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Addressing Environmental Claims and Liabilities in Chapter 11: Administrative Expenses, Third-Party Liability, Abandonment and Brownfield Development

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Environmental Liabilities in Chapter 11[1]

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I. Introduction

A. Environmental Considerations in Bankruptcy

1. Environmental liabilities require special consideration in the bankruptcy context because the goals of environmental laws stand in tension with the Bankruptcy Code's fresh start provisions.

2. Environmental laws are designed to prevent an entity from escaping responsibility for cleanup of contaminated sites. The key goals of the Government in bankruptcy cases are:

(a) protecting public health and safety;

(b) ensuring compliance with the law;

(c) maintaining the deterrent effect and purposes of environmental laws; and

(d) ensuring that bankruptcy is not a "safe haven" for wrongdoers and does not confer a competitive advantage on debtors.

3. Bankruptcy laws are designed to provide a debtor with a fresh start by, among other things, discharging prepetition liabilities.

B. Environmental Liabilities/Obligations

1. A company may have environmental obligations with respect to:

(a) sites currently owned or operated by the company;

(b) sites previously owned by the company; or

[1] This outline is a collective work that reflects input from panelists with diverse views and perspectives on the issues discussed herein. As such, the views expressed herein do not necessarily represent those of (1) each of the panelists, (2) any firm or company with which a panelist is associated, or (3) the Department of Justice, the Environment and Natural Resources Division or any agency.

(c) sites that are or were subject to an environmental harm (*e.g.*, contamination) that was caused in whole or part by the company.

2. A company may face one or more of the following types of environmental obligations:[2]

(a) Monetary Obligations

(i) A company may need to pay money to the government or a partially responsible third party ("PRP") for the costs associated with investigating or cleaning up a contaminated site

(ii) Such obligations may relate to sites owned by a company or non-company sites where a company's hazardous materials have come to be located

(b) Remediation Obligations

(i) Clean-up obligations may relate to sites currently or previously owned or controlled by a company or sites that were subject to environmental harm as a result of a company's conduct

(ii) Such obligations arise pursuant to Environmental Protection Agency ("EPA") or state regulatory orders

(c) Cease and Desist Orders

(i) A company may be subject to an injunctive order prohibiting release of hazardous substances at a site

(d) Existing or Future Regulatory Compliance Obligations

(e) Fines and Penalties

(i) Arise from violations of regulatory requirements

3. Statutory schemes under which environmental liabilities arise include:

[2] While not environmental obligations of the kind described above, a company may also face personal injury or property damages claims arising from a company's release of hazardous substances at its sites. And, directors and officers may face criminal and personal liability for a company's failure to comply with environmental regulations. An in depth discussion of these types of claims is beyond the scope of this outline.

(a) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA");

(b) the Resource Conservation and Recovery Act ("RCRA");

(c) the Clean Air Act;

(d) the Clean Water Act; and

(e) other federal and state laws.

4. Key non-company/debtor players in disputes regarding environmental obligations in bankruptcy include:

(a) the EPA and other federal agencies;

(b) the Department of Justice;

(c) various state, municipal, local, and tribal authorities; and

(d) other environmental claimant constituencies.

II. Can a Company use Bankruptcy to Compromise and Discharge its Environmental Obligations?

A. As discussed below, certain environmental obligations may be dischargeable, while others must be paid during the restructuring or pass through to the reorganized entity.

B. Compliance Obligations During the Case And Post-Emergence: A debtor must comply with all applicable environmental laws and regulations – including the exercise of the government's police and regulatory powers through enforcing such laws and regulations – while operating during and after bankruptcy.

1. Courts generally hold that, to the extent that a debtor continues to engage in business while in bankruptcy, it must comply with all federal and state environmental laws regulating its operations.

(a) The courts have relied on, among other things, 28 U.S.C. § 959(b) which states that a trustee or debtor in possession must "manage and operate" the property in its possession in compliance with all valid state laws (interpreted to include federal laws as well).

