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Scary Stories and the Limited Liability Polluter in Chapter 11

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"Scary stories make for bad policy."[1]

A recent high-profile bankruptcy case, that of American Smelting and Refining Co. ("Asarco") has attracted a lot of media attention,[2] and has generated a number of heated demands for reform of bankruptcy law, environmental law, corporate law, or perhaps all three. It is true that environmental, corporate, and bankruptcy law do intersect in a complex and often unpredictable manner, and that some cases—Asarco being a particularly prominent and visible example—at least at first glance suggest that firms may engage in apparently Machiavellian conduct that allows them to displace hundreds of millions of dollars of environmental liability onto taxpayers. Critics contend that the current structures of bankruptcy, corporate, and environmental law allow a firm to protect its assets by creating a subsidiary that carries the environmental liabilities but that has insufficient assets with which to pay those liabilities. The subsidiary then declares bankruptcy, leaving the taxpayers with the environmental cleanup bill and the parent corporation's assets untouched The solution, critics argue, is to redraft bankruptcy and environmental law, and perhaps to revisit corporate law notions of limited liability as well, to prevent businesses from engaging in such deceptive and scheming behavior.

However, the proposed solution—redrafting bankruptcy, environmental, and/or corporate law—is draconian, and may cause dramatic and unintended consequences. Before we engage in wholesale revision of long-settled legal doctrines, we ought to determine whether a problem really exists, and what the extent of that problem might be.

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[1] The quotation paraphrases a quote by Elizabeth Warren. We were unable to locate the original quotation, and Professor Warren, when asked, remembered the quote but also could not remember the source of the original quotation. *See* E-mail from Elizabeth Warren, Professor, Harvard Law School, to Lynda Oswald, Professor, University of Michigan School of Business (Aug. 16, 2007 17:59:00 EST) (on file with authors).

[2] *See, e.g.*, Les Blumenthal, *Asarco leaves legal heartburn*, NEWS TRIB., Mar. 20, 2006, at A01, *available at* 2006 WLNR 5184072; Marie Leone, *Environmentally Bankrupt?*, CFO.COM, Sept. 8, 2005, http://www.cfo.com/printable/article.cfm/4370356/c_2984351?f=options; Joel Millman, *Asarco Bankruptcy Leaves Many Towns with Cleanup Mess*, WALL ST. J., May 24, 2006, at B1; Marilyn Berlin Snell, *Going for Broke*, SIERRA CLUB, http://www.sierraclub.org/sierra/200605/goingforbroke/page1.asp.

Unfortunately, however, the debate on this topic has been driven so far by "scary stories" but very little substantive data.

Asarco has become the poster-child for reform in the bankruptcy/environmental arena. On its face, the Asarco case presents deplorable facts. Asarco filed for bankruptcy protection in August, 2005. As a result of its former copper mining and refining operations, Asarco was associated with at least nineteen Superfund sites around the country, with estimated environmental liabilities ranging between $500 million and $1 billion.[3] Asarco's potential environmental liabilities are not limited to federal Superfund sites, however; it also faces substantial state environmental liabilities[4] and civil suits,[5] as well. Asarco's president at the time of the bankruptcy filing cited the environmental liabilities of the company as the leading cause for the company's Chapter 11 filing.[6]

What ignites the ire of the public and media is the perception that Asarco has engaged in a shell game, shifting valuable assets to an affiliated corporation and leaving behind a bankrupt husk with huge liabilities and no assets. The perception arises out of the circumstances following the buy-out of Asarco by a Mexican metals conglomerate, Grupo Mexico in 1999.[7] Shortly after the purchase, Grupo Mexico attempted to sell Asarco's most valuable asset, a majority share in a lucrative Peruvian mining operation, to another Grupo Mexico subsidiary, American Mining Corporation. The sale was initially blocked by the U.S. Department of Justice, which argued that the sale was a fraudulent transfer of valuable assets at below-market prices, a result that would leave Asarco with few assets to fund the cleanup of its contaminated sites.[8] Eventually, the Department of Justice and Asarco reached agreement that Asarco could sell the assets for $765 million; Asarco agreed to set up a trust fund of $100 million for cleanup of contaminated sites.[9]

Since then, the Asarco bankruptcy case has continued to wend its way through the legal system[10]--and cleanup of the firm's polluted sites remains uncertain. What does seem likely is that U.S. taxpayers will end up picking up a large part of the bill for

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[3] Snell, *supra* note 2, at p. 1.

[4] For example, faced with a $900,000 fine imposed by Montana's Department of Environmental Quality for illegal handling of toxic materials at its closed East Helena smelter, Asarco negotiated a reduced fine of $179,924 in February 2005, and agreed to clean up the site. Asarco's filing for bankruptcy six months later stayed payment of the settlement, however, and put the state environmental agency in line for payment behind a long list of other creditors. Millman, *supra* note 2, at B1.

[5] *See* Snell, *supra* note 2 ("When Asarco filed for bankruptcy, more than 10 civil enforcement cases were pending against it.").

[6] Max Jarman, *Asarco files for Chapter 11*, THE ARIZ. REPUBLIC, Aug. 11, 2005, http://www.azcentral.com/arizonarepublic/business/articles/0811asarco11.html. Asarco's then-president listed the following factors, in order, as the cause of Asarco's bankruptcy filing: (1) environmental liabilities of up to $1 billion; (2)asbestos liabilities of up to $900 million; (3) a credit downgrading from Standards & Poor's Financial Rating Service to CCC; and (4) a labor strike. *See* Thomas Stauffer, Joseph Barrios, & Andrea Kelly, *Asarco seeks bankruptcy protection*, ARIZ. DAILY STAR, Aug. 11, 2005, *available at* 2005 WLNR 12874856.

[7] Millman, *supra* note 2, at B1.

[8] *Leone*, *supra* note 2.

[9] Wall Street analysts at that time estimated that cleanup could cost as much as $700 million. *See* Elisabeth Malkin, *Company News: Asarco Settles with Justice Dept. on Sale and Pollution*, N.Y.TIMES, Feb. 4, 2003, at C. Estimated costs now are as high as $1 billion. *See id.*

[10] For information on the bankruptcy, see the *Asarco, LLC Restructuring-Information Website*, at http://www.asarcoreorg.com/ and the *Asarco Bankruptcy News*, at http://bankrupt.com/asarco.txt.

cleanup, as Asarco simply lacks the resources needed to fully satisfy its environmental liabilities. It is that shortfall that has led to cries for legal reform.

What is not known, however, is whether the Asarco situation is typical or atypical. Are firms routinely siphoning off assets of their subsidiaries, leaving behind bankrupt shells unable to satisfy their environmental liabilities? Commentators have suggested that the strategy is common, arguing that bankruptcy provides the "last loophole" for escaping environmental liabilities,[11] or asserting that corporations have routinely avoided environmental liabilities by declaring bankruptcy.[12]

In fact, however, there are no data to indicate the true extent of this problem, only unsupported assertions and anecdotal "evidence." When the Government Accounting Office ("GAO") investigated this issue for Congress in a 2005 report ("GAO Report"),[13] the GAO noted the data deficiencies in evaluating the interface between environmental law and bankruptcy law.

> While national bankruptcy data show that more than 231,000 businesses operating in the United States filed for bankruptcy in fiscal years 1998 through 2003, the extent to which these businesses had existing environmental liabilities is not known because neither the federal government nor other sources collect this information.[14]

The EPA told the GAO that it did not track information on its review of bankruptcy cases, including whether environmental liabilities are involved in such cases, because of the large number of bankruptcy notices it receives and the limited resources that it has to track this information.[15] The GAO noted that, as a result, the data on business bankruptcies involving federal environmental liabilities was limited to data on the bankruptcy cases that the Department of Justice pursued in court on behalf of the EPA or other federal agencies.[16] The Justice Department initiated 136 cases of this type between 1998 and 2003.[17] The GAO concluded that "EPA's efforts to identify bankruptcies that may warrant pursuit in bankruptcy court are hampered by the lack of timely, complete, and reliable information on the many thousands of businesses filing for bankruptcy each year."[18]

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[11] *See* Debra L. Baker, *Bankruptcy—The Last Environmental Loophole*, 34 S. TEX. L. REV. 379, 379 (1993).

[12] *See, e.g.*, Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421, 422 (1990) (stating that "[m]any of these corporations have sought refuge in bankruptcy"); Karyn S. Bergmann, *Bankruptcy, Limited Liability and CERCLA: Closing the Loophole and Parting the Veil* 2 (Univ. of Maryland Sch. of Law Pub. Law & Legal Theory Accepted and Working Research Paper Series No. 2004-02), *available at* http://ssrn.com/abstract=503143 (noting that "[m]any violators have avoided their environmental obligations in bankruptcy by either discharge of environmental 'claims' or abandonment of contaminated property").

[13] GENERAL ACCOUNTING OFFICE, ENVIRONMENTAL LIABILITIES: EPA SHOULD DO MORE TO ENSURE THAT LIABLE PARTIES MEET THEIR CLEANUP OBLIGATION (2005) [hereinafter GAO REPORT].

[14] *Id*. at 3.

[15] *Id*. at 4.

[16] *Id*.

[17] *Id*.

[18] *Id*. at 4-5.

We set out to examine the question of whether firms are indeed inappropriately using bankruptcy as a way to escape environmental liabilities on any sort of pervasive, wide-scale basis. We acknowledge up front the inherent limitations of any such study. These limitations are occasioned by the complexity of statutory and common law rules regarding environmental obligations and by the utter lack of data in the area. Environmental liabilities can arise at both the state and federal levels, can involve both statutory violations and common law actions, and can result in imposition of a host of obligations for the environmental defendant, including penalties, reimbursement of cleanup costs, and/or mandates for remedial action. Thus, environmental obligations can manifest themselves in various ways and in multiple jurisdictions simultaneously, making the tracking of these obligations for any given company challenging. In addition, because the EPA and the Department of Justice have not tracked data on bankruptcy cases involving environmental matters in any manner, it is necessary to comb through individual bankruptcy filings one by one to find cases posing environmental issues. As a result, any effort to address this absence of data is necessarily but a first step in what will ultimately be a lengthy and multi-pronged analysis. By taking this first step, however, we begin to shed light on the actual nature and extent of the use of bankruptcy as a tool to inappropriately avoid environmental liability.

