</sup>

Similarly, the Second Circuit in *In re Chateaugay Corp.*, held that “[a]n injunction that does no more than impose an obligation entirely as an alternative to a payment right is dischargeable. . . . On the other hand, if the order . . . requires [the debtor] to take any action that ends or ameliorates current pollution, such an order is not a ‘claim.’”<sup>109</sup> In contrast, the Sixth Circuit read the *Kovacs* decision broadly. In *United States v. Whizco*, the federal government, under the Surface Mining Control and Reclamation Act of 1977,<sup>110</sup> brought a suit against a mining company for failing to reclaim lands that it used in its mining operations.<sup>111</sup> The government sought an injunction against Whizco that would require it to clean up the polluted sites.<sup>112</sup> The court compared *Kovacs*, in which the government was actually seeking a monetary remedy, to *Whizco*, in which the remedy sought would require the debtor to spend money.<sup>113</sup> The court reasoned that “when we look at the substance of what the plaintiff seeks, rather than the form of the relief sought, we see that the plaintiff is really seeking payment.”<sup>114</sup> Therefore, under the standard set in *Kovacs*, the environmental obligation was considered a claim.

The *Apex Oil* case was appealed to the Supreme Court to remedy the jurisdictional split. However, the Court denied the petition for certiorari, effectively leaving the resolution in the hands of Congress.

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108. *Torwico*, 8 F.3d at 150.

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

110. Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201–1328 (2006).

111. *Whizco*, 841 F.2d at 148.

112. *Id.*

113. *Id.* at 150.

114. *Id.*

### III. ANALYZING BP'S ENVIRONMENTAL OBLIGATIONS UNDER CURRENT ENVIRONMENTAL LAWS

If BP were to file for bankruptcy, how would its obligations be treated under the current framework for defining claims? There is no clear precedent for the treatment of environmental claims, thus, a bankruptcy court in any of the Gulf states' jurisdictions could follow the reasoning of any of the circuits discussed above. The speculative nature of such a decision reinforces the need for a federal standard in dealing with environmental obligations in bankruptcy.

#### *A. Facts About BP and the Gulf Oil Spill*

On April 20, 2010, the Deepwater Horizon drilling rig caught fire due to a subsea explosion.<sup>115</sup> This event killed 11 workers and caused approximately 205 million gallons of oil to leak into the Gulf of Mexico.<sup>116</sup> The total amount of damage caused by this event is unknown, and it will be difficult to calculate the cost required to repair this damage. To date, several mechanisms have been established to reimburse parties that have been adversely affected by the incident. These mechanisms are designed to assure that compensation for economic and natural resource damages will be allocated fairly and adequately.

Individuals, businesses, and state and local governments adversely affected by the oil spill may file a claim to receive compensation with the Gulf Coast Claims Facility (GCCF), funded by a voluntary escrow accounted set up by BP.<sup>117</sup> Alternatively, if the GCCF denies a claim, a party may seek compensation from the Oil Spill Liability Trust Fund, a fund established under the Oil Pollution Act, which is administered by the U.S. Coast Guard.<sup>118</sup> President Obama has proposed that Congress establish a Gulf Coast Recovery Fund, dedicated to long-term recovery and restoration

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115. Henry Fountain, *US Says BP Well Is Finally Dead*, N.Y. TIMES, Sept 19, 2010, [http://www.nytimes.com/2010/09/20/us/20well.html?ref=gulf\\_of\\_mexico\\_2010](http://www.nytimes.com/2010/09/20/us/20well.html?ref=gulf_of_mexico_2010).

116. *Id.*

117. *Deepwater Horizon Oil Spill Claims Process Fact Sheet For Individuals and Businesses*, RESTORETHEGULF.GOV, <http://www.restorethegulf.gov/release/2010/09/29/claims-fact-sheet-individuals-and-businesses> (last visited June 1, 2012); *Deepwater Horizon Oil Spill Claims Process Fact Sheet For State and Local Governments*, RESTORETHEGULF.GOV, <http://www.restorethegulf.gov/release/2010/09/29/claims-fact-sheet-state-and-local-governments> (last visited June 1, 2012).

118. *Id.*

in the Gulf.<sup>119</sup> All of these remedies are funded either directly or indirectly by BP and the oil industry. In the event of a BP bankruptcy, the Oil Spill Liability Trust Fund and Gulf Coast Recovery Fund would remain unaffected because they are independent funds. However, there is a limit to how much these funds are able to pay out and their resources may become exhausted.