(b) Some courts have held that a trustee's obligation to comply with state laws under section 959(b) does not apply to a

debtor that is liquidating its estate. *See, e.g.*, *In re Valley Steel Prods. Co., Inc*., 157 B.R. 442, 449 (Bankr. E.D. Mo. 1993).

(c) However, other courts have held that a trustee's duties are the same whether liquidating or reorganizing the estate, and that the bankruptcy policy to marshal and distribute assets must yield to those laws that provide for public health and safety. *See, e.g*., *In re Wall Tube & Metal Prods. Co.*, 831 F.2d 118, 121-22 (1987).

2. This means that, as a general matter, a company that owns environmentally contaminated property cannot use bankruptcy to cleanse itself of obligations related to the site and its ongoing business (*e.g.*, permitting, emissions, etc.).

(a) For example, a company operating in chapter 11 could not ignore the requirements of RCRA with respect to hazardous wastes it generates and must maintain compliant financial assurance if it wishes to continue its operations. *See Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846 (4th Cir. 2001); *In re Commonwealth Oil Ref. Co.*, 805 F.2d 1175 (5th Cir. 1986).

(b) The debtor remains bound to remediate the property in accordance with applicable laws, regulations, consent decrees, judgments and other requirements.

3. Impact of the automatic stay on issuance of orders by regulatory agencies and environmental enforcement actions:

(a) Actions or proceedings by governmental units to enforce their "police or regulatory power" are excepted from the automatic stay. 11 U.S.C. § 362(b)(4). Actions to enforce money judgments are not excepted.

(b) Matters within this automatic stay exception include, for example, actions or proceedings seeking injunctive relief that are aimed at preventing future harm. *See Penn Terra Ltd. v. Dep't of Envtl. Res.*, 733 F.2d 267 (3d Cir. 1986).

4. An owner-operator of contaminated property also cannot use bankruptcy to escape post-emergence owner-operator liability. To the extent that any environmental statute, regulation or non-rejected contract requires a debtor to take compliance actions post-emergence, the related obligations are effectively non-dischargeable.

(a) For instance, a company's obligation to remediate contamination at its owned sites cannot be discharged. *See e.g., In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992) (holding that a reorganized company's post-emergence clean-up obligations with respect to its owned property were not discharged, notwithstanding the fact that the EPA, which was aware of the contamination before the bankruptcy commenced, did not take any actions during the pendency of the reorganization).

C. Other Environmental Obligations: The ability of a debtor to discharge other environmental obligations turns on (1) whether such obligations constitute "claims" for bankruptcy purposes, and (2) when the "claims" at issue arose.

1. In bankruptcy, only "claims" are dischargeable.

(a) The Bankruptcy Code defines a "claim" as a "right to payment" or 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) As a general matter, debtors contend that if monetary compensation is an available alternate remedy for the performance of an equitable obligation, the obligation is a "claim" within the meaning of the Bankruptcy Code, while governmental agencies contend that that equitable obligations are not "claims" if the government has not sought a right to payment or where there is ongoing pollution.

2. If an obligation is not a "claim" under the Bankruptcy Code, it may survive the bankruptcy and remain a continuing obligation of the reorganized debtor. The obligation/liability is not dischargeable.

3. In determining whether injunctive obligations are "claims" for bankruptcy purposes, the key issue is whether breach of the injunction gives rise to a "right to payment."

(a) One of the significant issues that has been and is being litigated in this area is the question of when a mandatory cleanup injunction will be considered to give rise to a right to payment so as to make it a claim.

(b) In *Ohio v. Kovacs*, 469 U.S. 274 (1985), the Supreme Court held that an injunction to cleanup a hazardous waste site gave rise to a right to payment against the bankrupt former site owner, where a receiver had been appointed prepetition to

take control of the bankrupt individual's assets, thereby dispossessing the debtor of the ability to comply with the state's order other than by payment of the cleanup costs. Accordingly, the obligation under the clean-up order constituted a dischargeable "claim" against the debtor.

(c) Some subsequent cases have limited *Kovacs* to its unusual facts and, under certain circumstances, found injunctive remedies not to be dischargeable claims. *See United States v. Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009); *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir. 1993).

