

# WHY CONGRESS SHOULD CLEAN UP THE BANKRUPTCY CODE TO RENDER ENVIRONMENTAL CLEANUP ORDERS INTO CLAIMS

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## INTRODUCTION

The current judicially created legal test for when an environmental cleanup order becomes a claim in bankruptcy fails to give businesses and governments clear legal guidance, and often saddles government agencies with debtors' environmental obligations. Accordingly, this Note proposes to amend the Bankruptcy Code to convert environmental cleanup orders into administrative priority claims in bankruptcy court.

Businesses incur various obligations during the course of their activities.<sup>1</sup> These obligations stem from contracts, tort claims, the tax code, and environmental regulations, among other things.<sup>2</sup> Solvent businesses ordinarily satisfy these obligations in full.<sup>3</sup> By definition, an insolvent business cannot satisfy all of these obligations.<sup>4</sup> Insolvent businesses therefore face a choice of which conflicting obligations to satisfy and in what order.<sup>5</sup>

Bankruptcy solves this problem. Bankruptcy provides a forum wherein a debtor's numerous creditors can collect on their claims according to their respective priority of right.<sup>6</sup> For debtors who file for liquidation under Chapter 7, bankruptcy serves the substantive goal of maximizing creditor recovery.<sup>7</sup> For debtors who petition for reorganization under Chapter 11, however, bankruptcy serves an additional purpose.<sup>8</sup> Unlike Chapter 7 liquidation, Chapter 11 reorganization grants debtors a "fresh start," allowing the insolvent debtor to reemerge and start anew.<sup>9</sup> Thus, the debtor can continue to operate so that the community accrues benefits from the business for as long as possible.<sup>10</sup> These benefits include: the wellbeing of employees who depend on the debtor, the continued revenue flow to the debtor's suppliers, and the convenience for the debtor's longtime

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1. G. Eric Brunstad, Jr., *Bankruptcy and the Problems of Economic Futility: A Theory on the Unique Role of Bankruptcy Law*, 55 BUS. LAW. 499, 505 (2000).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. DAVID G. EPSTEIN, STEVE H. NICKLES, JAMES J. WHITE, *BANKRUPTCY* 3 (1993).

7. THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 20 (1986).

8. *Id.* at 4.

9. *Id.* at 4.

10. See Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 788 (1987).

customers.<sup>11</sup> The fresh start policy therefore recognizes that businesses serve a vital function in an interconnected community.<sup>12</sup>

The modern Bankruptcy Code promotes the fresh start policy by allowing the debtor to shed as many cumbersome obligations, or “debts,” as possible.<sup>13</sup> The Code accomplishes this goal by defining “debt” broadly as a “liability on a claim.”<sup>14</sup> The Code even considers an equitable remedy—such as an environmental injunction—a “claim” as long as it “gives rise to a right of payment” for breach of performance.<sup>15</sup> The right of payment for a breach of performance may even be contingent, disputed, unmatured, or not yet reduced to judgment.<sup>16</sup>

The end result of a Chapter 11 reorganization is to restructure all prepetition debts.<sup>17</sup> This involves a process of deciding which claimants get paid and how much.<sup>18</sup> Some claimants receive mere pennies on the dollar. Some claimants, who would enjoy the right to full payment from the debtor outside of bankruptcy, lose those rights when the debtor receives a discharge.<sup>19</sup> The substantive bankruptcy policy of giving the debtor a fresh start can therefore abrogate rights that exist outside of bankruptcy.<sup>20</sup>

Nowhere is this abrogation more apparent than in environmental law. Bankruptcy’s fresh start policy, and its desire to distribute a debtor’s defaults among its various creditors, conflicts with environmental law’s policy of making the polluter remedy their own environmental violations.<sup>21</sup> Because neither Congress’s environmental statutes nor the Bankruptcy Code specifically address whether environmental cleanup orders are claims in bankruptcy, courts disagree on how to treat them in bankruptcy.<sup>22</sup> The substantive policy of bankruptcy, however, dictates that courts should treat

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11. *Id.* at 787–88; see, e.g., Adam J. Levitin, *In Defense of Bailouts*, 99 GEO. L.J. 435, 485 (2011) (discussing GM’s interconnectedness with other companies in the context of its bankruptcy).

12. See Warren, *supra* note 10, at 788.

13. H.R. REP. NO. 95-595, at 309 (1977); S. REP. NO. 95-989, at 21–22 (1978).

14. 11 U.S.C. § 101(12) (2006).

15. *Id.* § 101(5)(B).

16. *Id.*

17. 11 U.S.C. § 1141(d).

18. JACKSON, *supra* note 7, at 225.

19. *Id.*

20. *Id.*

21. Ingrid Michelson Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy*, 12 AM. BANKR. INST. L. REV. 331, 333 (2004); Catherine A. Kellett, *The Future of the Environmental Enforcement Injunction After Ohio v. Kovacs*, 13 B.C. ENVTL. AFF. L. REV. 397, 398 (1986).

22. *In re Goodwin*, 163 B.R. 825, 829–33 (Bankr. D. Idaho 1993) (debating the differing approaches on how to treat environmental cleanup orders in bankruptcy); ADAM P. STROCHAK, JENNIFER L. WINE & ERIN K. YATES, ENVIRONMENTAL ISSUES IN BANKRUPTCY CASES 44 (2009).

environmental cleanup orders as claims because this would allow the debtor to discharge the maximum amount of prepetition liabilities.<sup>23</sup>

This policy creates a powerful incentive for businesses with environmental liabilities to seek refuge in bankruptcy; if a business is able to have its environmental obligations classified as claims, it may only have to satisfy them partially. Government claims for environmental damages will typically be classified as general unsecured claims of the lowest priority, entitled only to pro rata distribution of the bankruptcy estate.<sup>24</sup> A polluter can thereby frustrate the efforts of a government agency to use the polluter's assets to pay for environmental cleanup.<sup>25</sup>

This Note discusses how different courts have treated the dischargeability of environmental cleanup orders in bankruptcy. The Note argues that the current test for when an environmental injunction becomes a claim in bankruptcy fails to give clear guidance to businesses and government agencies. Additionally, this Note proposes that Congress not only amend the Bankruptcy Code to convert environmental cleanup orders into claims, but also to give these claims administrative priority. Section I describes the genesis of the current legal test for when an environmental injunction becomes a dischargeable claim in bankruptcy. Section II discusses why the current legal test for when an injunction becomes a claim yields unpredictable results. This section critiques some of the approaches taken by other legal scholars. Finally, Section III outlines a proposal to amend the Bankruptcy Code to create a compromise between the policy objectives of bankruptcy and environmental law by treating all cleanup orders as administrative claims.

#### I. GENESIS OF THE CURRENT LEGAL TEST: WHEN AN ORDER BECOMES A CLAIM

Case law spanning more than two and a half decades defines the current legal test for when an environmental cleanup order becomes a claim. This section outlines some of the major developments in this area of law in order to give a sense of how courts have arrived at the current legal test. This section begins with *Ohio v. Kovacs*, the only Supreme Court case on point,

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23. STROCHAK, WINE & YATES, *supra* note 22, at 44, (citing *Ohio v. Kovacs*, 469 U.S. 274, 279 (1985)).

24. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-658, ENVIRONMENTAL LIABILITIES: EPA SHOULD DO MORE TO ENSURE THAT LIABLE PARTIES MEET THEIR CLEANUP OBLIGATIONS 15 (2005).

25. *Id.*; *In re Chemtura Corp.*, 443 B.R. 601, 605-06 (Bankr. S.D.N.Y. 2011) (describing bankruptcy in which the government settled its two billion dollar claims against debtor for thirty million dollars).

and ends with *Mark IV Industries*, a recent case that states the current legal test.

*A. The Supreme Court Frames the Discussion in Kovacs*

The issue in *Ohio v. Kovacs* was whether the State of Ohio's environmental cleanup order against a debtor, one William Lee Kovacs, became a claim in bankruptcy.<sup>26</sup> If Ohio's cleanup order was a claim, then Ohio could only make Kovacs pay for cleanup to the extent that he was able to.<sup>27</sup> Conversely, if the cleanup order was not a claim, then Ohio could enforce its cleanup order at Kovacs's expense.<sup>28</sup> Naturally, Ohio preferred the second option. The critical issue in the case was whether the cleanup order, an "equitable remedy," gave rise to a "right of payment" for "breach of performance."<sup>29</sup>

The facts of the case have become legendary. The State of Ohio ordered Kovacs to remediate a hazardous waste site.<sup>30</sup> Kovacs was the Chief Executive Officer and a stockholder of Chem-Dyne Corp.<sup>31</sup> Chem-Dyne owned and operated an industrial waste disposal site in Hamilton, Ohio.<sup>32</sup> In 1976, the State of Ohio's Environmental Protection Agency and Department of Natural Resources (Ohio) sued Kovacs, both individually and as a company officer, in state court for violating state environmental laws.<sup>33</sup> Ohio alleged that Kovacs polluted public waters with pesticides and industrial waste.<sup>34</sup> In 1979, Kovacs settled the lawsuit with Ohio.<sup>35</sup> Kovacs stipulated that Chem-Dyne would refrain from bringing additional industrial waste onto the property, remove certain environmental hazards from the property, pay \$75,000 in compensation for injury to wildlife, and

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26. *Ohio v. Kovacs*, 469 U.S. 274, 275 (1985).