Setting aside the issue of the GCCF escrow account, it is instructive to examine what types of claims could be filed against BP under state and federal law and whether or not such claims would be protected during the bankruptcy process. The U.S. government has declared BP Corporation America, Inc., the guarantor, as a responsible party for the spill under the OPA, and has been billing BP Exploration and Production, a subsidiary of BP America and another designated responsible party, for the response costs to date.<sup>120</sup>

### B. Oil Pollution Act

The Oil Pollution Act of 1990 allows the government to hold responsible parties liable for removal costs and damages specified in OPA.<sup>121</sup> Removal costs include all costs “incurred by the United States, a State, or an Indian tribe . . . and any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan [(NCP)].”<sup>122</sup> The NCP is the federal government’s “blueprint” for responding to oil spills.<sup>123</sup> Since the NCP was first published in 1968, it has been amended to reflect important changes in environmental law, including revisions that reflect important provisions in OPA.<sup>124</sup> The NCP provides that “any person may undertake a response action,” but also includes a provision that would allow the government to force a responsible party to cleanup a contaminated area.<sup>125</sup> Generally, a responsible party will

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119. *America’s Gulf Coast: A Long Term Recovery Plan after the Deepwater Horizon Oil Spill*, RESTORE THE GULF.GOV (Sept. 28, 2010, 1:47 PM EST) <http://www.restorethegulf.gov/release/2010/09/28/america%E2%80%99s-gulf-coast-long-term-recovery-plan-after-deepwater-horizon-oil-spill>.

120. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-90R, DEEPWATER HORIZON OIL SPILL: PRELIMINARY ASSESSMENT OF FEDERAL FINANCIAL RISKS AND COST REIMBURSEMENT AND NOTIFICATION POLICIES AND PROCEDURES (2010).

121. Oil Pollution Act of 1990, 33 U.S.C. § 2702(a) (2006).

122. § 2702(b)(1).

123. *National Oil and Hazardous Substances Pollution Contingency Plan Overview*, U.S. ENVIRONMENTAL PROTECTION AGENCY EMERGENCY MANAGEMENT, [www.epa.gov/emergencies/content/lawsregs/ncpover.htm](http://www.epa.gov/emergencies/content/lawsregs/ncpover.htm) (last updated Aug. 19, 2011).

124. *Id.*

125. 40 C.F.R. § 300.700(a) (2010).

have the opportunity to work cooperatively with the federal and state response agencies in the cleanup activities.<sup>126</sup> If the responsible party refuses to voluntarily undertake a cleanup operation, the government has an alternative right of payment guaranteed under OPA.<sup>127</sup> A responsible party is liable for specific damages, including: natural resource damage, damage to real or personal property, damage for loss of subsistence use, lost revenues, lost profits and earning capacity, and costs of providing public services.<sup>128</sup> Under OPA, the government also has a right to seek reimbursement for funds expended from the Oil Spill Liability Trust Fund.<sup>129</sup>

A key provision of OPA requires that owners and operators of vessels and facilities establish proof of financial assurance sufficient to meet the limits of liability covered by the statute.<sup>130</sup> A Mobile Offshore Drilling Unit, like the Deepwater Horizon, is treated as a vessel for purposes of liability and as an offshore facility for any removal and damage costs that exceed the vessel liability cap.<sup>131</sup> As an offshore drilling unit, the Deepwater Horizon is subject to a higher level of financial responsibility, not to exceed \$150 million, “based on the relative operational, environmental, human health, and other risks posed by the quantity or quality of oil that is explored for, drilled for, produced, or transported by the responsible party.”<sup>132</sup> The limitation on financial responsibility compared to the costs of damages incurred in the Gulf to date, which far exceeds \$150 million, illustrates the inadequacy of this provision.<sup>133</sup> The reliance on new technologies and methods for deepwater drilling makes it difficult to predict the amount of damage that could arise from failure. The federal government must create another mechanism to ensure that the responsible party will be held fully accountable.

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126. ENVIRONMENTAL LAW HANDBOOK 377–78 (Thomas F. P. Sullivan ed., 19th ed. 2007).

127. 33 U.S.C. § 2702(a) (2006).

128. *Id.* § 2702(b)(2)(A)–(F).

129. *Id.* § 2712(a).

130. *Id.* § 2716(a).

131. CURRY L. HAGERTY & JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., R41262, DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 11 (2010).

132. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-90R, DEEPWATER HORIZON OIL SPILL: PRELIMINARY ASSESSMENT OF FEDERAL FINANCIAL RISKS AND COST REIMBURSEMENT AND NOTIFICATION POLICIES AND PROCEDURES 1 (2010); 33 U.S.C. § 2716(c).