4. Whether an environmental obligation gives rise to a claim (as defined in the Bankruptcy Code) – or constitutes something else (*e.g.,* an action enforcing governmental police or regulatory powers, a non-"claim" injunction obligation, etc.) and is, thus, not dischargeable in bankruptcy – presents a complex legal question. The case law is inconsistent and unsettled with respect to this issue.

(a) Ultimately, the "claim" determination will depend on, among other things, the facts and circumstances of the case, the statute relied upon, the nature and status of the regulatory action, and the jurisdiction where the case is pending.

(i) Claims by the government and PRPs to recover the cost of remediation work on sites formerly owned by the debtor, and fines and penalties for pre-filing violations of regulatory requirements, are the environmental obligations most susceptible to discharge in bankruptcy.

(ii) Environmental obligations associated with properties owned during and after bankruptcy often cannot be discharged.

5. Although no easy answers exist, a few general observations regarding dischargeability are noted below:

(a) Claims for remediation already completed (dischargeable). When the government (or PRP) has already completed the remediation prepetition, and the debtor's only remaining obligation is to pay money to the government (or PRP), the obligation is a "right to payment" and constitutes a "claim" subject to discharge in bankruptcy, at both debtor-owned sites and third-party sites.

(i) At least one court has held that a debtor's having posted financial assurance (*i.e.*, in the form of a bond etc.) does not transform an environmental obligation into a "right of payment" such that it falls within the definition of a "claim." *See, e.g., In re Industrial Salvage, Inc.*, 196 B.R. 784 (Bankr. S.D. Ill. 1996) (noting that the state's "ability to proceed against . . . performance bonds or securities to fund closure of a landfill does not give the State a right to payment against the operators themselves.").

(b) Injunctions prohibiting further contamination (not dischargeable). An injunction or order directing a debtor to cease activities at debtor-owned properties that give rise to a release or threat of release of a hazardous substance is not a "right to payment" and is thus, not dischargeable as a "claim" or a "debt."

(c) Remediation obligations relating to debtor-owned sites (nondischargeable). If the debtor owns contaminated property, and the contamination has not been addressed prepetition, the debtor remains responsible for the post-petition remediation of the property (though it may have claims against other operators, generators, or arrangers for contribution).

(i) *See, e.g., In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992), addressed *supra*.

(d) Remediation under state and federal statutes for which a "right of payment" does not exist (likely nondischargeable). Certain environmental statutes contain only an "enforcement" component under which the government may direct the debtor to stop or remediate polluting activities, but do not feature any alternate provisions allowing the government to clean-up the property and seek cost recovery from the offending or co-liable parties. Courts have held that where the government proceeds under a statute that does not have an alternative monetary remedy for breach of a clean-up order, the environmental obligation does not constitute a "claim" and thus, is not dischargeable.

(i) *See, e.g., U.S.* v. *Apex Oil Co.*, 579 F.3d 734 (7th Cir 2009) (holding that EPA's injunctive order under the Resource Conservation and Recovery Act, which "does not authorize *any* monetary

relief," not even for reimbursement of clean-up costs, is not a "claim" subject to discharge).

(ii) The Sixth Circuit in *United States v. Whizco*, 841 F.2d 147 (6th Cir. 1988) applied a "practical effects" test in an individual debtor case under which an injunction constitutes a dischargeable "claim" where the debtor did not have the ability to fulfill the obligations under the order without spending money. *See id.* at 150-51 (concluding that where the individual debtor was unable to perform the relief sought, reclamation of a mine site, which would therefore necessarily require the expenditure of money on the part of the individual debtor, the obligation was a liability on a "claim" subject to discharge). Courts have taken issue with this approach on the basis that compliance with injunctive obligations will always cost money, and as such, the "practical effects" standard improperly focuses on compliance expenditures that would render most injunctions subject to discharge. *See, e.g., Apex Oil Co.*, 579 F.3d at 738 (rejecting *Whizco*'s approach, referencing authority holding that "cost incurred is not equivalent to 'right to payment."); *In re Chateaugay Corp.*, 112 B.R. 513, 524 (S.D.N.Y. 1990), *aff'd* 944 F2d 997 (2d Cir. 1991) (rejecting the 'practical effects' approach adopted by *Whizco*, noting that it has the effect of "render[ing] dischargeable any claims for injunctive relief other than those merely seeking the cessation of some unlawful activity.").