We set out to define a narrow but manageable set of data - Chapter 11 business bankruptcy cases for calendar year 2004—with an eye to examining the following questions. First, how many firms in the data set reported environmental violations, liabilities, or other obligations? Second, of these firms, in how many instances did the environmental issues play a role in the bankruptcy filing? Third, of the firms in which environmental matters caused, even in part, the bankruptcy filing, in how many cases did the debtor end up shifting the cost of the environmental cleanup to the taxpayer? Fourth, even if environmental obligations did not play a role in the decision to file for bankruptcy, did the debtor avoid paying for environmental remediation either by invoking the Bankruptcy Code's abandonment power or the right to discharge? Finally, is there any evidence that parent corporations effectively shift the cost of environmental cleanup to the taxpayers by creating subsidiaries with insufficient assets to pay for their environmental obligations?

Our findings suggest that Asarco is an atypical case and that the strategic use of chapter 11 to avoid environmental obligations is an uncommon phenomenon. In only 3.2% of the chapter 11 business bankruptcy cases in our data set did debtors report an environmental obligation or violation that possibly was pending at the time of the bankruptcy filing. Moreover, in more than ninety-nine percent of the cases in our data set, environmental violations and cleanup obligations played virtually no role in the decision to file for bankruptcy. In addition, the concern that debtors use bankruptcy to abandon contaminated property proved without merit in the context of chapter 11. In only one case–less than one tenth of one percent of the total number of cases in the data set-did the debtor successfully invoke the Bankruptcy Code's abandonment power. We did find two cases in which debtors had massive environmental liabilities; in only one, however, did the debtor confirm a plan of reorganization and, thus, discharge a significant portion of its environmental debt, thereby effectively shifting the costs of cleanup to the taxpayer. Finally, we were unable to substantiate the claim that parent corporations rely on bankruptcy to shield them from the costs of environmental remediation, by creating

subsidiaries that carry and ultimately discharge in bankruptcy significant environmental liabilities.

We begin the Article with an overview, in Part I, of environmental, corporate, and bankruptcy law to set the stage for the analysis that follows. Part II explains the methodology we employed to create the data set, and provides a project overview, a description of the research design, and a description of how cases were identified for inclusion in the data set. In Part III, we discuss our findings. Part III.A summarizes the results of our research. In Part III. B, we discuss "false positives"–those cases with environmental disclosures but no pending environmental issues at the time of the bankruptcy filing. In Part III.C, we discuss in some detail the five cases in our data set in which the debtor reported that its environmental obligations played a role in the decision to file for chapter 11. Part III.D examines the "loophole" issues of abandonment and the bankruptcy discharge in light of the chapter 11 cases in the data set. Finally, in Part IV, we conclude with two suggestions about how to improve the reporting of environmental issues in bankruptcy, and also with a cautionary note about reforming bankruptcy, environmental, or corporate law based on anecdotal, rather than empirical, evidence.

I. BACKGROUND: AN OVERVIEW OF ENVIRONMENTAL, CORPORATE, AND BANKRUPTCY LAW

Environmental issues in bankruptcy cases pose extremely interesting but often difficult legal and policy issues because they appear at a crowded intersection of three areas of the law: corporate, environmental, and bankruptcy. Overlapping levels of jurisdiction add to this complexity. Bankruptcy law is exclusively federal law. Corporate law doctrine arises under state law. Environmental regulation, by contrast, is found at both the state and federal levels. The net result is an intricate interweaving of legal doctrine and standards in the environmental and bankruptcy law arena that leads to thorny analyses and convoluted outcomes.

The interplay between bankruptcy law and environmental statutes is complex, at best, and has created numerous analytical problems for the courts.[19] As the U.S. Court of Appeals for the Seventh Circuit noted:

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[19] *See, e.g.*, In re Chicago, M. & St. P. & Pac. R.R. Co., 974 F.2d 775, 777 (7th Cir. 1992) ("The interface of bankruptcy laws and environmental laws has perplexed courts since the passage of [CERCLA]."). As the Third Circuit recognized, the conflict is heightened when it is a state environmental law involved in a bankruptcy case:

> One the one hand, the federally created bankruptcy policy requires that assets of a debtor be preserved and protected, so that in time they may be equitably distributed to all creditors without unfair prejudice. On the other hand, the environmental policies of the Commonwealth of Pennsylvania requires [sic] those within its jurisdiction to preserve and protect natural resources and to rectify damage to the environment which they have caused. The potential conflict between these two policies is presented in this case, in which the Commonwealth has attempted to force a company which has petitioned in bankruptcy to correct violations of state antipollution laws, even though this action would have the effect of depleting assets which would otherwise be available to repay debts owed to general creditors.

Penn Terra Ltd. v. Dep't of Envt'l Res., 733 F.2d 267, 269 (3d Cir. 1984).

> The interface of environmental cleanup laws and federal bankruptcy statutes is never tidy; jurisprudentially, it is somewhat grubby. . . . [CERCLA] and similar state laws . . . seek to protect public health and the environment by facilitating the cleanup of environmental contamination and imposing costs on the parties responsible for the pollution. The Bankruptcy Reform Act of 1978 and its predecessors were designed to give a debtor a fresh start by discharging as many of its debts as possible. The tension between these fundamental aspects of our national policy is profound.[20]

The problem is that the goals of environmental and bankruptcy law—and corporate law as well—are often in conflict. The purpose of environmental remedial statutes, such as CERCLA and RCRA,[21] is to promote cleanup of past contamination by those most responsible for the contamination in the first place—the oft-cited "polluter pays" principle.[22] The primary goal of bankruptcy law, on the other hand, is to provide the debtor with a "fresh start."[23] In furtherance of this goal, bankruptcy law seeks to equitably distribute the debtor's assets among all creditors, which means that environmental liabilities may not be fully paid by a bankrupt party.[24] As a result, the "fresh start" of bankruptcy can trump the "polluter pays" principle of environmental law. Adding to this complex mix is the principle of limited liability underlying traditional state corporate law doctrine. While limited liability helps encourage investment in business activities,[25] thus promoting economic activity and wealth creation, limited liability principles can also enable firms to escape environmental and other liabilities through careful corporate structuring.[26] This problem arguably is heightened when firms couple strategic corporate structuring with the debt relief of bankruptcy.

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[20] In re Chicago, M & St. P. & P. R.R. Co., 3 F.2d 200, 201 (7th Cir. 1993).
[21] *See infra* Part I.A.
[22] *See* Dedham Water Co. v Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) (stating that Congress intended CERCLA to provide EPA with effective means of responding to problems of hazardous waste, and to ensure that those responsible for hazardous waste problems pay for the harm created).
[23] Williams v. United States Fid. & Guar. Co., 236 U.S. 549, 554-55 (1915) ("It is the purpose of the Bankruptcy Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.").
[24] Kathryn Heidt, *Products Liability, Mass Torts and Environmental Obligations in Bankruptcy: Suggestions for Reform*, 3 AM. BANKR. INST. L. REV. 117, 121-22 (1995).
[25] *See infra* Part I.B.
[26] As explained in the GAO REPORT:

> [A] subsidiary that is engaged in a business that is at risk of incurring substantial liability, such as mining or chemical manufacturing, can protect its assets by transferring the most valuable ones—such as equipment and patents—to a related entity, such as the parent or other subsidiary engaged in less risky endeavors. The high-risk subsidiary can continue to use the transferred assets, as appropriate, by leasing or renting them. It has become common practice for experts in asset protection to recommend that corporations protect their assets in this way. . . . If a liability arises, under the limited liability principle, the high-risk subsidiary's remaining assets may be reached—but generally not those of the parent corporation or other subsidiaries to which assets were transferred.

We explore the pertinent aspects of these three areas of the law in the following Sections.

A. Overview of Environmental Law Regulatory Schemes

The plethora of environmental regulation at both the state and federal levels makes it difficult to get a handle on the extent to which firms escape or try to escape environmental liabilities (appropriately or inappropriately) through bankruptcy. Although federal environmental laws have received the most attention from scholars who have examined the intersection between bankruptcy and environmental law, there is a substantial body of state environmental regulation, as well as extensive common law tort actions, all of which can generate liabilities of a magnitude that could easily affect the financial health of a firm. Tracking all of these levels of liability exposure in specific bankruptcy filings is extremely difficult.

Most case law involving the interface of environmental and bankruptcy law involves the Comprehensive Environmental Response, Compensation, and Liability Act of 1980[27] ("CERCLA").[28] However, while the staggering expense associated with CERCLA's goal of cleaning up contaminated sites[29] does create a natural linkage between the statute and bankruptcy filings by firms, there are no data to indicate how many bankruptcy filings actually involve CERCLA liabilities as opposed to other types of federal or state environmental liabilities. Anecdotally we may well suspect that CERCLA is a primary source of environmental liability in bankruptcy, but empirically we have no data to support or disprove that supposition.

CERCLA is a remedial statute. It was enacted by Congress in an attempt to address the growing environmental issues posed by past hazardous waste disposal. Well-publicized environmental incidents, including Love Canal in New York[30] and the James River kepone contamination in Virginia,[31] illustrated to Congress the need for remedial legislation designed to address the environmental problems posed by hazardous waste produced and abandoned in the past. Congress' goal in enacting CERCLA was to ensure that the parties responsible for hazardous waste contamination bore the costs of its

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GAO REPORT, *supra* note 13, at 21-22.