133. The federal government alone has already billed BP for over \$690 million dollars in removal costs. *Oil Spill Cost and Reimbursement Fact Sheet*, RESTORE THE GULF (July 12, 2011, 9:15 AM EST) <http://www.restorethegulf.gov/release/2011/07/12/oil-spill-cost-and-reimbursement-fact-sheet>.

*C. State Laws*

The Gulf States each have laws that deal with oil spill pollution, most of which are modeled in some way after federal law.<sup>134</sup> This article looks at the laws of two of the Gulf States, Louisiana and Florida, and examines what legal mechanisms, if any, have been established that would protect the state in the event of bankruptcy.

## 1. Louisiana

Louisiana's Oil Prevention and Response Act (LOPRA) is an integral mechanism to protect Louisiana's fragile natural resources in the event of a spill. Louisiana has "large volumes of stored oil, numerous production platforms and miles of pipelines, large numbers of inland barges, and heavy tanker traffic, including the Louisiana Offshore Oil Port which receives fifteen percent of the oil imported into the United States."<sup>135</sup> Because of Louisiana's strong connection to the production and shipment of oil, together with Louisiana's "limited adequate highway access to the coast and remote inland areas for rapid transport of oil spill equipment and few areas suitable for staging facilities, . . . great potential for a major oil spill event and its consequences" exist.<sup>136</sup>

LOPRA was created to "support and compliment" the federal OPA.<sup>137</sup> LOPRA mirrors OPA, containing similar provisions for liability, natural resource damages, and defenses and establishes a state fund similar to the Oil Spill Liability Trust Fund.<sup>138</sup> The analysis of LOPRA in a bankruptcy context is much like the analysis of OPA. However, unlike OPA, LOPRA requires a responsible party to "[u]ndertake all reasonable actions to abate, contain, and remove pollution from the discharge."<sup>139</sup> This provision allows the state government to order a responsible party to undertake a cleanup obligation and, depending on a court's analysis, possibly avoid having such an obligation be defined as a "claim" under the Code. Under LOPRA the government has an alternative right to payment if a responsible party fails

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134. Louisiana's Oil Spill Prevention and Response Act was created to "support and compliment" the Oil Pollution Act. LA. REV. STAT. ANN. § 30:2453 (2000); Florida's Pollution Discharge Prevention and Control Act was enacted "to support and complement applicable provisions of the Federal Water Pollution Control Act" FLA. STAT. ANN. § 376.021(6) (West 2010).

135. LA. REV. STAT. ANN. § 30:2452.

136. *Id.*

137. *Id.* § 30:2453(B).

138. *Id.*

139. *Id.* § 2463(A)(2).

to complete its cleanup obligation, making it susceptible to the alternative definition as a “claim” under the Code.<sup>140</sup>

## 2. Florida

Florida’s Pollutant Discharge Prevention and Control Act (formerly titled the Oil Spill Prevention and Pollution Control Act) was enacted “to support and complement applicable provisions of the Federal Water Pollution Control Act.”<sup>141</sup> It provides that “[a]ny person discharging pollutants as prohibited by [the Act] shall immediately undertake to contain, remove, and abate the discharge.”<sup>142</sup> Similarly to LOPRA, Florida’s act allows the government to conduct the removal in the event the responsible party does not or is not capable of doing so, and to recover all costs incurred from the responsible party.<sup>143</sup> Florida’s oil spill act is similar to LOPRA in the bankruptcy context. The government may be able to avoid asserting a bankruptcy “claim” as long as it orders the responsible party to clean up and does not attempt to recover any money.

Florida’s State Lands Statute gives the Board of Trustees for the Internal Improvement Trust Fund (the Board) the obligation to ensure that state lands are adequately managed, protected, and conserved.<sup>144</sup> In order to fulfill this obligation, the Trustees may bring a suit or impose a fine against any person who has damaged state lands.<sup>145</sup> Its unique feature, from a bankruptcy perspective, is that all fines and damages awarded under the statute constitute a lien upon the real and personal property of a responsible party.<sup>146</sup> This statute creates a secured claim by allowing the Trustees to impose a lien, which would be given a higher priority than other environmental obligations that are not secured. This Act has the potential of providing Florida with an alternative and more secure way of ensuring that the responsible party is held accountable. However, the Act is narrow, covering only damage to state lands, and has never been used in such a way before.

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140. *Id.* § 30:2463(B) (allowing state to undertake cleanup for responsible parties that fail to complete their cleanup obligation); *Id.* § 30:2480(G) (allowing state to recover costs associated with the “restoration, rehabilitation, replacement, or mitigation of damages to natural resources”).