(e) Remediation under state and federal statutes for which an alternate "right of payment" exists (possibly dischargeable). Statutes, such as CERCLA, that contain an enforcement right *and* an alternate right to seek payment for remedial costs present the most complicated scenario: the clean-up order requiring remediation fits the definition of a non-dischargeable injunction under the police power, but the demand for cost recovery fits the definition of a "claim."

(i) Some courts have advanced the view that, where the statute affords a governmental authority an alternate right to enforce remediation or to recover costs, it can give rise to a dischargeable claim, regardless of the path the government actually pursues. *See, e.g., In re Goodwin*, 163 B.R. 825, 831 (Bankr. D. Idaho

1993)("The equitable right to an injunction cannot be distinguished from the equally available right to money damages; the injunction provides no additional relief for which money damages are an inadequate substitute. The Bankruptcy Code's definition of 'claim' encompasses such as a situation.").

(ii) Where there are multiple statutory remedies available to a governmental unit, certain of which provide for alternate clean-up reimbursement remedies, courts often focus on the statute that the governmental unit relied on in issuing the injunctive order. *See, e.g., Torwico Elecs., Inc. v. New Jersey (In re Torwico Elecs., Inc.),* 8 F.3d 146, 151, n.6 (3d Cir.1993)("[I]t is undisputed that the order was issued under statutory sections which do not allow the state to perform the cleanup and then sue for reimbursement of its costs. That authority may exist under other potentially relevant statutes for the state to perform the cleanup and seek reimbursement for its costs is irrelevant."); *In re Mark IV Indus., Inc.*, 438 B.R. 460, 470 (Bankr. S.D.N.Y. 2010), *aff'd*, 459 B.R. 173 (S.D.N.Y. 2011) (concluding that for purposes of assessing whether the governmental unit's requested relief is a dischargeable claim "the focus is the statute under which [the governmental unit] elected to proceed," citing *Torwico*).

(iii) The Second Circuit created an "ongoing pollution" standard under which a clean-up injunction found in an order is a claim only if "ongoing pollution" is not occurring, irrespective of the ability to seek money instead of enforcing clean-up. *See In re Chateaugay Corp.*, 944 F.2d 997, 999 (2d Cir. 1991).

6. If an environmental liability constitutes a "claim," courts must next consider when the claim arose.

(a) To be dischargeable, the claim must have arisen prior to confirmation in a chapter 11 case, *see* 11 U.S.C. § 1141(d), or prepetition in a chapter 7 case, *see id*. § 727(b).

(i) When the environmental obligation fully accrued prepetition – for instance, when the government fully remediated a site and is looking for payment under

cost recovery – the obligation constitutes a prepetition claim.

(ii) Conversely, environmental liabilities that arise post-petition and before confirmation must be lawfully addressed by the debtor during the pendency of the bankruptcy or in connection with its emergence pursuant to a plan of reorganization.

(b) Courts have established different standards for determining when an environmental claim arises, including the following:

(i) Underlying Act: In *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), the Second Circuit held that the pivotal event in the accrual of a CERCLA cleanup claim for bankruptcy purposes was the release or threatened release of a hazardous substance.

(ii) Fair Contemplation: Some courts have limited discharge to cases where response costs were "fairly contemplated" by the debtor and creditor as of the petition date. *In re National Gypsum* 139 B.R. 397 (Bankr. N.D. Tex. 1992). The standard for fair contemplation varies from court to court but, under all articulations, involves a fact-sensitive inquiry. *See*, *e.g.*, *In re Crystal Oil Co.*, 158 F.3d 291, 295 (5th Cir. 1998) ("a regulatory environmental claim will be held to arise when 'a potential . . . claimant can tie the bankruptcy debtor to a known release of a hazardous substance'") *quoting In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 3 F.3d 200 (7th Cir. 1993); *In re National Gypsum*, 139 B.R. at 408 (noting that a number of factors may be relevant in determining whether future costs at any particular site could have been fairly contemplated, including "knowledge by the parties of a site in which a PRP may be liable, [the listing of the site on CERCLA's National Priorities List], notification by EPA of PRP liability, commencement of investigation and cleanup activities, and incurrence of response costs").