[27] Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C. §§ 9601-9675 (2000), amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613). CERCLA is often referred to as "Superfund," a term more properly used in reference to a hazardous waste trust fund designated for cleanup actions. The discussion of CERCLA and its provisions in this Article is necessarily limited. For a more complete discussion, see Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331, 334-58 (2004).

[28] *See, e.g.*, Hillinger & Hillinger, *supra* note 27, at 334 ("Most environmental-bankruptcy case law involves CERCLA.").

[29] *See infra* notes 51-52 and accompanying text.

[30] *See, e.g.*, 126 CONG. REC. 30,931 (1980), *reprinted in* SENATE COMM. ON ENV'T & PUBLIC WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT OF 1980 (SUPERFUND), vol. I, at 684 (Comm Print. 1983) [hereinafter A LEGISLATIVE HISTORY] (remarks of Sen. Randolph, co-sponsor of CERCLA); S. REP. NO. 848, 96th Cong., 2d Sess. 8-10 (1980), *reprinted in* A LEGISLATIVE HISTORY, *id.*, vol. I, at 315-17.

[31] *See* S. REP. NO. 848, *supra* note 30, at 7, *reprinted in* A LEGISLATIVE HISTORY, *supra* note 30, vol. I, at 314.

cleanup.[32] As a result, liability under CERCLA is deliberately broad[33]: liability is retroactive,[34] joint and several,[35] and strict.[36] Liable parties under CERCLA are responsible for both cleanup costs and damages.[37] In addition, the categories of potentially responsible parties ("PRPs") under CERCLA are also deliberately broad, encompassing: (1) the current owners and operators of a site or area where hazardous waste is located; (2) the past owners or operators of such sites; (3) persons who arranged for the disposal or treatment of hazardous substances ("generators"); and (4) transporters of hazardous waste.[38]

The EPA ranks contaminated sites in order of severity of contamination and threat to human health, and places the worst of these sites on a list known as the National Priorities List ("NPL").[39] Under Section 104 of CERCLA, the EPA may start a removal action or remedial action in response to a release or threatened release of hazardous substances.[40] A removal action is a short-term, relatively inexpensive cleanup action undertaken to protect public health and welfare.[41] A remedial action is a long-term, permanent action designed to address the contamination, and may only be undertaken at NPL sites.[42]

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[32] H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 3, at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3038 (noting that Congress' goals in enacting CERCLA were: "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups").

[33] *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 21 (1989) (plurality opinion of Brennan, J.) (emphasis in original) ("The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of clean-up).

[34] *See* United States v. NEPACCO, 810 F.2d 726, 732-33 (8th Cir. 1986) ("Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect.").

[35] Although the statute does not specifically provide for joint and several liability, the courts have determined that such liability is appropriate in cases of indivisible harm. *See, e.g.*, O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989).

[36] *See, e.g.*, Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1572 (5th Cir. 1988); New York v. Shore Realty Corp., 759 F.2d 1032, 1042 (2d Cir. 1985).

[37] 42 U.S.C. § 9607(a) (2000).

[38] 42 U.S.C. § 9607(a) (2000).

[39] For more information about the NPL site listing process, *see* United States Envt'l Prot. Agency, National Priorities List, NPL Site Listing Process, http://www.epa.gov/superfund/sites/npl/npl_hrs.htm (last visited Aug. 15, 2007).

[40] 42 U.S.C. § 9604(a)(1) (2000).

[41] 42 U.S.C. § 9601(23) (2000).

[42] 42 U.S.C. § 9601(24) (2000). The EPA describes the Superfund cleanup process on its website.

> The Superfund cleanup process begins with site discovery or notification to EPA of possible releases of hazardous substances. Sites are discovered by various parties, including citizens, State agencies, and EPA Regional offices. Once discovered, sites are entered into the Comprehensive Environmental Response, Liability and Response Information System (CERCLIS), EPA's computerized inventory of potential hazardous substance release sites . . . . Some sites may be cleaned up under other authorities. EPA then evaluates the potential for a release of hazardous substances from the site through these steps in the Superfund cleanup process.

United States Envt'l Prot. Agency, Superfund, Cleanup Process,. http://www.epa.gov/superfund/cleanup/index.htm (last visited Aug. 15, 2007).

Under Section 106 (a) of CERCLA, the EPA may order PRPs to clean up a site,[43] or may directly remediate the site and seek reimbursement from the PRPs.[44] *De minimis* parties (i.e., those that played a minor role in the contamination of the site) may avoid joint and several liability for the entire costs of cleanup by settling with the EPA.[45] Parties that do not qualify as *de minimis*, however, are liable for the entire costs of remediation,[46] including the orphan shares of those PRPs that may no longer be in existence at the time of cleanup.

Where no PRPs are in existence or the site poses an imminent hazard to public health, the EPA may undertake a removal action and/or remediate the NPL site.[47] Funds for remedial actions may come from the Hazardous Waste Superfund ("Superfund").[48] The Superfund is a trust fund created through a tax on crude oil and certain chemicals, and an environmental tax on corporations. The authority for these taxes expired in 1995, and Congress has not renewed the taxes. Although the Superfund continues to receive revenues from recovery of cleanup costs from liable parties, interest on the trust balance, and fines and penalties, most of the Superfund revenue since fiscal year 2000 has come from general revenue fund appropriations.[49] Superfund revenue has not kept pace with the growth in the number of NPL sites. As of July 31, 2007, there were 1,243 Final Sites and sixty-one Proposed Sites on the NPL.[50] According to the GAO Report, cleanup costs for the majority of sites would average $12 million per site.[51] At the 142 "megasites," however, the average cost of cleanup per site was estimated to be $140 million.[52]

Finally, under Section 107 of CERCLA, private parties, states, and the federal government have the right to seek reimbursement of cleanup costs from responsible parties.[53] In addition, under Section 106, the EPA may request an injunction to prevent parties from further releasing hazardous waste.[54]

In contrast to CERCLA, the Resource Conservation and Recovery Act of 1976 ("RCRA")[55] provides a statutory scheme for monitoring solid wastes and their disposal from "cradle to grave." While CERCLA is retrospective, addressing cleanup of past contamination, RCRA is largely prospective, addressing contamination at operating facilities, and providing for prevention of future contamination by ensuring that hazardous waste facilities are closed properly and safely and are monitored after closure so as to protect human health and the environment. The EPA has authorized most states

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[43] 42 U.S.C. § 9606(a) (2000).
[44] 42 U.S.C. § 9604(a) (2000). CERCLA also permits PRPs that have incurred response and remediation costs to file suit for contribution from other PRPs. 42 U.S.C. § 9113(f)(1) (2000).
[45] 42 U.S.C. § 9622(g) (2000 & Supp. IV 2004).
[46] *Id.*
[47] 42 U.S.C. § 9604(a) (2000).
[48] 42 U.S.C. § 9611(a) (2000 & Supp. IV 2004).
[49] *See* U.S. GEN. ACCOUNTING OFFICE, SUPERFUND PROGRAM: BREAKDOWN OF APPROPRIATIONS DATA at 2 (2004), *available at* http://www.gao.gov/new.items/d04787r.pdf.
[50] UNITED STATES ENVT'L PROT. AGENCY, NATIONAL PRIORITIES LIST, NPL SITE TOTALS BY STATUS AND MILESTONE, http://www.epa.gov/superfund/sites/query/queryhtm/npltotal.htm (last visited Aug. 15, 2007).
[51] GAO REPORT, *supra* note 13, at 8.
[52] *Id.* at 8-9.
[53] 42 U.S.C. § 9607 (2000).
[54] 42 U.S.C. § 9606(a) (2000).
[55] 42 U.S.C. §§ 6901-6992k (2000 & Supp. IV 2004).

to administer all or part of RCRA's statutory program, thus creating a joint federal/state partnership in this arena.

RCRA requires owners and operators of facilities used to treat, store, or dispose of hazardous waste to obtain operating permits and to prepare closure plans and cost estimates for necessary closure activities, such as removing or securing wastes or decontaminating equipment. In addition, Section 7003 of RCRA authorizes the EPA to bring suit against persons who have in the past handled, stored, treated, transported or disposed of solid or hazardous waste or who are presently contributing to such activities, where such activities constitute an imminent and substantial endangerment to human health or the environment.[56] Section 7003 also allows the EPA to issue administrative orders requiring abatement of an imminent hazard.[57]

RCRA was enacted in 1976, four years before CERCLA. Although the EPA tends to turn to CERCLA more now for hazardous site cleanup, RCRA is still a "potent enforcement tool,"[58] and can be used either jointly with CERCLA or in instances where CERCLA is inapplicable. Because CERCLA applies to "hazardous substances" and RCRA to "hazardous wastes"-categories that are not necessarily coterminous-the decision as to which statutory provision to use is often driven by the type of material at issue.[59] Like CERCLA, RCRA imposes broad liability that is strict,[60] joint and several[61] (unless the harm is divisible),[62] and retroactive.[63]

RCRA's corrective action program addresses contamination at operating industrial facilities; thus, unlike CERCLA sites, RCRA sites usually have viable operators and ongoing operations. Under RCRA, such facilities can be required to clean up contamination occurring on their sites. The EPA estimates that 3,746 sites will be identified by the end of 2008 as needing corrective action.[64] Cleanup costs can be extensive in the RCRA arena as well. A 2002 EPA study estimated that between two and sixteen percent of the then-known nine hundred facilities would have total cleanup costs exceeding $50 million each.[65]

Although RCRA and CERCLA are the two most prominent environmental statues addressed by commentators in the bankruptcy area, other federal environmental statutes, such as the Clean Air Act[66] and the Clean Water Act[67] also create environmental liability