141. FLA. STAT. ANN. § 376.021(6) (West 2010).

142. § 376.09(1).

143. § 376.09(2).

144. FLA. STAT. ANN. §§ 253.01, 253.03 (West 2009 & Supp. 2011).

145. § 253.04(1)–(2).

146. § 253.04(6).

## IV. POSSIBLE SOLUTIONS

A number of solutions have been proposed to reconcile the gap that exists between the Bankruptcy Code and environmental laws.<sup>147</sup> Perhaps the most obvious is to amend the Bankruptcy Code. Of the many different options for such an amendment, this article will explore only a few. Aside from such a sweeping change in the governing bankruptcy law, states have a variety of options available to ensure that their environmental claims will not be discharged in bankruptcy proceedings. These options enable states to better protect their natural resources and the public health of their citizens.

*A. Amendments to the Bankruptcy Code*

The current incarnation of bankruptcy law in the United States is a result of a relatively modern historical shift.<sup>148</sup> As society's views of debt and the need for relief changed, so did bankruptcy law. When the Code was enacted in 1978, the country did not have extensive familiarity or experience with many of the environmental laws that have become an integral part of protecting the nation's natural resources. Thirty-four years after the passage of the current federal bankruptcy system, it is time to step back and think about how this system could be amended to create a uniform and fair procedure for treating environmental obligations.

One option is to define all environmental obligations as claims and to amend the Code to raise the priority status for these claims. Currently, most environmental claims rank eighth under Section 507's priority list, falling behind other unsecured claims.<sup>149</sup> This low level of priority means that the environmental obligation will not be paid in full, if at all.<sup>150</sup> Moving environmental obligations to rank first in priority of unsecured claims would make obtaining substantial repayment far more likely.<sup>151</sup> Also, this would avoid the unfairness of placing environmental claims ahead of secured creditors. The environmental claim would, as it is currently, be considered unsecured and all of the secured claims would still be paid ahead of the environmental obligation.<sup>152</sup>

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147. Smith, *supra* note 2, at 1005–06; Norman I. Silber, Note, *Cleaning Up In Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters*, 85 COLUM. L. REV. 870, 890 (1985).

148. See *supra* Part I.A. (explaining the history of bankruptcy law in the United States).

149. 11 U.S.C. § 507(a)(8) (2006).

150. Silber, *supra* note 147, at 890.

151. *Id.* at 891.

152. *Id.*

Another option is to amend Section 523 of the Code, which creates exceptions to the discharge provision, to include environmental claims under the debts that cannot be discharged.<sup>153</sup> This option is premised on the idea that the “fresh start” principle of bankruptcy law is not more important than the responsibility of states to hold polluters responsible for damage to the environment.<sup>154</sup> The current law allows environmental claims to be discharged, thereby implicitly condoning the behavior that gave rise to such obligations.<sup>155</sup> Adding environmental obligations to the list of non-dischargeable debts that “concern misconduct by the debtor in the events leading up to the bankruptcy” would signal a stronger commitment to environmental protection.<sup>156</sup>

These two options, although they would aid in cleanup, would not hold a debtor fully responsible. By prioritizing environmental claims, these added expenses will have to be taken into consideration in the final bankruptcy settlement. This could result in secured claims receiving less and many unsecured claims not being paid at all. In the end, other debtors will end up sharing the cost of the environmental remediation.

Lastly, a third option is to amend the Code to make it more difficult to evade environmental obligations. Senator Cantwell introduced this idea in a bill to the Senate in 2007.<sup>157</sup> This bill was in response to a report by the Government Accountability Office that highlighted the need to ensure that parties meet their cleanup obligations.<sup>158</sup> This report noted that the number of bankruptcies involving environmental obligations was unknown, simply because the information is not routinely collected.<sup>159</sup> Part of the proposed bill would require any business that is filing for bankruptcy to report all environmental liabilities to the EPA.<sup>160</sup>

The most innovative section of this bill calls for an amendment to the Bankruptcy Code which would allow a trustee to access any assets of the debtor that were transferred within the previous ten years if the debtor, at the time of transfer, had environmental liabilities under CERCLA.<sup>161</sup> This

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153. *Id.* at 888.

154. *Id.*

155. *Id.*

156. *Id.* (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 128, (1977)).

157. S. 452, 110th Cong. (2007).

158. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-658, ENVIRONMENTAL LIABILITIES: EPA SHOULD DO MORE TO ENSURE THAT PARTIES MEET THEIR CLEANUP OBLIGATIONS (2005).