(c) If the debtor continues to own the contaminated property after reorganization, its post-bankruptcy ownership will give rise to CERCLA liability for any ongoing, post-bankruptcy releases or threats of releases. *See In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992), addressed *supra*.

D. Notice: A debtor seeking to maximize the benefit of its discharge should consider carefully (1) its notice obligations and strategy with respect to the bankruptcy filing (*i.e.*, which parties should receive notice, what type of notice should be provided, etc.) and (2) the scope, timing, and manner of its environmental-related disclosures. A reorganized entity facing post-emergence claims that relate to pre-confirmation conduct may find it difficult to persuade a court that the claims were discharged if the claimants were not provided adequate notice of the bar date or lacked knowledge of the existence of the claims.[3]

E. Claims for Contribution: The issues of when environmental claims arise and become dischargeable and exceptions to discharge for failure to notify creditors of the bar date also arise in connection with environmental claims for contribution against debtors. In addition, contingent claims for contribution, such as those that arise under CERCLA, may be disallowed in a bankruptcy proceeding under section 502(e) of the Bankruptcy Code. That section provides for the disallowance of contribution claims in three instances, including where "such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution." 11 U.S.C. § 502(e)(1)(B).

III. Where do Cost Recovery Claims Fit in the Bankruptcy Priority Scheme?

A. A claim for recovery of costs incurred prepetition will be a general unsecured claim (unless a lien or security interest has been perfected before bankruptcy).

B. A number of courts have held that the government is entitled to an administrative expense priority for costs incurred post-petition with respect to property of the bankruptcy estate since the trustee or debtor in possession had an obligation to clean up the property, and the government fulfilled that obligation. *See, e.g.*, *In re H.L.S. Energy Co.*, 151 F.3d 434 (5th Cir. 1998); *Pennsylvania v. Conroy*, 24 F.3d 568 (3d Cir. 1994); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991); *In re Smith-Douglass, Inc.*, 856 F.2d 12 (4th Cir. 1988); *In re Wall Tube & Metal Prods. Co.*, 831 F.2d 118 (6th Cir. 1987); *In re Appalachian Fuels, LLC*, 493 B.R. 1 (6th Cir. BAP 2013).

1. Costs of complying with environmental regulations often are considered "actual, necessary costs and expenses of preserving the estate" entitled to administrative priority under section 503(b)(1)(A) of the Bankruptcy Code.[4]

(a) *See Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434 (5th Cir. 1998) (holding that state had an administrative

[3] An in-depth discussion of notice requirements and best practices is beyond the scope of this outline.

[4] Post-petition penalties for violation of administrative orders or injunctions or violations of environmental laws may be also be entitled to administrative expense priority status. *See In re Munce's Superior Petroleum Products, Inc.*, 736 F.3d 567 (1st Cir. 2013).

expense claim for the costs associated with plugging unproductive wells owned by debtor during the pendency of the chapter 11 cases).

(b) *See In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991) (affording EPA administrative expense priority for its clean-up costs assessed post-petition in response to prepetition release or threatened release of hazardous waste).

C. If the court allows response costs as administrative expenses, those costs might still be subordinated to the interests of secured creditors in their collateral. If all of the estate's assets are subject to security interests, the administrative expenses may not be paid although administrative expense claims must be paid in full if the debtor wishes to reorganize pursuant to a plan (unless the administrative claimant agrees to different treatment). However, under section 506(c) of the Bankruptcy Code, if a response action is taken with respect to a secured creditor's collateral, the trustee or debtor-in-possession may seek to recover from, or surcharge against, such collateral the amounts necessary to preserve it.

1. If the government has perfected an environmental lien on property of the debtor, *see, e.g.*, 42 U.S.C. § 9607(l), (r) the government will have a secured claim.