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[56] 42 U.S.C. §6973(a) (2000).
[57] *Id.* at §6973(c).
[58] ENVIRONMENTAL LAW IN REAL ESTATE AND BUSINESS TRANSACTIONS § 2.01[1] (2005).
[59] *Id*. at § 2.01[2].
[60] The statute does not explicitly impose a strict liability standard, but the legislative history indicates congressional intent to create liability "without fault." *See* H.R. REP. NO. 198, 98th Cong., 2d Sess., pt. 1, at 48, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5607. The courts have imposed a strict liability standard in Section 7003 cases as a result. *See* United States v. Aceto Agr. Chems. Corp., 872 F.2d 1373, 1377 (8th Cir. 1989).
[61] *See* United States v. Valentine, 856 F. Supp. 627, 633-34 (D. Wyo. 1994).
[62] *See* ENVIRONMENTAL LAW IN REAL ESTATE AND BUSINESS TRANSACTIONS § 2.04[2][b] (2005).
[63] *See, e.g.*, United States v. Price, 523 F. Supp. 1055, 1071 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1983).
[64] *See* UNITED STATES ENVT'L PROT. AGENCY, CORRECTIVE ACTION, FACILITY INFORMATION, http://www.epa.gov/epaoswer/hazwaste/ca/facility.htm#2020 (last visited Aug. 15, 2007).
[65] *See* GAO REPORT, *supra* note 13, at 11.
[66] 42 U.S.C. §§ 7401-7671 (2000 & Supp. IV 2004).
[67] The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (2001), is commonly called the Clean Water Act. Other major federal environmental statutes include the Toxic Substances Control Act, 15 U.S.C.

for businesses, as do various state statutes and common law theories of tort or contract. Over eighty percent of the states, for example, have a state "superfund" law that they use to impose cleanup liability in instances not reached by CERCLA, although most of them impose a less severe standard of liability than that found under the federal CERCLA.[68]

It is impossible to cover the full range of environmental regulation in this Article. The important point, for our purposes, is to realize that the scope of liability for environmental matters under state and federal law is extensive. For example, debtors may not be aware that they face environmental liability until an event triggers outside notice from regulators or injured plaintiffs.[69] Moreover, a number of different entities, including the federal EPA, its state equivalents, or even private parties, such as neighboring property owners, workers, or other third parties harmed by the environmental wrongdoings of a debtor, have enforcement rights under various environmental statutes.

B. Corporate Law's Limited Liability Provisions

Traditional corporate law doctrine provides for limited liability. The goal of limited liability rules is to encourage investment by limiting the financial exposure of investors to the amount of capital that they invested.[70]

> Under the doctrine of limited liability, the owner of a corporation is not liable for the corporation's debts. Creditors of the corporation have recourse only against the corporation itself, not against its parent company or shareholders. It is on this assumption that "large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted."[71]

Thus, the corporation is regarded as an entity "separate and distinct" from its shareholders,[72] and the shareholders typically are not liable for the debts and liabilities of the corporation beyond their contribution to capital.[73] This limited liability extends not

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§§ 2601-2692 (2000), the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401-67 (2000), The Endangered Species Act, 16 U.S.C. §1531-1544 (2000), and the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136-136y (2000).

[68] For a summary of these state statutes, see ENVIRONMENTAL LAW IN REAL ESTATE AND BUSINESS TRANSACTIONS § 4.02 (2005). This source lists the following states as having no state equivalent to CERCLA and as relying primarily upon the federal statute instead: Colorado, Kentucky, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, and Wyoming. *Id*. at § 4.02[2].

[69] A firm may unwittingly create liability for itself. For example, a company may hire a licensed waste hauler to legally dispose of its waste. If the waste hauler illegally disposes of the waste, the firm that hired the waste hauler is responsible.

[70] It is hornbook law that shareholders are, in effect, merely investors in the corporation in which they own stock. *See, e.g.*, United States v. Jon-T Chems., Inc., 768 F.2d 686, 690 (5th Cir. 1985).

[71] *Id*.

[72] 1 WILLIAM FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 14, at 463 (rev. perm. ed. 1990); *see also* HARRY G. HENN & JOHN R. ALEXANDER, LAW OF CORPORATIONS 127 (3d ed. 1983) ("For most purposes, [a corporation] is a person separate and apart from the persons who compose it.").

[73] *See, e.g.*, Krivo Indus. Supply Co. v. National Distillers & Chem. Corp., 483 F.2d 1098, 1102 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974). Several theoretical advantages have been advanced in support of limited liability. These include: minimizing risk exposure of absentee investors; encouraging very large scale enterprises and portfolio diversification;

only to individual shareholders, but also to corporations that own shares in other corporations.[74] Affiliated corporations are generally regarded as separate and distinct legal entities.[75] Even a parent corporation, which by definition can exercise control over its subsidiary, is protected from liability for its subsidiary's debts by the rule of limited liability, absent fraud or other abuse of the corporate form.[76]

There are many legal mechanisms by which business entities can achieve limited liability. The most commonly known, of course, is the corporation,[77] but limited liability can also be achieved through other mechanisms, such as a limited liability company ("LLC")[78] or a limited partnership,[79] as well as entities formed for specific purposes, such as a professional corporation ("PC")[80] or a limited liability partnership ("LLP").[81] As a

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minimizing agency costs; maintaining efficiency of the capital market; and minimizing creditors' collection costs and the costs of contracting around liability. *See* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: TORT, CONTRACT AND OTHER COMMON LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 4.02 (1987); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89-97 (1985); Richard Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 502-13 (1976).

[74] *See generally* HENN & ALEXANDER, *supra* note 72, at 355.

[75] *Id.* ("The parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers."); *see also id*. at 347 ("The prevailing rule is that where corporate formalities are substantially observed, initial financing reasonably adequate, and the corporation not formed to evade an existing obligation or a statute or to cheat or to defraud, even a controlling shareholder enjoys limited liability.").

[76] Generally, the separate existence of the subsidiary or other affiliated corporation will be recognized unless:

> (a) The business transactions, property, employees, bank and other accounts and records of the corporation are intermingled;
>
> (b) The formalities of separate corporate procedures for each corporation are not observed (where the directors and officers of each corporation are common, separate meetings and delineation of the respective capacities in which the common directors and officers are acting should be observed);
>
> (c) The corporation is inadequately financed as a separate unit from the point of view of meeting its normal obligations foreseeable in a business of its size and character, because of either initial inadequate financing or having its earnings drained off so as to keep it in a condition of financial dependency;
>
> (d) The respective enterprises are not held out to the public as separate enterprises;
>
> (e) The policies of the corporation are not directed to its own interests primarily but rather to those of the other corporation.

Wehner v. Syntex Agribusiness, Inc., 616 F. Supp. 27, 30 (E.D. Mo. 1985) (*quoting* HENN & ALEXANDER, *supra* note 72, at 355-56).

[77] *See* MARK R. LEE & LEONARD GROSS, ORGANIZING CORPORATE AND OTHER BUSINESS ENTITIES §1.04[7] (6th ed. 2000).

[78] *See id.* at §1.04[6].

[79] *See id.* at §1.04[5].

[80] *See id.* at §5.02[5].

[81] *See id.* at §1.04[4]; *see also* Robert R. Keatinge *et al., Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business Organization,* 51 BUS. LAW. 147 (1995).

result of the growing variety of approaches to limited liability provided by state law, business entities have a wide range of choices to consider when deciding how best to structure activities that may generate environmental liabilities.

Although it is legitimate to use limited liability entities as a mechanism to protect assets, it is generally illegal to transfer assets to an affiliated entity or otherwise in an effort to defraud creditors. At the federal level, the Bankruptcy Code permits invalidation of a transfer if it occurred within 2 years before the bankruptcy filing, if the transfer was made with the intent to defraud creditors or if, under specified circumstances, the debtor received "less than a reasonably equivalent value in exchange for such transfer."[82] At the state level, almost all states have enacted the Uniform Fraudulent Transfer Act, which has similar provisions permitting creditors to invalidate certain fraudulent transfers within four years of their occurrence.[83]

C. Chapter 11 Basics[84]

Typically, a chapter 11 case begins when the debtor files a voluntary petition;[85] doing so creates the bankruptcy estate. The estate is "a separate judicial entity" from the debtor[86] and, with certain exceptions, consists of "all legal or equitable interests of the debtor in property as of the commencement of the case."[87] The filing of a petition also operates as a stay of most pre-petition litigation and collection activities against the debtor, also known in a chapter 11 case as the debtor-in-possession or DIP.[88]

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[82] 11 U.S.C.A. § 548(a)(1) (2004 & West Supp. 2007).

[83] *See* UNIFORM FRAUDULENT TRANSFER ACT (2004), available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/ufta84.htm. Forty-four states have adopted the Uniform Act, and the Act was introduced in New York in 2007. *See* Unif. L. Comm'rs, A Few Facts About the Uniform Fraudulent Transfer Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufta.asp (last visited Aug. 15, 2007).

[84] We only address Chapter 11 bankruptcy cases in this Article. But, a limited liability debtor also may file for bankruptcy under Chapter 7, which is commonly known as the liquidation chapter. It is not correct, however, to assume that liquidation is limited to chapter 7. A limited liability debtor may either reorganize or liquidate inside chapter 11. *See* Elizabeth Warren and Jay Westbrook, *Remembering Chapter 7*, 23-4 AM. BANKR. INST. J. 22 (2004).