159. *Id.* at 17–18.

160. S. 452, 110th Cong. § 101(3) (2007).

161. *Id.* § 201. CERCLA is the acronym for the Comprehensive Environmental Response, Compensation, and Liability Act, commonly referred to as “Superfund.”

would allow the EPA to fully recover from a parent corporation if the environmental liabilities sought were from a bankrupt subsidiary. This amendment aims to target corporations that participate in a “shell game,” whereby the corporation moves assets out of a liable subsidiary, leaving an empty shell and avoiding responsibilities. Of all of the proposed amendments to the Bankruptcy Code, this solution stays truest to the “polluter pays” principle. The amendment would keep the obligation in the hands of the debtor, rather than merely shifting priorities of the bankruptcy estate. Unfortunately, this amendment does not appear to have any political support and the bill has effectively died in committee hearings.<sup>162</sup>

### *B. State Solutions: Liens and Superliens*

In the absence of an amendment to the federal Bankruptcy Code, securing a claim by means of a statutory lien or a statutory environmental “superlien” is a good way for states to ensure that the responsible party will be held accountable.<sup>163</sup> A statutory lien, similar to the Florida State Lands Statute’s lien, applied specifically to all removal expenditures incurred by the state, would give the state a better standing in the bankruptcy proceeding.<sup>164</sup> In the case of the Gulf Oil Spill, adding a statutory lien provision to LOPRA or Florida’s Pollution Prevention Act would allow the states to recover more of their removal costs in a bankruptcy proceeding than their current laws now provide. However, the downfall of a regular statutory lien is that it only has privilege over other secured liens filed after the statutory lien was filed.<sup>165</sup> The statutory lien does not have priority over any previously filed lien; therefore, it is not guaranteed to be fully secured.

An alternative to a non-priority statutory lien is an environmental super-priority lien, or superlien. A superlien has priority over all claims and prior liens of other creditors. A few states have enacted superlien laws, some more expansive than others.<sup>166</sup> The New Jersey Spill Compensation and Control Act (Spill Act) is the most expansive of the state superlien

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162. *Bill Summary & Status, 110th Congress (2007-2008), S.452*, THE LIBR. OF CONGRESS: THOMAS, <http://www.thomas.gov/cgi-bin/bdquery/z?d110:SN00452:@@L&summ2=m&:> (last visited June 1, 2012).

163. Smith, *supra* note 2, at 1005–06.

164. *Id.* at 1006.

165. AHERN, *supra* note 2, § 1:21.

166. Alabama, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Pennsylvania, Wisconsin, and Wyoming all have passed environmental priority liens. AHERN, *supra* note 2, §§ 7:12–7:13, 7:15–7:19, 7:21, 7:24–7:25.

statutes.<sup>167</sup> The Spill Act is an apt model for Gulf states because it allows the government to impose the lien on any property of the debtor's estate. Other superlien laws only attach a lien to the real property where hazardous waste was released.<sup>168</sup> An expansive lien, like the Spill Act, is essential in the Gulf due to the extent and high cost of the damage. Also, limiting the lien attachment to the real property where hazardous waste was released would not have effect in the Gulf because the Macondo well—the source of the released oil—was leased, not owned, by BP from the federal government.

#### CONCLUSION

In the wake of a devastating environmental disaster, it is difficult to step back and observe what changes need to be made. The federal Bankruptcy Code is in many ways at odds with the purposes and goals of environmental laws. Unfortunately, there is no perfect fix that can reconcile this divide. In the absence of a federal amendment to the Code, it is essential that the Gulf states reevaluate the strength of their environmental laws. Although there is no state law that is bankruptcy-proof, there are laws that would better protect the Gulf States in the event that a responsible party files for bankruptcy. Enactment of these laws could also signal change in the culture of oil exploration in the Gulf. If the penalties for failure are higher, the level of investment in precautionary measures by the oil industry are also likely to increase. Thus, whether BP files for bankruptcy is not as important as the lessons to be learned from this disaster. Once a party responsible for environmental damages files for bankruptcy, it is too late to make changes in state laws to hold them accountable. Gulf states need to look ahead and create stronger environmental laws that will secure some level of financial assurance in the event that a polluter files for bankruptcy. Such laws will help ensure that states will not be left to pick up the tab for cleanup costs.

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167. Smith, *supra* note 2, at 1007.

168. Spill Compensation and Control Act, 58 N.J. STAT. ANN. § 10.23.11f(3)(f) (Supp. 2011). For example, Massachusetts' superlien statutes only attaches to the property where the hazardous waste was released. Smith, *supra* note 2, at 1008.