IV. Does a Buyer Take Contaminated Property "Free and Clear" of Environmental Liabilities Under a Bankruptcy Sale?

A. Debtors may seek to sell their property in bankruptcy free and clear of environmental obligations. Section 363(f) of the Bankruptcy Code permits a debtor to sell property "free and clear of any interest in such property" under certain conditions.

B. To what extent can a debtor deliver property to a purchaser free and clear of environmental liabilities? No clear answer exists. To be sure, a purchaser that acquires property through a section 363 sale is required, post-sale, to comply with all environmental regulations that apply to an owner/operator of the property. Complexities arise, however, in determining whether and to what extent, a purchaser may be liable for a debtor's pre-sale activities. While a buyer should take property free and clear of environmental liabilities that constitute pre-sale, dischargeable "claims"[5] (such as pre-sale penalties or response costs), case law on this issue is sparse and inconsistent.

[5] Underscoring the interconnected nature of the issues at stake, when courts consider whether "free and clear" provisions in sale order bar successor liability claims, a threshold question is whether the asserted successor liability claims "qualify as 'claims' under Chapter 11." *In Matter of Motors Liquidation Co.*, 829 F.3d 135, 155 (2d Cir. 2016) (stating that "the bankruptcy court's power to bar

1. Cases addressing the imposition of successor liability tend to involve fact-intensive inquiries, particularly in the context of bankruptcy asset sales, as they implicate, among other things, issues of due process, adequacy of notice, and the knowledge and intent of the parties. These inquiries often require an examination of, among other things, (i) whether the debtor and/or purchaser were aware of the liabilities, including contingent claims; (ii) whether the identities of the claimants were known or reasonably ascertainable; (iii) whether the notice afforded to such claimants was reasonably calculated to inform them of the proceedings and applicable deadlines; and (iv) the intent of the parties. The analysis is even more complicated in "the difficult case of prepetition conduct that has not yet resulted in detectable injury." *In Matter of Motors Liquidation Co.*, 829 F.3d 135, 155 (2d Cir. 2016) (quoting *Chateaugay*, 944 F.2d.at 1004).

2. While black-and-white rules are elusive in this context, case law suggests that section 363(f) sale orders may not shield purchasers from successor liability where "the party asserting a claim did not bring, and could not have brought, that claim prior to the bankruptcy." *In re Gen. Motors LLC Ignition Switch Litig.*, No. 14-MC-2543 (JMF), 2017 WL 3382071, at *5 (S.D.N.Y. Aug. 3, 2017) (citing *Allis-Chalmers*, 195 B.R.. at 732).

C. To afford parties in interest an opportunity to object or otherwise be heard, section 363(b) of the Bankruptcy Code provides that debtors may only sell assets outside the ordinary course of business "after notice and a hearing." Federal or state agencies may object to sales of property free and clear under section 363(f) in order to clarify that the buyer is liable to protect against hazards to the public. Such objections are often resolved by the addition of satisfactory language to the order approving the sale. For instance, the EPA often seeks to have the sale approval order include language along the following lines:

> Nothing in this Order or the Asset Purchase Agreement releases, nullifies, or enjoins the enforcement of any liability to a governmental unit under police and regulatory statutes or regulations that any entity would be subject to as the owner or operator of property after the date of entry of this Order. Nothing in this Order or the Asset Purchase Agreement authorizes the transfer or assignment of any governmental (a) license, (b) permit, (c) registration, (d) authorization or (e) approval or the discontinuation of any obligation thereunder, without compliance with all applicable legal requirements and approvals under police

"claims" in a quick Section 363 sale is plainly no broader than its power in a traditional Chapter 11 reorganization.").

or regulatory law.

D. In cases in which a debtor lacks the resources necessary to address extant environmental liabilities (*e.g.*, extensive clean-up obligations), regulators may be supportive of a sale of contaminated property to a buyer that is better situated to address such liabilities.

V. Disclosure Statements and Plans of Reorganization

A. Governmental agencies may object to a disclosure statement if it does not provide adequate information about how a proposed plan of reorganization would deal with environmental liabilities.