27. In a Chapter 7 liquidation, general unsecured creditors are entitled to pro rata distribution of whatever remains after every other class of creditors has been paid—usually very little. *See* 11 U.S.C. § 726(b) (2006) (providing for pro rata distribution based on 11 U.S.C. § 507). The result in a Chapter 11 reorganization is similar; a creditor cannot receive less than they would in a Chapter 7 liquidation—but not necessarily any more—under the “cram down” provision. 11 U.S.C. § 1129(a)(7) (2006).

28. 11 U.S.C. § 541 (2006) (exempting nonclaims from the bankruptcy).

29. 11 U.S.C. § 101(5)(B).

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

31. *Id.* at 276.

32. *Id.*

33. *In re Kovacs*, 717 F.2d 984, 984–85 (6th Cir. 1983), *aff'd sub nom.*, *Kovacs*, 469 U.S. 274 (1985).

34. *Id.* at 985.

35. *Kovacs*, 469 U.S. at 276.

to otherwise cease polluting.<sup>36</sup> The Ohio state court entered judgment accordingly.<sup>37</sup>

Kovacs, however, failed to comply with the terms of the stipulation and judgment entry, a “breach of performance” under section 101(5)(B).<sup>38</sup> Therefore, Ohio moved to have the court appoint a receiver to force him to comply.<sup>39</sup> The court granted Ohio’s motion, authorizing the receiver to take possession of Kovacs’s property and assets.<sup>40</sup> Ohio directed the receiver to remediate the Chem-Dyne site as per the stipulation.<sup>41</sup> Significantly, the receiver had the power to collect reimbursement from Kovacs for the remediation work.<sup>42</sup> If this power “[gave] rise to a right of payment,” then it could be discharged as a claim if Kovacs filed for bankruptcy.<sup>43</sup> And in fact, Kovacs did file for bankruptcy before the receiver had fully remediated the site.<sup>44</sup>

Ohio suddenly faced a problem: Kovacs could walk away from his environmental obligations if they were claims within the meaning of section 101(5)(B), leaving the state to pay for cleanup. Thus, Ohio needed to find a way to pay for the cleanup without “[giving] rise to a right of payment.” Accordingly, Ohio tried to divert Kovacs’s post-bankruptcy earnings to pay for the receiver’s remediation duties.<sup>45</sup> To that end, Ohio filed a motion in state court to discover Kovacs’s earnings.<sup>46</sup> Kovacs, however, successfully stayed those proceedings.<sup>47</sup> On appeal, the Sixth Circuit held that Ohio was ultimately trying to enforce a money judgment against Kovacs; the motion to discover his earnings was the first step in forcing him to reimburse the receiver.<sup>48</sup> The Bankruptcy Code’s “automatic stay” provision, therefore, barred Ohio’s motion in state court to discover his earnings.<sup>49</sup>

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36. *Id.*

37. *Id.* at 277.

38. *Id.* at 278.

39. *Id.* at 276.

40. *Id.*

41. *Id.*

42. *Id.* at 283.

43. 11 U.S.C. § 101(5)(B).

44. *Kovacs*, 469 U.S. at 276 n. 1 (describing how Kovacs originally filed under Chapter 11 but later converted his petition to a Chapter 7 liquidation).

45. *Id.* at 277.

46. *Id.* at 276.

47. *Id.*

48. *In re Kovacs*, 681 F.2d 454, 456 (6th Cir. 1982), *vacated and remanded*, 459 U.S. 1167 (1983).

49. *Id.* (citing 11 U.S.C. § 362 (1982)). Normally, filing a bankruptcy petition automatically stays all proceedings against the petitioner. 11 U.S.C. § 362(a) (2006). However, governments can move to exempt themselves from the automatic stay to exercise their police power against a debtor. *Id.* at § 362(b)(4). But this exemption does not apply when the governmental unit is trying to enforce a monetary judgment against a debtor. *Id.*

In response, Ohio filed a complaint in bankruptcy court for declaratory relief.<sup>50</sup> Ohio sought to put Kovacs's environmental obligations outside of the bankruptcy proceeding by declaring them nondischargeable duties rather than monetary obligations.<sup>51</sup> The bankruptcy court, however, found that Ohio's claim was dischargeable.<sup>52</sup> The court rejected Ohio's assertion that Kovacs owed an affirmative obligation to remediate rather than a monetary obligation.<sup>53</sup> The court reasoned instead that Ohio was mainly seeking payment from Kovacs; therefore, it had a claim in Kovacs's bankruptcy.<sup>54</sup> The district court affirmed.<sup>55</sup>

On appeal, the Sixth Circuit held that Kovacs could not comply with the stipulation and judgment order because the receiver had dispossessed him of the Chem-Dyne site.<sup>56</sup> Ohio had a monetary claim in Kovacs' bankruptcy because his only option was to pay money.<sup>57</sup> On petition from Ohio, the Supreme Court granted certiorari.<sup>58</sup>

Ohio argued before the Court that Kovacs had no right to pay money instead of performing the cleanup order; therefore, the cleanup order did not "give rise to a right of payment."<sup>59</sup> The Court rejected this argument.<sup>60</sup> Instead, the Court agreed with the court of appeals that Ohio was trying to find a way to pay for work done by the receiver.<sup>61</sup> Moreover, it found that Kovacs could not perform the work himself because of the receivership.<sup>62</sup> Therefore, the Court held that, inasmuch as Ohio was merely trying to exact monetary payments from Kovacs, it had a claim subject to discharge.<sup>63</sup> Kovacs could, therefore, avoid his cleanup obligations to the State of Ohio if his bankruptcy estate did not have sufficient funds to pay for them.

Despite this ruling, the Court circumscribed its holding in five ways.<sup>64</sup> First, Kovacs' discharge did not shield him from criminal prosecution for

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50. *Kovacs*, 469 U.S. at 276–77.

51. *Id.* at 277.

52. *Id.*

53. *State v. Kovacs*, 29 B.R. 816, 818 (Bankr. S.D. Ohio 1982).

54. *Id.* The court took judicial notice that Ohio had already sought relief from the automatic stay to determine Kovacs's earnings to this end. *Id.*

55. *In re Kovacs*, 717 F.2d 984, 987 (6th Cir. 1983), *aff'd sub nom.*, *Ohio v. Kovacs*, 469 U.S. 274 (1985).

56. *Id.* at 988 ("The impact of [Ohio's] attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics.").

57. *Id.*

58. *Ohio v. Kovacs*, 465 U.S. 1078 (1984).

59. Brief for Petitioner at 26, *Ohio v. Kovacs*, 469 U.S. 274 (1985) (No. 83-1020).

60. *Kovacs*, 469 U.S. at 279.

61. *Id.* at 282–83.

62. *Id.* at 283.

63. *Id.*

64. *Id.* at 284–85.

environmental crimes or criminal contempt proceedings for violating the injunction.<sup>65</sup> Second, his discharge did not shield him from any fines or penalties prior to bankruptcy.<sup>66</sup> Third, the Court reserved judgment on the legal consequences had Ohio not put Chem-Dyne into receivership.<sup>67</sup> Fourth, the holding did not apply to the injunction to stop polluting.<sup>68</sup> Lastly, the Court stressed that anyone in possession of the Chem-Dyne property had a duty to comply with Ohio's laws.<sup>69</sup> Evidently, by circumscribing its holding, the Court did not want its holding to give a broad license to polluters to seek refuge in bankruptcy.

Even so, the *Kovacs* decision left many questions unanswered because its holding was grounded in the facts of the case.<sup>70</sup> Thus, the *Kovacs* decision provides little guidance on how different factual scenarios would change whether an injunction was a claim under the Code.<sup>71</sup> Clearly, after the *Kovacs* decision, all debtors have an obligation to comply with environmental laws, but only up to a point; once that obligation can be reduced to some sort of monetary payment, debtors can discharge the obligation as a debt. Under what circumstances an injunction would give rise to a right of payment was still an open question.