[85] 11 U.S.C. §301 (2007). Official Form 1 is the voluntary petition. *See* Official Form 1, BANKRUPTCY CODE, RULES AND FORMS 535 (2007 ed.). A debtor's creditors, however, may force the debtor into bankruptcy by filing an involuntary petition. *See* 11 U.S.C. §303 (2007). Two of the ninety-three debtors in our sample of cases with environmental liabilities ended up in bankruptcy because their creditors had filed involuntary petitions for relief. *See* Chapter 7 Involuntary Petition, In re Knowlton Specialty Papers, Inc., No. 04-11565 (Bankr. N.D. N.Y. March 12, 2004); Chapter 11 Involuntary Petition, In re Ivyport Logistical Servs., Inc., No. 04-07016 (Bankr. D. P.R. July 2, 2004). The Knowlton case began with an involuntary chapter 7 petition; the case subsequently converted to chapter 11. *See* Order to Convert Case to Chapter 11, In re Knowlton Specialty Papers, Inc., No. 04-11565 (Bankr. N.D. N.Y. March 29, 2004) (Docket No. 16).

[86] Hillinger & Hillinger, *supra* note 27, at 370.

[87] 11 U.S.C. §541(a)(1) (2000).

[88] *See* 11 U.S.C. §1101(1) (2000) (stating that "'debtor-in-possession' means debtor"). With limited exceptions, the debtor-in-possession has the same rights, powers, and duties as a trustee. *See* 11 U.S.C. §1107 (2000).

While most people associate chapter 11 with business reorganization, individuals may file for relief under chapter 11.[89] Moreover, not all business debtors emerge from bankruptcy as reorganized entities. While liquidation typically occurs under chapter 7, §1123 of the Bankruptcy Code allows debtors to use chapter 11 to liquidate.[90] Regardless of whether the debtor intends to reorganize or to liquidate, however, it must file a plan.

The debtor's plan is its proposal for how it intends to pay its creditors. It is a proposal because creditors have the right to vote to accept or reject the plan if the plan impairs or alters their legal, equitable or contractual rights.[91] In order to obtain confirmation of a consensual plan under §1129(a) of the Bankruptcy Code, each class of creditors either must be unimpaired by the plan or have voted to accept it.[92] Thus, the Bankruptcy Code gives large creditors leverage in chapter 11. Suppose the debtor proposes to pay its unsecured creditors twenty-five percent of the amount of their claims in cash on the plan's effective date. If the debtor has ten unsecured creditors holding claims totaling $1 million, six of those creditors must vote to approve the plan and their claims must equal $666,667.[93] If one unsecured creditor holds a large claim, for example for $350,000, that creditor's vote is necessary, although not sufficient, for acceptance of the plan by the class of unsecured creditors.[94] Therefore, the debtor may need to negotiate with its creditors in order to draft an acceptable plan.

The goal of plan confirmation for the debtor is the discharge of its pre-confirmation debts.[95] Suppose, once again, that the confirmed plan provides for payment to the unsecured creditors of $.25 on the dollar. Creditor X holds an unsecured claim for $100,000. If the reorganized debtor pays Creditor X $25,000, then Creditor X may not pursue the debtor post-confirmation for the remaining $75,000, even if Creditor X voted against the plan of reorganization.[96]

Only those holding allowed claims, however, are entitled to vote on the plan.[97] The Code defines a claim as either 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."[98] Thus, pre-petition orders to stop polluting likely do not qualify as claims.[99] Moreover,

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[89] *See* Toibb v. Radloff, 501 U.S. 157, 166 (1991) ("T]he plain language of the Bankruptcy Code permits individual debtors not engaged in business to file for relief under Chapter 11.").

[90] *See* 11 U.S.C. §1123(a)(5)(D) (2000) (stating that a plan may provide for the "sale of all or any part of the property of the estate"); *see also* 11 U.S.C. §1123(b)(4) (2000) (stating that a plan may "provide for the sale of all or substantially all of the property of the estate"). For a discussion of liquidating plans, which are becoming more common in chapter 11, *see* Warren & Westbrook, *supra* note 84, at 22.

[91] *See* 11 U.S.C. §1124(1) (2000).

[92] 11 U.S.C. §1129(a)(8) (2000).

[93] *See* 11 U.S.C. §1126(c) (2000) (stating that a class accepts the plan if "at least two-thirds in amount and more than one-half in number of the allowed claims" vote to accept).

[94] If an impaired class of creditors does not accept the plan, the bankruptcy court still may confirm it under §1129(b) – the cramdown provision.

[95] *See* 11 U.S.C. §1141(d)(1) (2000). The debtor does not obtain a discharge with a liquidating plan. *See* 11 U.S.C. §1141(d)(3) (2007). But, with a liquidating plan, the debtor goes out of business; therefore, for limited liability entities there is no post-confirmation entity to pursue.

[96] *See* 11 U.S.C. §1141(d)(1)(A)(iii) (2000).

[97] *See* 11 U.S.C. §1126(a) (2004). If a creditor files a proof of claim, that claim is allowed unless a party in interest, such as the debtor, objects. *See* 11 U.S.C. §502(a) (2000).

[98] 11 U.S.C. §101(5) (2000).

[99] *See* Kathryn R. Heidt, *Environmental Obligations in Bankruptcy: A Fundamental Framework*, 44 FLA. L. REV. 153, 167-169 (1992) [hereinafter *Fundamental Framework*].

confirmation of the debtor's plan discharges only "debts", which the Bankruptcy Code defines as "liability on a claim."[100] Thus, an environmental agency that obtained an injunction against the debtor's pre-petition polluting activities could not vote on the debtor's plan.[101] But, the pre-petition order would remain in effect post-confirmation. The confirmed plan would not discharge the anti-pollution injunction, because the injunction did not qualify as a debt and the agency did not hold a claim in the chapter 11 case.

1. Who Pays?

Some commentators contend that bankruptcy has become a safe haven for polluters.[102] The argument is that polluters invoke bankruptcy's protection in order to avoid their environmental obligations and emerge from chapter 11 "leaner and meaner."[103] Commentators contend that the abandonment power and the ability of debtors to discharge debts in bankruptcy create a loophole that polluters exploit to circumvent their environmental obligations.[104]

a. Abandonment

Section 554 of the Bankruptcy Code provides that either the trustee or a party in interest "may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."[105] Consider the example of a debtor that has filed for liquidation under chapter 7.[106] Suppose the debtor owns real property

[100] 11 U.S.C. §101(12) (2000).
[101] *See infra* Part III.C.1.d for a discussion of the Gopher State Ethanol bankruptcy case.
[102] *See, e.g.*, Aronovsky & Fuller, *supra* note 12, at 422 (1990) (stating that many corporations liable under CERCLA "have sought refuge in bankruptcy"); *see* Bergmann, *supra* note 12, at 2 (contending that "[m]any violators have avoided their environmental obligations in bankruptcy"); *Snell*, supra note 2.
[103] Snell, *supra* note 2.
[104] *See* Bergmann, *supra* note 12, at 12-19. We do not discuss the automatic stay in this Article for two reasons. First, unlike the debtor's power to abandon property or to discharge pre-confirmation claims, the automatic stay does not afford the debtor the power to permanently shift the costs of environmental remediation from private to public coffers; it merely delays payment. Second, §362(b)(4) of the Bankruptcy Code contains an important exception to the stay for the exercise by a governmental unit of its police or regulatory powers. *See* 11 U.S.C. §362(b)(4) (2000). For a more detailed discussion of the impact of the automatic stay on a debtor's environmental obligations, *see* NORTON BANKRUPTCY LAW & PRACTICE 2D §149:18 (2006); Hillinger & Hillinger, *supra* note 27, at 377-79.
[105] 11 U.S.C. §554(a), (b) (2000). In Midlantic Nat'l Bank v. New Jersey Dep't of Env. Protection, 474 U.S. 494 (1986), the Supreme Court held that "a trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Id.* at 507 (note omitted). But, in its infamous footnote 9, the Court qualified its holding by stating that "[t]he abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." *Id.* at 507 n.9. Commentators uniformly agree that Midlantic "created more confusion than clarity." Brent Bolea, *Bankruptcy Abandonment Power and Environmental Liability,* 106 COM. L. J. 83, 101 (2001); *see* Hillinger & Hillinger, *supra* note 27, at 363 (noting that "[b]y any standard, the Court's 'holding' is elastic"). For a detailed discussion of the variety of approaches taken by the lower federal courts to the abandonment question, *see* Hillinger & Hillinger, *supra* note 27, at 361-371.
[106] *See* Joel Gross, *Abandonment of Contaminated Property in* ENVT'L PRAC. GUIDE §10.14 (2007) (note omitted) (explaining that "[a]bandonment issues have almost always come up in the context of chapter 7 trustees").

worth $1 million, but the cleanup costs associated with the land are estimated at $3 million. The trustee in the chapter 7 case must "manage and operate the property . . . according to the valid laws of the State in which such property is situated."[107] Most courts have interpreted this language as imposing on the trustee an obligation either "to remediate the property or accord administrative expense priority to the party who fulfills the trustee's obligations."[108] But, if the trustee undertakes the cleanup, the estate bears the costs of remediation. Moreover, administrative expenses are priority claims; in a business liquidation case under chapter 7, they are second in line, after the secured creditors, for payment from the estate.[109]

Substantial costs for environmental remediation, therefore, eat away at any potential recovery for general unsecured creditors, who are located at the bottom of the payment priority ladder. As a result, the chapter 7 trustee may file a motion to abandon the property as burdensome to the estate.[110] Doing so removes the polluted property from the debtor's bankruptcy estate.[111] Moreover, any claim by an environmental agency for projected cleanup costs, if allowed, would have unsecured, non-priority status, not administrative priority status.[112] Therefore, abandonment of contaminated property makes more money available in the estate to pay creditors holding claims other than those for environmental remediation.