B. Governmental agencies may object to plans that do not meet the requirements set forth in 11 U.S.C. § 1129. The asserted grounds for an objection could include:

1. the plan's discharge and release provision are improper because they seek to discharge or release:

(a) environmental claims that arise after confirmation, *see* 11 U.S.C. § 1141;

(b) environmental liabilities that are not dischargeable claims under the Bankruptcy Code; or

(c) liabilities of non-debtors;[6] and

2. particularly in cases involving sizable environmental liabilities, the plan is:

(a) not proposed in good faith and in compliance with applicable law because it does not provide for compliance with environmental law, or

[6] Except when plans purport not to impair claims, the Government will often withdraw objections based on overly broad discharge and release provisions if the debtors agree to language such as the following:

> Nothing in this Order or the Plan discharges, releases, or precludes: (i) any police or regulatory liability to a governmental unit as defined in 11 U.S.C. § 101(27) ("Governmental Unit") that is not a Claim; (ii) any police or regulatory Claim of a Governmental Unit arising on or after the Confirmation Date; (iii) any police or regulatory liability to a Governmental Unit that any entity is subject to as the owner or operator of real property after the Confirmation Date; or (iv) any liability to a Governmental Unit on the part of any Person other than the Debtors or Reorganized Debtors. Nor shall anything in this Order or the Plan enjoin or otherwise bar a Governmental Unit from asserting or enforcing, outside this Court, any liability described in the preceding sentence.

(b) not feasible because it does not provide adequate funding for compliance with environmental law.

VI. Abandonment

A. A debtor may abandon contaminated property in bankruptcy, but only under limited circumstances.

B. Section 554 of the Bankruptcy Code authorizes a debtor to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."

C. Despite this broad language, in *Midlantic Nat. Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494 (1986), the Supreme Court held that a debtor may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from "imminent and identifiable harm." *Id.* at 507.

D. Some courts allow a debtor to abandon property despite environmental contamination on the site when a showing of imminent and identifiable harm is not made, or when the estate does not have any unencumbered assets available to fund compliance with environmental laws. The cases are fact specific, however, and courts vary widely in their interpretation of *Midlantic*.

1. For these courts, the financial condition of the debtor may be relevant:

(a) As noted above, courts have held that cleaning up environmental violations is properly considered an administrative expense.

(b) While such expense is subordinate to secured claims, it would have priority over unsecured claims, and administrative expense claims must be paid in full in reorganization cases (as discussed above).

(c) As a result, courts have held that where the estate has unencumbered assets, the bankruptcy court should require stricter compliance with state environmental law before abandonment is permitted.

(d) Some courts have recognized an implicit duty to use unencumbered assets to address environmental obligations where such assets exist. *See In re Peerless Plating, Co.*, 70 B.R. 943 (Bankr. W.D. Mich. 1987).

(e) However, where the estate lacks unencumbered assets, and in the absence of serious public health and safety risks posed, some courts permit abandonment. *See*, *e.g.*, *In re Smith-Douglass, Inc.*, 856 F.2d 12 (4th Cir. 1988).

E. A minority of courts have concluded that *Midlantic* means a debtor/trustee cannot abandon property unless and until the property complies with all state and federal environmental regulations. *See, e.g., Peerless Plating Co.* 70 B.R. at 946-47.

F. Governmental agencies may object to motions to abandon contaminated property based on *Midlantic* on the ground that the bankruptcy court does not have jurisdiction to authorize abandonment unless it is subject to conditions protecting public health or safety from imminent and identifiable harm. In some liquidation cases, governmental agencies may enter into agreements as to appropriate conditions to permit abandonment.

VII. Environmental Response Trusts

A. Where a debtor owns contaminated property, placement of the property into an environmental response trust with appropriate funding for cleanup can, in some cases, be a win-win situation for the government and debtors. The government obtains the benefit of up front funding for cleanup and avoids the risk of festering unattended contamination or a second bankruptcy in the future; debtors obtain a final resolution of liability under environmental law.