### *B. The Sixth Circuit Puts the Ball in Congress's Court . . . And Gets it Right?*

The Sixth Circuit tried to clarify under what circumstances the *Kovacs* decision could turn an ordinary cleanup order into a claim in *United States v. Whizco*.<sup>72</sup> In that case, the Surface Mining Control and Reclamation Act of 1977 (SMCRA) obligated the debtor coal mining company, Whizco, and its director to reclaim its mine sites.<sup>73</sup> Whizco became insolvent and

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65. *Id.* at 284.

66. *Id.* (citing 11 U.S.C. 523(a)(7) (1978)).

67. *Id.*

68. *Id.* at 284–85.

69. *Id.* at 285.

70. *See id.* (narrowing its holding to situations where the debtor has had the land subject to environmental cleanup obligations dispossessed).

71. For example, the Supreme Court did not have much difficulty concluding that *Kovacs's* breach of cleanup order "[gave] rise to a right of payment" under section 101(5)(B) because Ohio admitted that it was merely trying to exact payment out of *Kovacs* to pay the receiver. While *Kovacs's* breach of the cleanup order "[gave] rise to a right of payment" here, the Court declined to decide what else might give rise to a right of payment. *See id.* (declining to rule on which environmental injunctions are dischargeable in bankruptcy).

72. *United States v. Whizco, Inc.*, 841 F.2d 147, 147 (6th Cir. 1988).

73. *Id.* at 148 (citing 30 U.S.C. §§ 1251–1279 (1982)). Reclamation under SMCRA roughly means: "[R]eturning the mine site to its premining use and preventing the former mine site from

abandoned its mine sites without properly reclaiming them.<sup>74</sup> Whizco and its director then filed for Chapter 11 reorganization.<sup>75</sup>

The Department of the Interior issued Whizco three orders under SMCRA instructing Whizco to properly reclaim its mine sites.<sup>76</sup> When Whizco failed to comply, the United States sued in district court seeking injunctive relief.<sup>77</sup> Shortly thereafter, the debtor converted his petition to Chapter 7 liquidation.<sup>78</sup> Whizco's director contended that, although he was subject to the same reclamation obligations as Whizco, his bankruptcy discharged them.<sup>79</sup> The district court found that, because Whizco was defunct, and all of its equipment liquidated, the only way the director could comply with his reclamation obligations was to spend money.<sup>80</sup> The injunction "gave rise to a right of payment."<sup>81</sup> The Sixth Circuit affirmed, viewing section 101(5)(B)'s "right of payment" to really mean "payment to anyone."<sup>82</sup> In other words, as long as the debtor had an obligation to spend money, that obligation could be a claim in bankruptcy.<sup>83</sup> The bankruptcy estate would only have to satisfy the claim to the extent that it has sufficient funds to do so.

However, no other circuit has followed this reading of section 101(5)(B).<sup>84</sup> Other circuits that have considered the issue have found that the Sixth Circuit's expansive reading of section 101(5)(B) conflicted with *Kovacs* intent to preserve governmental authority because it excused debtors of virtually every environmental obligation—after all, every environmental obligation costs money.<sup>85</sup> By broadening the definition of claims to include every monetary obligation, the *Whizco* court gave

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harming the natural environment." 30 U.S.C. § 1258 (outlining requirements of a reclamation plan under the SMCRA).

74. *Whizco*, 841 F.2d at 147.

75. *Id.*

76. *Id.*

77. *Id.* (citing 30 U.S.C. § 1271 (1982)).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 149 (citing 11 U.S.C. § 101(4)(B) (1982)).

82. *Id.* at 151.

83. This has been called the "expenditure test." STROCHAK, WINE & YATES, *supra* note 22, at 43.

84. At least one bankruptcy court, however, has followed its reasoning. See *United States v. Robinson* (*In re Robinson*), 46 B.R. 136, 139 (Bankr. M.D. Fla. 1985), *rev'd on other grounds*, 55 B.R. 355 (M.D. Fla. 1985) (holding that the obligation of individual debtor to restore wetlands was dischargeable because it required him to spend money).

85. *United States v. Apex Oil Co.*, 579 F.3d 734, 738 (7th Cir. 2009); *United States v. Chateaugay Corp.* (*In re Chateaugay Corp.*), 944 F.2d 997, 1005 (2d Cir. 1991); *Torwico Elecs., Inc. v. N.J. Dep't of Envtl. Prot.* (*In re Torwico Elecs., Inc.*), 8 F.3d 146, 150 (3d Cir. 1993); *United States v. Hubler*, 117 B.R. 160, 164 n.1 (W.D. Pa. 1990).

absolute priority to bankruptcy's "fresh start" policy at the expense of environmental law's policy of making the polluter pay.

In that sense, the Court provided a facile solution to the conflict between bankruptcy law and environmental law. The court implicitly recognized this when it noted that Congress bore the responsibility of resolving the apparent conflict.<sup>86</sup> While the *Whizco* court's overbroad reading of section 101(5)(B) vitiates the polluter pays principle, it got one thing right: the duty to reconcile the policy conflict between environmental statutes and the Bankruptcy Code should fall to Congress, not the courts.

### *C. The Second and Seventh Circuits Craft a Judicial Solution to the Statutory Conflict*

The Second Circuit acknowledged that it was Congress's responsibility to resolve the statutory policy conflict.<sup>87</sup> The court did not take the Sixth Circuit's easy way out.<sup>88</sup> It refused to give absolute primacy to the policy objectives of either the Bankruptcy Code or federal environmental laws.<sup>89</sup> The court rejected the debtor's argument that its injunctive obligations were dischargeable because they required the debtor to spend money.<sup>90</sup> The Second Circuit agreed with the district court that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>91</sup> cleanup orders were dischargeable insofar as they were substitutes for the Environmental Protection Agency (EPA) acting and then seeking payment from the debtor.<sup>92</sup> An injunction to cease polluting was nondischargeable, however, because it did not give EPA a right to collect payment.<sup>93</sup> However, most environmental injunctions fall into both categories—they contemplate an order to cleanup "ongoing" pollution and order a polluter to cease polluting—and these injunctions are also nondischargeable.<sup>94</sup> But this leaves the question of when is pollution ongoing?

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86. *Whizco*, 841 F.2d at 149 n.5.

87. *Chateaugay*, 944 F.2d at 1002.

88. *See id.* ("Of course, the comprehensive nature of the bankruptcy statute does not relieve us of the obligation to construe its terms, nor may we resolve all issues of statutory construction in favor of the 'fresh start' objective.").

89. *Id.*

90. *Id.* at 1006–07.

91. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §§ 9601–9675 (2006).

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

93. *Id.*

94. *Id.* at 1008–09.

The Seventh Circuit grappled with this question in *In re CMC Heartland Partners*.<sup>95</sup> The facts of that case were typical. A railroad leased a gravel pit to General Motors (GM) for use as a dumping pit for paint sludge from 1956 to 1974.<sup>96</sup> On the orders of the Wisconsin state environmental agency, GM installed safeguards to prevent leaching of pollutants when they closed the pit.<sup>97</sup> Later, in 1977, the railroad filed for reorganization.<sup>98</sup> One year before the bar date for filing claims, EPA put the gravel pit on the National Priorities List of polluted sites, but did not file a claim before the bar date.<sup>99</sup> The railroad emerged from bankruptcy, but no longer operated as a railroad.<sup>100</sup>

More than ten years after the former railroad (now called CMC Heartland) emerged from bankruptcy, EPA issued an order to CMC and GM to clean up the gravel pit under section 106(a) of CERCLA because the pit was allegedly leaching heavy metals into the groundwater.<sup>101</sup> In response, CMC contended that EPA had a claim that was discharged in CMC's bankruptcy arising from its prepetition conduct; EPA had every opportunity to file a claim, but failed to, and, therefore, CMC should not have to remedy the pollution of its predecessor company even though it still owned the pit.<sup>102</sup> The court upheld this as a general rule.<sup>103</sup> Specifically, the court held that CERCLA created an obligation that ran with the land.<sup>104</sup> CMC, as the current owner of the site, therefore had to act to remediate "an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance" per CERCLA.<sup>105</sup> In other words, bankruptcy does not discharge cleanup orders for pollution that currently endangers public health.

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95. *In re CMC Heartland Partners*, 966 F.2d 1143, 1147–48 (7th Cir. 1992).

96. *Id.* at 1145.

97. *Id.*

98. *Id.* at 1144.