The problem, however, is that a business debtor uses chapter 7 to go out of business. Thus, after the bankruptcy case, there is no entity to pursue to clean up the contaminated property. For this reason, some commentators consider the abandonment power to be a loophole through which debtors pass in order to avoid their cleanup obligations under state and federal environmental laws.[113]

But, does abandonment work in chapter 11?[114] It is important to remember that property abandoned from the estate typically reverts to the debtor.[115] In a reorganization case, the debtor emerges from bankruptcy and still has possession and control of that

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[107] 28 U.S.C. §959(b) (2000).

[108] Hillinger & Hillinger, *supra* note 27, at 369 (note omitted).

[109] *See* 11 U.S.C.A. §507(a)(2) (West Supp. 2007). A domestic support obligation has priority over the payment of administrative expenses, but is not an issue in a business liquidation case. *See* 11 U.S.C.A. §507(a)(1) (West Supp. 2007). The payment priority ladder in bankruptcy is as follows: (1) secured creditors; (2) unsecured, priority creditors, such as holders of administrative expense claims; and (3) unsecured, non-priority creditors.

[110] *See* Bolea, *supra* note 105, at 87 (noting that "property contaminated with toxic waste is burdensome to the estate when environmental liabilities outweigh the value of the property without such liabilities").

[111] Whether the estate sheds all liability for remediation costs depends on whether abandonment means that the bankruptcy "estate is deemed never to have owned the property". *See* Hillinger & Hillinger, *supra* note 27, at 370.

[112] *See* Hillinger & Hillinger, *supra* note 27, at 371.

[113] *See* Bergmann, *supra* note 12, at 12.

[114] For a good discussion of the issues of abandonment in the context of chapter 11, *see* Joel M. Gross, *The Effect of Bankruptcy on Obligations to Clean Up Contaminated Properties: Recent Developments and Open Issues Two Decades after* Kovacs *and* Midlantic, ANN. SURV. BANKR. L. 1, 23-25 (2003 ed.), *available at* http://www.arnoldporter.com/pubs/files/Effect_Bankruptcy_Contaminated_Properties.pdf [hereinafter *Bankruptcy Obligations*].

[115] Bolea, *supra* note 105, at 88; *see Bankruptcy Obligations*, *supra* note 114, at 23 (explaining that while it "does seem strange", abandoned property in chapter 11 would move from the debtor-in-possession to the debtor).

contaminated property. Therefore, abandonment does not necessarily free the reorganized debtor from continued liability post-confirmation for environmental remediation.[116]

The result differs if the debtor liquidates its business inside chapter 11.[117] As in a chapter 7 case, the debtor goes out of business; therefore, there is no reorganized entity to pursue for the costs of environmental remediation. If the debtor disposes of substantially all of its assets through its chapter 11 liquidating plan, then the prior abandonment of the contaminated property may effectively shift the costs of environmental remediation to the taxpayer.[118]

This distinction between reorganization and liquidation inside chapter 11 is not always made in the commentary on the abandonment power,[119] but it is an important one to bear in mind. While debtors increasingly are using chapter 11 to liquidate,[120] the existing empirical data indicates that the majority of confirmed chapter 11 plans are still plans of reorganization.[121] That explains why the abandonment power has been a tool almost exclusively employed by chapter 7 trustees.[122] For this reason, we did not expect the abandonment power to play a significant role in our sample of chapter 11 cases.

b. The Discharge

Suppose the debtor operates a plant that discharges hazardous waste into a local lake.[123] The state environmental agency obtains an order enjoining the debtor from further polluting the lake and expends funds to clean up the polluted waters. The debtor brings its plant into compliance with state law and stops discharging pollutants into the lake. But, it files for bankruptcy under chapter 11 before the state agency can recoup the costs of cleanup. What happens to the state's recovery of its response costs?[124]

In order to recoup its cleanup costs in full, the state agency would have to argue that the costs are not claims and, therefore, are not dischargeable in the debtor's bankruptcy case. But this argument will fail, because the agency is seeking only the payment of a monetary obligation from the debtor.[125] Thus, the state agency has a claim in the debtor's chapter 11 case; that claim likely has unsecured, non-priority status.[126] If the debtor's plan provides for only partial payment to the unsecured creditors and the

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[116] *See* Bolea, *supra* note 105, at 88; *Bankruptcy Obligations, supra* note 114, at 24.
[117] For a discussion of liquidating plans, *see* John C. Anderson & Peter G. Wright, *Liquidating Plans of Reorganization*, 56 AM. BANKR. L.J. 29 (1982); *see also* Warren & Westbrook, *supra* note 84.
[118] *Cf.* Bolea, *supra* note 105, at 88 (discussing the effect of abandonment in a chapter 7 liquidation case).
[119] *See, e.g.*, Bergmann, *supra* note 12.
[120] Warren & Westbrook, *supra* note 84, at 22.
[121] ELIZABETH WARREN & JAY WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 412 (5th ed. 2006) (stating that data from the Business Bankruptcy Project "show[s] that 20 percent or more of the confirmed plans in Chapter 11 cases are liquidating plans").
[122] *See* Gross, *supra* note 106.
[123] We are indebted to Professor Heidt's excellent and eminently readable analysis about the types of environmental obligations that constitute claims in bankruptcy. *See Fundamental Framework, supra* note 99, at 153.
[124] *See id.* at 167-69.
[125] *See* Ohio v. Kovacs, 469 U.S. 274, 283 (1985) (holding that debtor's obligation was a claim that was dischargeable in bankruptcy, because the State of Ohio sought only the payment of money from the debtor).
[126] The cleanup costs would not qualify as administrative expenses because the state incurred them pre-petition.

bankruptcy court confirms the plan, then the state agency cannot pursue the debtor post-confirmation for the difference between the full costs of cleanup and what the agency received under the terms of the chapter 11 plan.

An agency's efforts to collect fines or penalties imposed pre-petition for violation of environmental rules or regulations meet a similar fate in chapter 11.[127] Such fines or penalties typically are unsecured, non-priority claims. While §523(a)(7) excepts from discharge a debt "to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit,"[128] its language only applies to "an individual debtor."[129] Moreover, unlike the exception from discharge contained at §1328 for criminal fines and restitution in individual reorganization cases under chapter 13, there is no similar language specifically excepting corporate fines or penalties from discharge in chapter 11.[130]

II. METHODOLOGY

A. Project Overview

In its 2005 report to Congress,[131] the GAO criticized the EPA's record with regard to holding business firms financially responsible for their environmental cleanup obligations.[132] In that report, the GAO commented on the almost total absence of data about the number of business firms with environmental liabilities that had sought bankruptcy protection.[133] To address this information vacuum, we designed a research project using PACER, an electronic case service operated by the Administrative Office of the Courts that provides case information and dockets for cases filed in federal court, including the bankruptcy courts.[134]

B. Research Design

We obtained our data by conducting judicial district-by-judicial district searches on PACER. Every judicial district has its own PACER page, which contains a toolbar across the top listing five options, one of which is "Reports." Under "Reports" is an option called "Cases." For bankruptcy cases, a PACER user can conduct case searches employing numerous criteria, such as by trustee name, by bankruptcy chapter, e.g.,

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[127] Joel Gross, *Dischargeability of Environmental Claims in* 2-10 ENVT'L L. PRAC. GUIDE §10.11[3] (2007) ("The discharge that corporations receive in chapter 11 cases is not subject to specific statutory exceptions."). *But see* Statement of Claim at 2 ¶¶3, 5, In re Alternative Fuels, L.C., No. 04-21822) (Bankr. E.D. Mich. Oct. 31, 2005) (Docket No. 62) (contending that civil fines and penalties are not dischargeable under 11 U.S.C. §523(a)(7)).

[128] 11 U.S.C. §523(a)(7)(2000).

[129] *Id.*

[130] *See* 11 U.S.C.A. §1328(a)(3) (West Supp. 2007); *see* Susan R. DeSimone, *The Price of Doing Business: Environmental Criminal Fines and the Administrative Expense Solution*, 17 EMORY BANKR. DEV. J. 489, 507 (2001).

[131] *See supra* notes 13-18 and accompanying text.

[132] *See* GAO REPORT, *supra* note 13.

[133] *See supra* notes 13-18 and accompanying text.

[134] PACER is an acronym for Public Access to Court Electronic Access. The web address is http://pacer.psc.uscourts.gov/.

chapter 7 versus 11, and by type of case, e.g., bankruptcy case versus adversary proceeding.

We limited our PACER searches to chapter 11 cases filed in 2004 and closed by the middle of 2006. Our interest in locating business bankruptcy filings meant that we had to search either for chapter 7 or chapter 11 cases. We selected chapter 11 for two reasons. First, the GAO Report indicated that "[m]ost bankruptcy claims EPA pursues in court are chapter 11 reorganizations."[135] Second, PACER charges a fee for access to the documents on its system.[136] The sheer number of annual chapter 7 filings made a chapter 7 project prohibitively expensive and time consuming.[137]

We selected 2004 as our search year. In order to avoid having to monitor the progress of multiple open cases in ninety-two judicial districts we decided to limit the searches to closed cases. The mid-2006 closing date was a function of the time period during which we began searching in the PACER database. Due to the rolling nature of the search process, the search date for each district varied. We conducted the earliest searches in June 2006, but did not complete some of the later searches until September 2006.

Thus, our search criteria consisted of the following: (1) chapter 11 bankruptcy cases, (2) filed between January 1, 2004, and December 31, 2004, and (3) closed at the time of the search, which was some time in mid-2006.[138] Unlike Lexis or Westlaw, PACER does not contain centralized libraries of data that are searchable by key words or

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[135] GAO REPORT, *supra* note 13, at 16.

[136] Users must register with the PACER Service Center in order to obtain a login and password. PACER charges $.08 per page for every docket viewed or printed; for most services on PACER the user is charged up to a maximum of 30 pages. Thus, the fee for a 30-page document and the fee for a 100-page document are identical - $2.40.

[137] In 2004, there were 1,137,958 chapter 7 filings, but only 10,132 chapter 11 filings, of which 9186 were business filings. *See* Table F-2, Business and NonBusiness Bankruptcy Cases Commenced, By Chapter of the Bankruptcy Code During the Twelve Month Period Ended Dec. 31, 2004, http://www.uscourts.gov/bnkrpctystats/bankrupt_f2table_dec2004.pdf. [hereinafter 2004 Bankruptcy Filings].

[138] There are several cases in the database that did not close by the middle of 2006 and that, in fact, are still open. Some open cases are included in the search results because the case was part of a jointly administered case in which the majority of the affiliated debtors' cases had closed by mid-2006. *See, e.g.*, In re BrainPlay.com, Inc., No. 04-10131 (Bankr. D.Del. Jan. 14, 2004) (one of three open cases in the seventy-debtor jointly administered KB Toys, Inc. chapter 11 filing). In some jointly administered cases, the open case is the lead case, and the docket in that lead case contains the documents necessary to determine either the presence of environmental liability or how the debtor dealt with environmental issues disclosed on the Statement of Financial Affairs. *See, e.g.*, Docket, In re KB Toys, Inc., No. 04-10120 (Bankr. D.Del. Jan. 14, 2004) (Docket Nos. 473-501, 503-543) (lead case docket providing access to the Statement of Financial Affairs for seventy affiliated debtors). In a jointly administered case, the affiliated debtors' cases may close after confirmation, but the lead case may remain open to address various issues, for example objections to claims. For example, in the US Airways bankruptcy case, the debtors' objection to the claim by the Maryland Department of the Environment is still pending, even though the bankruptcy court confirmed the debtors' plan on September 16, 2005. *See* Hearing Continued re: Objection to Claim, In re US Airways, Inc., No. 04-13819 (Bankr. D.Del. April 19, 2007) (Docket 4491) (continuing hearing on debtors' fourth omnibus objection to claims, which includes debtors' objection to claim filed by Maryland Department of the Environment).

phrases. As a result, we conducted the same basic search in ninety-two of the ninety-four judicial districts in the United States federal court system.[139]

We then eliminated individual debtors from each district's search results, counting only debtors engaged in business, e.g., corporations, limited partnerships.[140] The resulting database contains 5651 chapter 11 business cases filed in calendar year 2004 and closed by the middle of 2006.[141] *See* Table I, Column B Totals.

C. Counting Cases

For each of these 5651 cases, we searched the case docket on PACER for Official Form 7, commonly known as the Statement of Financial Affairs ("SFA"), which every debtor must file in its bankruptcy case.[142] In September 2000, the Judicial Conference of the United States amended the SFA[143] to require debtors to disclose in Question 17 all potential and actual environmental hazards, including pending and completed judicial and administrative proceedings.[144] In order to arrive at accurate statistics about the percentage

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[139] We did not conduct bankruptcy case filing searches for Guam or the North Mariana Islands. In fact, there were no business chapter 11 cases filed in Guam or the North Mariana Islands during 2004. *See* 2004 Bankruptcy Filings, *supra* note 137. In addition, PACER does not provide access to bankruptcy court data for the North Mariana Islands.

[140] We did not exclude general partnerships when collecting the basic data or in the adjustment phase discussed *infra* in Part II.C.1. But, for the reasons provided *infra* in note 176, we did exclude from our results any general partnership that answered Question 17 affirmatively.

[141] We encountered an unexplained anomaly during our PACER searches. We limited our searches to cases filed in 2004 and closed by mid-2006. Some of the 2004 cases remained open past the middle of 2006; therefore, we anticipated a difference between the number of cases we found in each district and the actual number of chapter 11 business filings by district for calendar year 2004. The disparity between found and filed cases varied so significantly by district, however, that we re-did the searches in several districts. This time, we also conducted open case searches to determine whether open cases might account for the disparity in number of cases found versus filed. To our surprise, the number of cases that we obtained – both open and closed – using PACER's search engine did not correspond with the actual filings within the districts in which we conducted spot checks. For example, there were 12 chapter 11 filings in the district of Alaska in 2004, one of which was an individual debtor case. *See* 2004 Bankruptcy Filings, *supra* note 137. Our search, conducted on July 10, 2007, found a total of 5 cases, 4 of which were closed. *See* Cases Report for 7/10/2007, U.S. Bankruptcy Court, District of Alaska (on file with authors). When we contacted the PACER Service Center, a customer service representative repeated the search and also obtained only 5 cases. We encountered similar discrepancies in other judicial districts. *See, e.g.*, Cases Report for 7/9/2007, U.S. Bankruptcy Court, Middle District of Alabama (on file with authors) (showing a total of 6 cases, both open and closed, when there actually were 14 chapter 11 cases filed in 2004 in the district); Cases Report for 7/10/2007, U.S. Bankruptcy Court, District of Puerto Rico (on file with authors) (showing a total of 113 cases, both open and closed, when there were 137 chapter 11 filings in 2004). It appears, therefore, that PACER's case search engine does not provide access to a sizeable minority of chapter 11 bankruptcy case filings.

[142] Official Form 7, BANKRUPTCY CODE, RULES AND FORMS 713 (2007 ed.). All debtors filing for bankruptcy must complete Questions 1 through 18 of Official Form 7. *Id.* Debtors in business also must complete Questions 19-25 of the SFA. *Id.* In a voluntary case, the debtor must file its schedules and statements either with its petition or within 15 days of filing the petition. FED. R. BANKR. P. 1007(A)(4)(C).

[143] *See* 15 COLLIER ON BANKRUPTCY, FEDERAL RULES OF BANKRUPTCY PROCEDURE AND OFFICIAL FORMS app. pt. 2, at 4 (15th ed. 2007).

[144] Question 17 has three subparts. Part a requires the debtor to "[l]ist the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law." Official Form 7, BANKRUPTCY CODE, RULES AND FORMS 713, 719 (2007 ed.). Question 17b requires the debtor to disclose the name and address for each

of debtors that disclose environmental issues in Question 17 of the SFA, however, we had to make adjustments to our pool of cases.

1. Adjustments to Search Results Totals

Column C of Table I provides the adjustments made by district to our initial search results. We made several types of adjustments to the raw number of cases.

First, in some jointly administered cases, we found only a consolidated SFA, instead of a separately filed SFA, for each debtor in the procedurally consolidated case.[145] In two cases, that consolidated SFA failed to disclose to which of the debtors in the jointly administered case Question 17 pertained.[146] In these two cases only, we treated the individually filed chapter 11 petitions as a single chapter 11 case. The Footstar case provides a dramatic illustration of the problem.

On March 2, 2004, Footstar, Inc. and 2528 of the firm's "direct and indirect subsidiaries" filed for bankruptcy protection under chapter 11.[147] The next day, on March 3, 2004, the court granted Footstar's motion for joint administration of the bankruptcy cases.[148] Footstar, Inc. subsequently filed a consolidated Statement of Financial Affairs

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"site for which the debtor provided notice to a governmental unit of a release of Hazardous Material." *Id.* Finally, part c of Question 17 mandates disclosure of "all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party." *Id.* Official Form 7 defines "Environmental Law" broadly as "any federal, state or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or materials into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to, statutes or regulations regulating the cleanup of these substances, wastes, or material." *Id.* The phrase "hazardous material" also has a broad reach, "mean[ing] anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law." *Id.*

[145] The federal rules of bankruptcy procedure permit the procedural consolidation or joint administration of one or more cases involving affiliated debtors that are pending before the same bankruptcy court. *See* FED. R. BANKR. P. 1015(b). Procedural consolidation differs from substantive consolidation. Procedurally consolidated cases often share "a single case file and docket in the court clerk's office and combination notices for many motions, but the assets and liabilities of each debtor remain distinct." Mary Elizabeth Kors, *Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381, 381 n.1 (1998) (citations omitted). Substantive consolidation, on the other hand, effects a merger of "two or more legally distinct (albeit affiliated) entities into a single debtor with a common pool of assets and a common body of liabilities." *Id.* at 381. While the corporate entities retain their status as separate legal entities once they emerge from bankruptcy, inside the bankruptcy case the affiliated debtors are treated as a single debtor with the assets and liabilities of each affiliated debtor becoming the assets and liabilities of the consolidated debtor. *See id.*

[146] *See* Statement of Financial Affairs at 7, In re Haynes International, Inc., No. 04-05364 (Bankr. S.D. Ind. April 28, 2004) (Docket No. 183) (filed with consolidated schedules); Statement of Financial Affairs at 6, In re Footstar, Inc., No. 04-22350 (Bankr. S.D. N.Y. June 30, 2004) (Docket No. 894).

[147] Chapter 11 Voluntary Petition at Exh. A, In re Footstar, Inc., No. 04-22350 (Bankr. S.D. N.Y. March 2, 2004) (Docket No.1). The debtor said that there were 2524 affiliated debtors, in addition to Footstar, Inc., yet Exhibit A to the bankruptcy court's order granting the debtors' motion for joint administration lists a total of 2929 debtors, including Footstar, Inc. *See* Order Pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure Directing Joint Administration of Chapter 11 Cases at Exh. A, In re Footstar, Inc., No. 04-22350 (Bankr. S.D. N.Y. March 3, 2004) (Docket No. 37) [hereinafter Footstar Joint Administration].

[148] *See* Footstar Joint Administration, *supra* note 147. On September 30, 2005, the bankruptcy court for the Eastern District of New York granted Footstar's motion for substantive consolidation. *See* Order Pursuant

for itself and its affiliated entities, listing in Question 17 the Dover, New Hampshire Municipal Landfill, which is a Superfund site.[149] Footstar, however, failed to identify which of the 2529 debtors bore responsibility for the Dover landfill site. Counting the Dover disclosure on the consolidated SFA as 2529 affirmative responses to Question 17 would seriously skew the total number of chapter 11 debtors disclosing some form of environmental liability. Therefore, we counted all 2529 Footstar cases as a single chapter 11 filing.