99. *Id.* at 1145 (citing 42 U.S.C. § 9605(a)(8) (1988)). Putting the site on the National Priorities List signified that EPA believed that the site is currently releasing pollutants, or that it will. *Id.*

100. *Id.*

101. *Id.* (citing 42 U.S.C. § 9606(a) (1988)).

102. *Id.* at 1146.

103. *Id.*

104. *Id.* The court noted in dicta that CMC would have to accept responsibility under CERCLA for its pollution even if it disposed of the property in bankruptcy. *Id.* at 1147. The Third Circuit later held that a company could be liable for ongoing pollution even if it no longer operated the site. *Torwico Elecs., Inc. v. New Jersey Dep't of Env'tl. Prot. (In re Torwico Elecs., Inc.)*, 8 F.3d 146, 151 (3d Cir. 1993) (citing *In re CMC Heartland Partners*, 966 F.2d 1143, 1146 (7th Cir. 1992)).

105. *CMC Heartland*, 966 F.2d at 1147 (citing 42 U.S.C. § 9606(a) (1988)).

The Seventh Circuit again ruled on the dischargeability of environmental cleanup orders in *United States v. Apex Oil Co.*<sup>106</sup> This case was factually similar to *CMC Heartland*. Apex Oil's predecessor purchased an oil refinery in 1967.<sup>107</sup> In 1987, the predecessor filed for Chapter 11 reorganization.<sup>108</sup> As part of the reorganization, the predecessor sold the refinery in 1988.<sup>109</sup> The reorganized business, Apex Oil, emerged from Chapter 11 reorganization in 1990 with a discharge of all claims.<sup>110</sup> Apex no longer operated any refineries and had little capacity to remediate environmental disasters.<sup>111</sup>

In early 2003, EPA commenced a formal review of Apex's predecessor's role in creating a massive underground hydrocarbon plume.<sup>112</sup> EPA invoked its authority under CERCLA<sup>113</sup> and the Clean Water Act of 1972 to commence the investigation.<sup>114</sup> EPA found that the plume was caused in part by Apex's predecessor's refinery, and was contaminating local groundwater and emitting noxious fumes, creating health and environmental hazards.<sup>115</sup> Subsequently, EPA entered into a consent decree to begin remediation efforts.<sup>116</sup> Apex, however, declined to contribute.<sup>117</sup> Apex's share of the cleanup totaled roughly \$150 million, though it could defray these costs by seeking contribution payments from other responsible parties.<sup>118</sup>

EPA informed Apex that if it did not comply with the consent decree, it would do the work itself and seek contribution under CERCLA and the Clean Water Act.<sup>119</sup> In particular, EPA did not carry out its threat.<sup>120</sup> Instead, EPA sued Apex for injunctive and declaratory relief.<sup>121</sup> EPA sued for a

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106. *United States v. Apex Oil Co.*, 579 F.3d 734, 738 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010).

107. *United States v. Apex Oil Co.*, No. 05-CV-242-DRH, 2008 WL 2945402, at \*1 (S.D. Ill. July 28, 2008), *aff'd*, 579 F.3d 734 (7th Cir. 2009).

108. *Id.*

109. *Id.*

110. Petition for Writ of Certiorari at 6, *Apex Oil Co. v. United States*, 131 S. Ct. 67 (2010) (No. 09-1023).

111. *Apex Oil*, 579 F.3d at 736.

112. Petition for Writ of Certiorari at 6, *Apex Oil*, 131 S. Ct. 67 (2010) (No. 09-1023).

113. 42 U.S.C. § 9604(a)(1) (2000).

114. 33 U.S.C. § 1252 (2000).

115. *Apex Oil*, 579 F.3d at 735.

116. *United States v. Apex Oil Co.*, No. 05-CV-242-DRH, 2008 WL 2945402, at \*40 (D.S. Ill. July 28, 2008), *aff'd*, 579 F.3d 734 (7th Cir. 2009).

117. *Id.*

118. *Apex Oil*, 579 F.3d at 736.

119. Petition for Writ of Certiorari at 7, *Apex Oil Co. v. United States*, 131 S. Ct. 67 (2010) (No. 09-1023).

120. *Id.*

121. *United States v. Apex Oil Co.*, 438 F. Supp. 2d 948, 948 (S.D. Ill. 2006).

declaration that Apex's cleanup obligation was not discharged in its predecessor's bankruptcy.<sup>122</sup> EPA also sued to compel Apex to remediate the hydrocarbon plume under the Resource Conservation and Recovery Act of 1976 (RCRA).<sup>123</sup>

RCRA, unlike CERCLA, does not contain a provision for EPA to remediate first, and then seek contribution from the debtor later.<sup>124</sup> Judge Posner found that this difference was the dispositive issue in whether the cleanup order was discharged as a claim in Apex's predecessor's bankruptcy.<sup>125</sup> An injunction "gives rise to a right to payment" only if it gives the plaintiff the right to collect money from the debtor under the same statute.<sup>126</sup> Because RCRA did not authorize EPA to seek contribution from Apex, the injunction could not constitute a discharged claim.<sup>127</sup> Rejecting *Whizco*, Judge Posner reasoned that to hold otherwise would hamper government efforts to enforce injunctions because all injunctions impose some cost on the debtor.<sup>128</sup>

#### *D. The Current Legal Test for When An Environmental Cleanup Order is a Claim*

Recently, the Bankruptcy Court of the Southern District of New York articulated a test for when an environmental cleanup order becomes a claim in bankruptcy in deceptively simple terms.<sup>129</sup> The court consolidated the jurisprudence from *Kovacs* through *Apex Oil* to create a three-factor test (*Mark IV* test) to use when deciding whether injunctions are claims.<sup>130</sup> The *Mark IV* test first asks if the debtor is capable of carrying out its injunctive

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122. *Id.*

123. *Apex Oil*, 2008 WL 2945402, at \*1.

124. *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010) (citing *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483–87 (1996) (construing 42 U.S.C. § 6973(a)) (holding that RCRA's citizen suit provision did not authorize monetary relief).

125. *Id.* at 736.

126. *Id.* at 737 (citing *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1348 (7th Cir. 1997)); *Torwico Elecs., Inc. v. N.J. Dep't of Env'tl. Prot.* (*In re Torwico Elecs., Inc.*), 8 F.3d 146, 151 (3d Cir. 1993); *In re CMC Heartland Partners*, 966 F.2d 1143, 1145–47 (7th Cir. 1992); *In re Commw. Oil Ref. Co.*, 805 F.2d 1175, 1186–87 (5th Cir. 1986); *Penn Terra, Ltd. v. Dep't of Env'tl. Res.*, 733 F.2d 267, 278–79 (3d Cir. 1984); *United States v. Hubler*, 117 B.R. 160, 164 n.1 (Bankr. W.D. Pa. 1990); *United States v. Chateaugay Corp.* (*In re Chateaugay Corp.*), 112 B.R. 513, 523–24 (Bankr. S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991)); *contra United States v. Whizco, Inc.*, 841 F.2d 147, 151 (6th Cir. 1988) (holding that costs incurred by debtor in complying with cleanup order constituted a claim in bankruptcy).

127. *Apex Oil*, 579 F.3d at 737.

128. *Id.* (citing *Torwico*, 8 F.3d at 150 n.146).

129. *In re Mark IV Indus., Inc.*, 438 B.R. 460, 467–69 (Bankr. S.D.N.Y. 2010).

130. *Id.*

obligations, or if it must do so by paying others.<sup>131</sup> Second, the test asks whether pollution is ongoing.<sup>132</sup> If it is, then the debtor must comply.<sup>133</sup> Third, the test asks whether the government agency has the option under the statute to clean up and then seek contribution from the debtor.<sup>134</sup>

These three factors form a complex legal test with potentially uncertain outcomes. This Note argues that the current legal test for determining when a cleanup order becomes a claim in bankruptcy, as set forth in *Mark IV*, does not provide clear guidance to either businesses or government agencies.

## II. DAMNED IF YOU DO, BUT NOT IF YOU WON'T?

The third prong of the *Mark IV* test—whether the government agency has a right to seek contribution under the statute—invites criticism because its arbitrariness could yield unpredictable results. Apex's petition for certiorari best illustrates this. Apex criticized the Seventh Circuit's reasoning, arguing that because RCRA gave no right to payment, an injunction under that statute could not constitute a claim.<sup>135</sup> Apex pointed out that under Federal Rule of Civil Procedure Rule 70(a), EPA did have a right to payment.<sup>136</sup> This rule provides that:

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131. *Id.* (citing *Chateaugay*, 944 F.2d at 1008; *Durham Inland Wetlands & Watercourses Agency v. Jimmo (In re Jimmo)*, 204 B.R. 655, 660 (Bankr. D. Conn. 1997); *Torwico*, 8 F.3d at 151; *Apex Oil*, 579 F.3d at 738).

132. *Mark IV Indus.*, 438 B.R. at 468 (citing *In re CMC Heartland Partners*, 966 F.2d 1143, 1147 (7th Cir. 1992)). The premise of *CMC Heartland*, that debtors must remediate ongoing pollution at their property even if it arose from prepetition conduct, is largely uncontroversial and will not be discussed in this Note. *See, e.g., CMC Heartland*, 966 F.2d 1143, 1148 (7th Cir. 1992) (noting that even the debtor conceded at oral argument that bankruptcy did not relieve it of the obligation to remediate ongoing pollution).

133. *Mark IV Indus.*, 438 B.R. at 468 (citing *Torwico*, 8 F.3d at 151 n.6). Courts do not seem to have difficulty with the first prong of the *Mark IV* test of whether the debtor has the ability to comply with the injunction. Short of actually preventing the debtor from complying, not much else seems to satisfy this prong. Requiring a debtor to pay money does not prevent the debtor from complying. *Apex Oil*, 579 F.3d at 738. Likewise, the debtor is not prevented from complying with its injunctive obligations even if it is no longer in possession of the site as long as it has access to it. *Torwico*, 8 F.3d at 151; *Mark IV Indus.*, 438 B.R. at 469. It is nevertheless possible to conceive of other scenarios in which the debtor would be prevented from complying with its injunctive obligations such that its cleanup obligation might be a dischargeable claim.

134. *Mark IV Indus.*, 438 B.R. at 468–69 (citing *Chateaugay*, 944 F.2d at 1008 (2d Cir. 1991); *Apex Oil*, 579 F.3d at 736).

135. Petition for Writ of Certiorari at 17, *Apex Oil Co. v. United States*, 131 S. Ct. 67 (2010) (No. 09-1023) (citing *Apex Oil*, 579 F.3d at 736).

136. *Id.* (citing FED. R. CIV. P. 70(a)). *Apex Oil* pointed to several cases in which courts had liquidated environmental injunctions under this rule. *Id.* (citing *United States v. Guam*, No. 02-000222, 2008 U.S. Dist. LEXIS 23459, at \*14 (D. Guam Mar. 17, 2008) (appointing a receiver under Rule 70 to enforce injunction under the Clean Water Act)); *United States v. Prod. Plated Plastics, Inc.*, Nos. 93-2055/93-2618, 1995 U.S. App. LEXIS 20539, at \*18 (6th Cir. July 19, 1995) (invoking Rule 70 to

If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party's expense—by another person appointed by the court. When done, the act has the same effect as if done by the party.<sup>137</sup>

So, EPA did have the right to obtain payment in lieu of performance of the RCRA injunction; if Apex failed to meet its injunctive obligations, EPA had a right to do the work itself and seek contribution from Apex. All EPA had to do was appoint a receiver under this rule.

The irony of EPA's position that the RCRA injunction was nondischargeable is that it creates a perverse incentive to disobey.<sup>138</sup> After all, the disobedient party would benefit by having a court liquidate its injunctive obligations under Rule 70(a); such a monetary judgment would unquestionably constitute a claim should the party choose to reenter bankruptcy.<sup>139</sup> In Apex's case, this incentive was considerable—up to \$150 million.<sup>140</sup> Had it not complied, and had EPA moved to secure a receiver under Rule 70(a), *Kovacs* might have controlled the case.<sup>141</sup>

Yet, this perverse incentive not to obey injunctions has a silver lining. If Apex liquidated under Chapter 7, EPA would not have been able to use the bankruptcy estate's assets to pay for cleanup because their RCRA injunction was not a claim.<sup>142</sup> If, however, the RCRA injunction was a claim, then at

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appoint receiver to liquidate defendant's assets to pay for compliance with a RCRA injunction); see also James C. Brand, *Bankruptcy, Contempt, and the Durability of Environmental Obligations*, 24 TUL. ENVTL. L.J. 221, 234–36 (2011) (discussing the possibility of converting injunctions into claims via courts' contempt power).

137. FED. R. CIV. P. 70(a).

138. Arguably, holding the RCRA injunction nondischargeable is doubly ironic because the policy of Rule 70 is to preserve the courts' power to enforce injunctions. See *Rodriguez v. Swank*, 496 F.2d 1110, 1112–13 (7th Cir. 1974) (bolstering injunction with contingent payments in the event of noncompliance). “The power to order compliance with federal regulations would be meaningless if the injunction were unenforceable.” *Id.*

139. 11 U.S.C. § 101(5)(A) (2006).

140. *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009), cert. denied, 131 S. Ct. 67 (2010).

141. See Lawrence T. Burick & Jennifer L. Maffett, *When is a Claim not a Claim: Does Apex Oil Clarify or Confuse?*, 12 NORTON BANKR. L. ADVISOR 1 (2009) (“In particular, as in *Apex Oil*, it appears that the governing Ohio environmental statute only entitled the State to require the owner to clean up his property and there was no alternative right to payment in lieu of requiring the owner to perform such cleanup.”).

142. See *Ohio v. Kovacs*, 469 U.S. 274, 286 (1985) (O'Connor, J., concurring) (explaining that, in Chapter 7 straight liquidations of corporate debtors, the state environmental agency's only recourse against the debtor is to have a cognizable claim).

least EPA could have filed a claim as an unsecured creditor if Apex filed for Chapter 7. In that case, it would have at least received its pro rata share of the general unsecured claims.

Apex's argument that Rule 70 renders all injunctions into claims suffers from one limitation. The argument fails to consider an important power of the bankruptcy court: the power to dismiss petitions,<sup>143</sup> specifically petitions for bad faith.<sup>144</sup> Therefore, if EPA moved to appoint a receiver after Apex had deliberately stalled in satisfying its injunctive obligations, and Apex filed for bankruptcy, the court might simply consider its petition an abuse of the bankruptcy process and dismiss it.<sup>145</sup> Dismissing would render Apex's argument moot because the entire discussion would be moved outside of the bankruptcy process.

Nevertheless, Apex's argument deserves attention because it underscores how unpredictable and arbitrary the third prong of the *Mark IV* test can be. Borrowing a phrase from Judge Posner, "the root arbitrariness"<sup>146</sup> of this prong is that the right to payment must come from the same statute that EPA invokes when requesting an injunction. But how can a business know what statute EPA will invoke?

In *Apex Oil*, EPA initially invoked CERCLA when it threatened to perform the work itself and then bill Apex.<sup>147</sup> EPA then changed course at the last minute when it opted to seek a RCRA injunction instead.<sup>148</sup> EPA's gambit created uncertainty for Apex because whether Apex had to spend up to \$150 million on cleanup depended on how EPA chose to proceed. If EPA chose to act under section 107 of CERCLA as it originally threatened, Apex might have had a valid argument that its obligation was discharged.<sup>149</sup> Accordingly, EPA had to choose carefully because if it acted in such a way

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143. See 11 U.S.C. § 1112(b)(1) (2006) (providing that bankruptcy judge may, after notice and a hearing, convert case to a Chapter 7 or dismiss petition "for cause").

144. See, e.g., *In re Boynton*, 184 B.R. 580, 581 (Bankr. S.D. Cal. 1995) (citing *In re Little Creek Dev. Co.*, 779 F.2d 1068, 1072 (5th Cir. 1986) (explaining that, if debtor's filing of a petition is a clear abuse of the bankruptcy process, bankruptcy court must dismiss for bad faith)).

145. Courts allow filing of a bankruptcy petition to avoid an adverse judgment if the debtor has a reasonable intention and ability to reorganize. See, e.g., *In re Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 227 (2d Cir. 1991).

146. *United States v. Apex Oil Co.*, 579 F.3d 734, 738 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010).

147. Petition for Writ of Certiorari at 6-7, *Apex Oil Co. v. United States*, 131 S. Ct. 67 (2010) (No. 09-1023).

148. *Id.* at 7.

149. See *United States v. Chateaugay Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1008 (2d Cir. 1991) (explaining that debtor had a claim if EPA had the authority under CERCLA to do the cleanup work and then recover from the debtor).

as to give itself a “right to payment,” its contribution efforts against Apex might have been barred, depending on when CERCLA liability attached.

Moreover, CERCLA and RCRA liability often overlap.<sup>150</sup> This overlap begs the question of what would have happened if EPA invoked its authority under RCRA, but could have also spent CERCLA funds to remedy the site. In this situation, courts disagree about whether EPA would have a claim under section 101(5)(B).<sup>151</sup> Until the Seventh Circuit handed down its decision, neither party knew where they stood and could not act with confidence in their legal positions.

Therefore, the third prong of the *Mark IV* test yields unpredictable outcomes because it depends on the actions of both the debtor and the government. Because one party’s rights are determined by the actions or inactions of the other, this prong does not provide clear guidance to either businesses or the government.

#### A. Why Predictability is the Key

Businesses and governments order their behavior around laws. Bright-line rules make it easy for businesses and governments to conform their conduct to the requirements of the law.<sup>152</sup> They minimize uncertainty by providing predictable outcomes for each course of behavior.<sup>153</sup> On the other hand, a system of standards marked by complex legal tests provides less certainty.<sup>154</sup> Under such a system, businesses and governments have less

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150. See National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666-01, 8698 (Mar. 8, 1990) (“EPA . . . has the discretion to use its authorities under CERCLA, RCRA, or both to accomplish appropriate cleanup action at a site, even where the site is listed on the NPL.”); National Priorities List for Uncontrolled Hazardous Waste Sites—Final Rule Covering Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act, 54 Fed. Reg. 41000-01 (Oct. 4, 1989) (describing “hybrid” RCRA/CERCLA cleanup orders).

151. See James Newton, *Searching for A “Right to Payment”: Defining the Scope of Bankruptcy Code S 101(5)(b) Under RCRA and Other Statutes Not Providing Express “Rights to Payment,”* 19 PENN ST. ENVTL. L. REV. 55, 76 (2011) (citing *Cal. Dep’t of Health Servs. v. Jensen* (*In re Jensen*), 995 F.2d 925, 929 (9th Cir. 1993) (holding that claim arises under § 101(5)(B) even if EPA did not yet have authority to Act under CERCLA); *In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 974 F.2d 775 (7th Cir. 1992); *In re Nat’l Gypsum Co.*, 139 B.R. 397, 405 (Bankr. N.D. Tex. 1992) (explaining that claim arises when all the actions giving rise to CERCLA liability have occurred, even if EPA cannot yet act); *United States v. Union Scrap Iron & Metal*, 123 B.R. 831, 835 (Bankr. D. Minn. 1990) (holding that because “all the elements necessary to give rise to a legal obligation under the relative substantive non-bankruptcy law,” EPA did not have a discharged claim in debtor’s bankruptcy)) (explaining that courts are split on whether a cognizable claim exists even if not all the elements of CERCLA liability are met).

152. LOUIS KAPLOW, THE GENERAL CHARACTERISTICS OF RULES, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 512–13 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

153. Jeffrey E. Bjork, *Seeking Predictability in Bankruptcy: An Alternative to Judicial Recharacterization in Structured Financing*, 14 BANKR. DEV. J. 119, 147–48 (1997).

154. Kaplow, *supra* note 152, at 512–13.

notice of what consequences flow from their conduct.<sup>155</sup> The end result is that complex legal tests encourage appeals and gamesmanship.<sup>156</sup> In the interests of providing predictability for businesses and the government, a system of bright-line rules should, therefore, be preferred over a system of standards involving complex legal tests.

Predictability is especially important in bankruptcy. Businesses structure their activities around bankruptcy law.<sup>157</sup> For better or for worse, businesses increasingly treat bankruptcy as part of their corporate strategy.<sup>158</sup> As a result, government agencies now routinely work with businesses to ensure state environmental interests survive bankruptcy.<sup>159</sup> Both governments and businesses would benefit from a system of clear rules for when injunctions become claims because such a system would provide clear guidance.

### *B. Fresh Look at the “Fresh Start” Policy in the Context of the Corporate Debtor’s Environmental Obligations*

*Apex Oil*, the most recent circuit court decision on this subject, has reopened the discussion on the dischargeability of environmental injunctions. It has drawn considerable criticism, however. These criticisms fall into two categories: First, that *Apex Oil* is inconsistent with *Kovacs*;<sup>160</sup> second, that *Apex Oil* gives undue preference for environmental policy over bankruptcy policy.<sup>161</sup> Both criticisms miss the mark.

First, despite arguments to the contrary, *Apex Oil* is perfectly consistent with *Kovacs*. The Supreme Court stressed that its holding was not meant to hamstring governmental efforts to force polluters to clean up.<sup>162</sup> If an injunction has to only meet the minimal requirement of creating a “right

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155. *Id.*

156. Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 11 (2011).

157. See David S. Kupetz, *The Bankruptcy Code Is Part of Every Contract: Minimizing the Impact of Chapter 11 on the Non-Debtor’s Bargain*, 54 BUS. LAW. 55, 74–90 (1998) (discussing the bankruptcy considerations that inhere in business contracts); Harvey R. Miller, Keynote address at the induction of the Class of 2010 Fellows of the American College of Bankruptcy: Bankruptcy and Reorganization Through the Looking Glass of 50 Years (1960-2010), 19 J. BANKR. L. & PRAC. 3 (2010).

158. Miller, *supra* note 157, at 3.

159. Arlene Elgart Mirsky, Richard J. Conway, Jr. & Geralyn G. Humphrey, *The Interface Between Bankruptcy and Environmental Laws*, 46 BUS. LAW. 623, 672 (1991).

160. Burick & Maffett, *supra* note 141, at 2 (“[T]he Seventh Circuit did not follow the United States Supreme Court’s holding in *Ohio v. Kovacs*.”); Mazelle Sara Krasoff, *Texas Cleans Up While the Seventh Circuit Continues Polluting: How Texas Land the Fifth Circuit Should Treat Environmental Clean-Up Obligations Under Chapter 11*, 12 TEX. TECH ADMIN. L.J. 201, 210 (2010).

161. Burick & Maffett, *supra* note 141, at 2 (criticizing Judge Posner’s decision in *Apex Oil* as “pro-green”).

162. *Ohio v. Kovacs*, 469 U.S. 274, 284 (1985).

against the debtor that is capable of sharing in the assets of the bankruptcy estate” to become a claim, virtually every injunction will be dischargeable.<sup>163</sup> After all, virtually every environmental obligation costs money. If debtors could treat all of their environmental expenses as claims subject to discharge, governments would have to pay for whatever obligations the debtor cannot satisfy. Accordingly, by expanding the definition of a claim to include all cleanup orders, debtors would have an even greater incentive to seek bankruptcy protection than they currently have. Consequently, governmental authority to enforce environmental laws would diminish. The Supreme Court has repeatedly strived to preserve governmental authority to avoid this outcome.<sup>164</sup>

The problem with the second criticism of the *Apex Oil* decision—that it gives undue preference to environmental policy over bankruptcy policy—is that this criticism overstates the so-called “fresh start” policy. The Supreme Court has discussed the “fresh start” policy as it applies to individual debtors; the “fresh start” serves to mitigate the psychological ills associated with financial failure.<sup>165</sup> Corporations do not experience these ills.<sup>166</sup> Some scholars even question the extent to which the “fresh start” policy should apply to corporate debtors.<sup>167</sup> Accordingly, the “fresh start” policy must, therefore, serve some other purpose if it is to trump environmental policy.

One justification for applying the “fresh start” policy to corporations is that corporate reorganization can mitigate the social damage that stems from a company’s insolvency.<sup>168</sup> While unquestionably valid, this logic only goes so far. Bankruptcy is fundamentally a question of allocating resources. Bankruptcy entails a decision to either let a debtor keep its assets and continue to operate, or to liquidate those assets and distribute them to purchasers. The assumption of the pro-“fresh start” line-of-reasoning is that a debtor’s assets maximize social welfare if they remain with the debtor in all cases.

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163. Brand, *supra* note 136, at 223.

164. See *Kovacs*, 469 U.S. at 285 (circumscribing holding to preserve governmental authority to enforce environmental statutes against debtors); see also *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 506–07 (1986) (holding that Chapter 7 trustee may not abandon property in contravention of environmental laws that protect health and safety).

165. KENNETH N. KLEE, *BANKRUPTCY AND THE SUPREME COURT* 407 (2008) (citing *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549 (1915)).

166. Even the Sixth Circuit has declined to extend *Whizco* to reorganizing corporate debtors. Brief for the United States in Opposition at 7, *Apex Oil Co. v. United States*, 131 S. Ct. 67 (2010) (No. 09-1023).

167. See JACKSON, *supra* note 7, at 210 (The justification for Chapter 11, in other words—and the measure against which its provisions should be examined—is whether the reorganized firm is better for its owners as a group than alternative uses of the assets).

168. Warren, *supra* note 10, at 788.

This conclusion is unwarranted. When a corporate debtor liquidates, its assets are sold by the Chapter 7 trustee and it ceases to exist as an entity.<sup>169</sup> The proceeds go to the creditors and the administrators of the bankruptcy estate. The assets go to whomever buys them. For example, Apex now stores, distributes, and sells petroleum products wholesale.<sup>170</sup> If its cleanup obligation forced it into liquidation, other businesses would simply purchase its assets (trucks, storage tanks, etc.) and assume its contractual obligations. The debtor's facilities might even continue to operate because the trustee would try to sell them as is, rather than piecemeal, to maximize return to the creditors.<sup>171</sup> Apex would cease to exist, but its loss would create gains in the form of consumer surplus to those businesses that purchased its assets at discounted prices. Liquidation of a company, therefore, does not necessarily reduce overall social welfare. What is bad for a single business is not necessarily bad for society.<sup>172</sup>

Significantly, Apex continues to operate.<sup>173</sup> Apex has not filed for bankruptcy in spite of its debts to third parties arising out of its cleanup obligation. Taxpayers do not have to pay for its predecessor's environmental externalities. This case, therefore, provides an excellent example of why forcing businesses to comply with cleanup orders, instead of relieving businesses of them, increases social welfare in at least some cases. To be sure, the "fresh start" principle has some limitations. Conceding that a debtor's "fresh start" is a worthy objective does not render it into an absolute imperative that should "trump" every other policy objective.<sup>174</sup> Rather, a corporate debtor's "fresh start" should only be allowed to the extent that it maximizes social utility.

Aside from these logical limitations of preferring a debtor's "fresh start," this approach suffers from another flaw: it requires the courts to effectuate the policy of the Bankruptcy Code, to the exclusion of environmental policy. Courts remain bound to carry out the intent of Congress. Unfortunately, Congress has not made its intent clear. Congress has variously defined "claims" in the broadest possible sense<sup>175</sup> while

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169. See 11 U.S.C. § 727(a)(1) (providing that a Chapter 7 liquidation ends in the dissolution of the corporation).

170. APEX OIL CO., <http://apexoil.com> (last visited Oct. 18, 2012).

171. See 11 U.S.C. § 704(a)(1) (2006) (requiring the trustee to act in "the best interests of parties in interest").

172. Krasoff, *supra* note 160, at 209 (citing F. REGIS NOEL, A HISTORY OF BANKRUPTCY LAW 181 (William S. Hein & Co. 2002) (1919)).

173. APEX OIL CO., *supra* note 170.

174. Krasoff, *supra* note 160, at 205 (citing Anne M. Lawton & Lynda J. Oswald, *Scary Stories and the Limited Liability Polluter in Chapter 11*, 65 WASH. & LEE L. REV. 451, 460-61 (2008)).

175. *In re National Gypsum Co.*, 139 B.R. 397, 405 (Bankr. N.D. Tex. 1992) ("[A]ll legal

maintaining that bankruptcy should not relieve debtors of their obligations to the general public and the environment.<sup>176</sup> In view of these conflicting intents, courts disagree on which policy should trump. This disagreement is problematic for two reasons.

First, when courts decide cases on policy grounds, they invade Congress's jurisdiction. When a court gives absolute preference to either environmental law or to the Bankruptcy Code by classifying a cleanup order as a claim, it can dramatically affect the way society allocates its resources. For instance, when a court classifies a cleanup order as an unsecured claim or administrative expense, the other general unsecured creditors invariably face a smaller payout. On the other hand, when a court treats a business's environmental obligations outside of the bankruptcy process, it hurts the business's chances of reorganizing.<sup>177</sup> In either event, Courts are ill-equipped to resolve this complicated policy question.<sup>178</sup> Rather, where Congress has created statutes with competing purposes, only it can reconcile them.<sup>179</sup>

Second, courts frustrate expectations when they decide whether to include cleanup orders in the bankruptcy based on policy considerations. For example, as mentioned above, in Apex's dispute with EPA, neither party understood with any certainty what legal consequences would flow from their actions. As a result, a lengthy legal dispute followed. While the Seventh Circuit sided with EPA, this was not a foregone conclusion.<sup>180</sup>

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obligations of the debtor, no matter how remote or contingent will be able to be dealt with in the bankruptcy case.") (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 309, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266).

176. See 11 U.S.C. § 362(b)(4) (2006) (granting governmental units relief from automatic stay to enforce laws against debtor); 28 U.S.C. § 959(b) (2006) (requiring trustee to obey laws while administering the estate).

177. See, e.g., Petition for Writ of Certiorari at 24, *Apex Oil Co. v. United States*, 131 S. Ct. 67 (2010) (No. 09-1023) (asserting that Apex could not have reorganized if it had been required to clean up the refinery site during bankruptcy); *Monograph: Environmental Issues in Bankruptcy Cases*, COLLIER ON BANKRUPTCY § 3(1) (16th ed. 2012) ("[E]nvironmental obligation can pass through the reorganization and can impose a significant burden on the reorganized company, the classification of environmental obligations can play a key role in determining whether to proceed under a chapter 11 reorganization or a chapter 7 liquidation.").

178. Jennifer A. Pasquarella, *In This Corner, We Have the Bankruptcy Code's Discharge Provisions and in this Corner, CERCLA, a Strict Liability Statute: In re Reading Company*, 9 VILL. ENVTL. L.J. 561, 603 (1998) (citing James K. McBain, *Environmental Impediments to Bankruptcy Reorganizations*, 68 IND. L.J. 233, 263 (1992)); *United States v. Whizco, Inc.*, 841 F.2d 147, 149 n.5 (6th Cir. 1988).

179. Pasquarella, *supra* note 178, at 603 (citing Nancy Hisey Kratzke, *Dischargeability Issues and Superfund Claims: The Conflict Between Environmental and Bankruptcy Policies*, 17 COLUM. J. ENVTL. L. 381, 409 (1992)).

180. See *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010) (agreeing with Apex that Whizco supported their position).

Moreover, nothing prevents another pro-“fresh start” court in another circuit from siding with the next Apex in another factually similar scenario. More costly appeals will ensue as debtors and government agencies dispute whether cleanup orders are claims.

Therefore, the pro-“fresh start” criticisms of the third prong of the *Mark IV* test do not correctly frame the debate; this should not be a debate over the relative importance of the debtor’s right to reorganize versus the benefits of a healthy environment. Instead, the discussion should focus on crafting a solution that allows businesses and governments alike to form clear expectations based on bright-line rules while addressing the debtor’s environmental defaults.

### III. A PROPOSAL FOR AMENDING THE BANKRUPTCY CODE

The competing purposes of Congress’s environmental statutes and the Bankruptcy Code have created a complex system of legal tests for when a cleanup order becomes a claim in bankruptcy. But this test fails to provide clear guidance to corporate and government actors. To remedy this problem, Congress must reconcile the competing policies of its environmental statutes and the Bankruptcy Code. Accordingly, Congress should amend section 101(5)(B) to include cleanup orders as claims, but should also give these claims the same priority as administrative expenses under section 503(b).<sup>181</sup> This would ensure that bankruptcy does not prevent government agencies from protecting public health and the environment. More importantly, this amendment to the Code would end the uncertainty described in Section II and replace it with a bright-line rule.

Furthermore, recognizing cleanup orders as claims would allow some businesses to shed their environmental liabilities in bankruptcy once and for all—by satisfying them. Businesses would also have clear notice of their legal position with respect to their environmental obligations. It would give them clear notice that they could not use bankruptcy to free themselves from their environmental obligations altogether.<sup>182</sup> This amendment would

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181. Canada, for example, has amended its Bankruptcy and Insolvency Act to make environmental injunctions high-priority claims in bankruptcy. Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s.14.06(7)–(8) (Can.). Canadian courts previously grappled with categorizing cleanup orders as claims. RODERICK J. WOOD, BANKRUPTCY AND INSOLVENCY LAW 260–61 (2009) (citing *Panamericana de Bienes y Servicios SA v. Northern Badger Oil & Gas Ltd*, 1991 ABCA 181, 81 D.L.R. 4th 280, 81 Alta. L.R. 2d 45 (Can.)).

182. See, e.g., Andrew N. Davis & Cynthia C. Retallick, *Managing Environmental Liabilities in Bankruptcy Leading Lawyers on Identifying Environmental Risks, Implementing Emerging Risk Transfer Strategies, and Navigating Current Trends in U.S. Environmental Liability*, ASPATORE, Sept. 2010, at 2–3 (characterizing recent economic downturn as an “opportunity” for firms to shed

allow businesses to shed more of their liabilities in bankruptcy and would unburden taxpayers of cleanup obligations, all while giving parties clear guidance.

### *A. The Mechanics of the Proposal*

#### 1. Notice Provision

One fundamental issue with this proposal is that environmental problems are often hard to detect. If most environmental liabilities were allowed as bankruptcy claims, governments might fail to detect them before the bar date for filing claims, especially if they have no notice of the bankruptcy. Thus, to ensure that all environmental claims would be included in the bankruptcy, each business would have to give EPA or the state environmental agency a reasonable opportunity to assess the situation.

This type of notice provision is not a new idea. Senators Cantwell (D-WA), Jeffords (D-VT), and Boxer (D-CA) attempted to pass such legislation in 2006.<sup>183</sup> The relevant provision required businesses to give notice before filing for bankruptcy.<sup>184</sup> A similar notice provision would be required in this proposal to ensure that governmental agencies would not forfeit environmental claims simply because they failed to detect them.

#### 2. Estimation of Claims

Another potential pitfall of categorizing all cleanup orders as claims is that environmental remediation is often a long process, often requiring lengthy scientific analysis and litigation.<sup>185</sup> Fortunately, the Bankruptcy

environmental obligations).

183. Press Release, Cantwell Hails ASARCO Superfund Cleanup Deal, Continues Push to Hold Corporate Polluters Accountable: Senator's legislation would close existing loopholes, keep corporate polluters from skipping town and sticking taxpayers with cleanup costs (Oct. 31, 2006), <http://cantwell.senate.gov/news/record.cfm?id=265566>.

184. See Cleanup Assurance and Polluter Accountability Act of 2006, S. 452, 110th Cong. § 101(a)(3) (2006) (requiring polluters to file a notice of bankruptcy with EPA administrator).

185. ADAM P. STROCHAK, JENNIFER L. WINE, & ERIN K. YATES, *supra* note 22, at 59. The Asarco bankruptcy, which took four years, is a recent example of how lengthy the pre-cleanup litigation process can be. Emily Chasan, *Asarco Exits Bankruptcy Under Grupo Mexico Deal*, REUTERS, Dec. 9, 2009, available at <http://www.reuters.com/article/2009/12/09/asarco-grupomexico-idUSN091732220091209>. This came largely as a result of its protracted environmental litigation between Asarco and EPA together with various state agencies. Press Release, Environmental Protection Agency, Largest Environmental Bankruptcy in U.S. History Will Result in Payment of \$1.79 Billion towards Environmental Cleanup and Restoration / Largest recovery of money for hazardous waste clean up ever (Dec. 10, 2009), available at

Code already furnishes a solution to this: estimation of claims under section 502(c).<sup>186</sup> Therefore, after sufficient notice, the court should hold a hearing to estimate the value of the debtor's cleanup order liabilities for allowance purposes. Cleanup orders should be liquidated based on fair market value of the net present value of cleanup.<sup>187</sup> These orders should be flexible to account for whatever contingencies might arise during the cleanup.<sup>188</sup>

### 3. Drawbacks

One drawback to this proposal is that it might hinder some businesses from reorganizing altogether.<sup>189</sup> Faced with substantial cash outlays for environmental obligations, some businesses will not be able to draft a feasible plan to repay creditors.<sup>190</sup> As a result, some debtors will not be able to reorganize.

Notwithstanding these drawbacks, treating environmental cleanup orders as claims might offer some countervailing advantages to debtors: notably, easier administration of the bankruptcy estate. For instance, outside of bankruptcy, negotiation with environmental agencies is otherwise protracted and expensive.<sup>191</sup> Bankruptcy greatly expedites these negotiations, lessening their overall financial impact on the debtor.<sup>192</sup> Because bankruptcy provides an impetus to deal with environmental obligations quickly and efficiently, it would preserve the value of the estate. Additionally, the proposal would obviate appeals and litigation with respect to the treatment of the debtors' environmental liability, further lessening the administrative expenses of the estate.

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<http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/c40dd49b8eebe5ff85257688006c9c7f!OpenDocument>.

186. The Bankruptcy Code provides that claims of an uncertain amount may be estimated in the interests of efficient administration of the case. 11 U.S.C. § 502(c) (2006). This provision also includes estimation of "any right to payment arising from a right to an equitable remedy for breach of performance." *Id.*

187. *See id.* (providing that claims may be estimated for the expeditious administration of the estate).

188. *See In re MacDonald*, 128 B.R. 161, 165 (Bankr. W.D. Tex. 1991) (cautioning that claims estimation process must remain flexible and adaptable for expeditious administration of the estate).

189. Petition for Writ of Certiorari at 24, *Apex Oil Co. v. United States*, 131 S. Ct. 67 (2010) (No. 09-1023) (asserting that Apex could not have reorganized if it had been required to clean up the refinery site during bankruptcy); *Monograph: Environmental Issues in Bankruptcy Cases*, COLLIER ON BANKRUPTCY § 3(1) (16th ed. 2012) ("[E]nvironmental obligation can pass through the reorganization and can impose a significant burden on the reorganized company, the classification of environmental obligations can play a key role in determining whether to proceed under a chapter 11 reorganization or a chapter 7 liquidation.").

190. *See* 11 U.S.C. 1129(a)(11) (requiring feasibility of plan as a condition of confirmation).

191. *Davis & Retallick*, *supra* note 182, at 1.

192. *Id.*

*B. Modifying the Code to Prioritize Environmental Cleanup Orders as Claims Comports with the Modern Trend to Codify Bankruptcy Practices*

The Bankruptcy Reform Act of 1978 replaced the Bankruptcy Act of 1898 with the modern Bankruptcy Code.<sup>193</sup> Whereas the Bankruptcy Act of 1898 conferred broad equitable powers to bankruptcy judges, the Bankruptcy Code contemplates a more statutory-based system of administering bankruptcies.<sup>194</sup> This shift evinces Congress's preference for a clear, predictable set of codified rules over a process based on judicial discretion.<sup>195</sup>

The judicially created test for when a cleanup order becomes a claim in bankruptcy defies this preference because it allows bankruptcy courts discretion in whether to treat a cleanup order as a claim. This test has arisen in the absence of clear statutory treatment of environmental cleanup orders in the Bankruptcy Code or clear statutory treatment of bankruptcy in the federal environmental statutes. In that sense, the *Mark IV* test can be a federal bankruptcy common law solution to the unclear language of section 101(5)(B). The test allows bankruptcy judges equitable discretion to weigh the three factors in deciding whether a cleanup order is a claim.<sup>196</sup>

Statutorily rendering cleanup orders into administrative priority claims, however, would be the next logical step in the trend away from broad equity powers. This solution would remove judicial discretion to weigh equities in favor of a clear-cut rule. No longer would bankruptcy judges retain the power to balance the equities of each case in which a debtor has environmental defaults—thereby upsetting the expectations of businesses, governments, or creditors. Instead, the duty of bankruptcy judges under this proposal would be to simply apply the Code as it is written. This proposal would, therefore, give clearer notice to all parties of their rights.

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193. Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, § 401, 92 Stat. 2549, 2682 (1978).

194. Alan M. Ahart, *The Limited Scope of Implied Powers of A Bankruptcy Judge: A Statutory Court of Bankruptcy, Not A Court of Equity*, 79 AM. BANKR. L.J. 1, 22–28 (2005).

195. See Adam J. Levitin, *Toward A Federal Common Law of Bankruptcy: Judicial Lawmaking in A Statutory Regime*, 80 AM. BANKR. L.J. 1, 2 (2006) (“The very nature of complex statutory structures is to create clear, one-size-fits-all rules that lack the fact-intensive flexibility and individualized justice of equitable discretion.”).

196. The Circuits are even split as to what powers a bankruptcy court has in creating federal bankruptcy common law. Levitin, *supra* note 195, at 4 n.13 (citing *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005) (assuming existence of federal common law of bankruptcy emanating from equity); *Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562, 566 (5th Cir. 1995) (denying bankruptcy courts the power to create an equitable right of contribution under § 362 of the Bankruptcy Code)).

## CONCLUSION

The most recent *Apex Oil* decision illustrates why the conflict between the competing policies of bankruptcy and the environmental laws has reached a logical and theoretical impasse. This impasse has created a complex system of legal tests for when an injunction becomes a claim in bankruptcy. Some criticize this system of tests as unduly favorable to environmental law. However, these criticisms are premised on a misguided assumption that reorganization is an absolute directive that trumps environmental law. Rather, the Code must be amended to enshrine environmental policy objectives. This Note's proposed solution would give governments the ability to collect on their environmental claims while enhancing predictability for all parties through clear legal guidance.