Second, the raw bankruptcy filing totals include both serial and duplicate filings by the same debtor or, in involuntary cases, the same creditor. For example, on March 2, 2004, C Denver, LLC, filed for relief under chapter 11 in the district court for Colorado.[150] Less than a month later, the bankruptcy court dismissed the case.[151] About a month after the dismissal, C Denver once again filed for relief under chapter 11[152] and, once again, the bankruptcy court dismissed the case.[153]

Debtors also file duplicate voluntary petitions. For example, on January 12, 2004, Blue Grass Manufacturing Company of Lexington, Inc. filed two voluntary petitions seeking relief under chapter 11 in the bankruptcy court for the Eastern District of Kentucky.[154] On January 14, 2004, the bankruptcy court granted the debtor's motion to dismiss its second-filed chapter 11 case.[155] Counting sequential or duplicate bankruptcy filings by the same debtor (or creditor)[156] as separate cases distorts, albeit minimally

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to Sections 105, 363 and 1112(b) of the Bankruptcy Code and Bankruptcy Rules 1017 and 9014 Granting Substantive Consolidation at 1, In re Footstar, Inc., No. 04-22350 (Bankr. S.D. N.Y. Sept. 30, 2005) (Docket No. 2839). The court's order also authorized the debtors to dismiss the bankruptcy cases of the affiliated Footstar entities. *See id.* As of August 2007, Footstar, Inc.'s chapter 11 case remains open.

[149] *See* United States Envt'l Prot. Agency, Superfund Info. Sys., Superfund Site Info., http://cfpub.epa.gov/supercpad/cursites/srchsites.cfm (last visited Aug. 15, 2007) (search active sites by typing in either "NHD980520191" for EPA ID, or "Dover Municipal Landfill" for Site Name).

[150] *See* Chapter 11 Voluntary Petition, In re C Denver, LLC, No. 04-13679 (Bank. D. Colo. March 2, 2004) (Docket No. 2).

[151] *See* Order Dismissing Case, In C Denver, LLC, No. 04-13679 (Bankr. D. Colo. March 31, 2004) (Docket No. 20).

[152] *See* Chapter 11 Voluntary Petition, In C Denver, LLC, No. 04-19314 (Bankr. D. Colo. May 3, 2004) (Docket No.2).

[153] *See* Order Dismissing Case, In C Denver, LLC, No. 04-19314 (Bankr. D. Colo. June 3, 2004) (Docket No. 37).

[154] *See* Chapter 11 Voluntary Petition, In re Blue Grass Mfg. Co. of Lexington, Inc., No. 04-50071 (Bankr. E.D. Ky. Jan. 12, 2004) (Docket No. 1); Chapter 11 Voluntary Petition, In re Blue Grass Mfg. Co. of Lexington, Inc., No. 04-50072 (Bankr. E.D. Ky. Jan. 12, 2004) (Docket No. 1).

[155] *See* Order Dismissing Case No 04-50072 and Refunding Filing Fee, In re Blue Grass Mfg. Co. of Lexington, Inc., No. 04-50072 (Bankr. E.D. Ky. Jan. 14, 2004) (Docket No. 5).

[156] Some creditors also fail to heed the bankruptcy court's dismissal of the initial involuntary petition against the debtor and decide to re-file. On July 27, 2004, Quality Streamline Management Services, LLC, ("QSMS") filed an involuntary petition against GF Foods, Inc. in the bankruptcy court for the district of Arizona. *See* Involuntary Chapter 11 Petition, In re GF Foods, Inc., No. 04-13156 (Bankr. D. Ariz. July 27, 2004) (Docket No. 1). The bankruptcy court dismissed the case on August 13, 2004, for failing to pay the filing fee. *See* Order Dismissing Case, In re GF Foods, Inc., No. 04-13156 (Bankr. D. Ariz. Aug. 13, 2004) (Docket #3). Two months later, QSMS filed a second involuntary petition against GF Foods, Inc. *See* Involuntary Chapter 11 Petition, In re GF Foods, Inc., No. 04-18136 (Bankr. D. Ariz. Oct. 15, 2004) (Docket No. 1). This time, the bankruptcy court not only dismissed the involuntary petition, it also imposed sanctions of $63,541 on QSMS. *See* Order Dismissing Case, In re GF Foods, Inc., No. 04-18136 (Bankr. D. Ariz. Nov. 4, 2004) (Docket No. 16); Order Granting Motion for Sanctions at 2 ¶B, In re GF Foods, Inc., No. 04-18136 (Bankr. D. Ariz. Dec. 27, 2004) (Docket No. 31).

given the small percentage of cases in which serial or double filing occurs, the actual number of debtors seeking bankruptcy protection under chapter 11.

Third, in a few instances, our search produced cases that had been filed in 2004 but consolidated with cases filed in earlier calendar years. For example, the Oakwood debtors–five related business entities–filed for relief under chapter 11 on March 5, 2004.[157] About sixteen months earlier, in November 2002, fifteen other affiliated entities–the Oakwood Homes' ("OH") debtors–also had filed for bankruptcy protection under chapter 11.[158] On March 10, 2004, the bankruptcy court granted the Oakwood debtors' motion to procedurally consolidate the Oakwood debtors' cases with the OH debtors' cases,[159] and three weeks later, the bankruptcy court confirmed the OH debtors' joint consolidated plan of reorganization.[160] Thus, we treated the 2004 Oakwood debtors as part of the 2002 case and did not count their bankruptcy filings in the search results for 2004. We reached a similar conclusion with regard to two chapter 11 cases filed in 2004 in Oregon and procedurally consolidated with the chapter 11 cases of four related entities that had filed for bankruptcy protection in late 2003.[161] The impact of this decision was minimal, eliminating a total of only seven cases from the search results for calendar year 2004,[162] although we did lose one case in which the debtor had responded affirmatively to Question 17.[163]

Finally, we made adjustments to the original search results totals for cases transferred either within a judicial district[164] or from one judicial district to another.[165] A

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[157] The five affiliated debtors in the 2004 cases were Oakwood Financial Corporation, Oakwood Investment Corporation, Oakwood Servicing Holdings Co., LLC, Oakwood Advance Receivables Company II, LLC, and Oakwood Tranche C Servicing Advance Receivables Company, LLC. *See* Voluntary Chapter 11 Petition at Sch. 1, In re Oakwood Fin. Corp., No. 04-10743 (Bankr. D. Del. March 5, 2004) (Docket No. 1)[hereinafter Oakwood Petition].

[158] Oakwood Homes Corporation was the lead case for the 2002 filings. *See* In re Oakwood Homes Corp., No. 02-13396 (Bankr. D. Del. Nov. 15, 2002). For a list of the affiliated debtors in the 2002 case, *see* Oakwood Petition, *supra* note 157, at Sch. 1.

[159] *See* Order (A) Granting Relief in Connection with the Commencement of Chapter 11 Cases by the SPE Debtors and (B) Incorporating the SPE Debtors into the Disclosure Statement and Plan as Small Business Debtors, In re Oakwood Fin. Corp., No. 04-10743 (Bankr. D. Del. March 10, 2004) (Docket No. 6).

[160] *See* Findings of Fact and Conclusions of Law Relating to, and Order Under 11 U.S.C. §§1129(a) and (b) Confirming Second Amended Joint Consolidated Plan of Reorganization of Oakwood Homes Corporation and its Affiliated Debtors and Debtors in Possession, In re Oakwood Homes Corp., No. 02-13396 (Bankr. D. Del. March 31, 2004) (Docket No. 3937). Two of the five 2004 debtors, however, were not listed in the footnote to the bankruptcy court's confirmation order as one of the debtor entities to which the confirmed plan applied. *See id.* at 1 n.1.

[161] *See* Supplemental Order Directing the Joint Administration of Chapter 11 Cases, In re Northwest Aluminum Co., No. 04-42061 (Bankr. D. Or. Nov. 15, 2004) (Docket No. 16) (directing joint administration for Northwest Aluminum Company and Northwest Aluminum Specialties, Inc.).

[162] The alternative – counting the 2002 and 2003 cases in with the 2004 cases – would have added nineteen cases to the search results for calendar year 2004.

[163] *See* Statement of Financial Affairs at 10-12, In re Northwest Aluminum Co., No. 04-42061 (Bankr. D. Or. Nov. 24, 2004) (Docket No. 19) (filed with schedules).

[164] *See, e.g.*, Order Transferring Case to Judge Cohen, I re Bryan Animal Clinic, P.C., No. 04-83566 (Bankr. N.D. Ala. Aug. 6, 2004) (Docket No. 5) (Decatur division); Chapter 11 Voluntary Petition, In re Bryan Animal Clinic, P.C., No. 04-83566 (Bankr. N.D. Ala. Aug. 6, 2004) (Docket No. 1) (Birmingham division).

[165] *See* Findings of Fact and Conclusions of Law Transferring Venue of Related Chapter 11 case: "IN RE STALLION USA, LLC, case No. 04-BK-8167" from The Middle District of Florida - Tampa Division to

transferred case involves the same debtor; thus, counting the originally filed and the transferred case as two cases distorts the true number of chapter 11 filings for 2004.

Thus, the figures in Column D of Table I include, with limited exceptions, chapter 11 business cases filed between January 1, 2004 and December 31, 2004, and closed some time between June and September 2006. The exceptions involve jointly administered cases in which either the lead or an affiliated debtor case remained open into 2007, even though the majority of the jointly administered cases had closed out by mid-2006. As Column D of Table I indicates, the adjustments left a total of 3012 cases. The significant drop in number of cases from Column B to Column D of Table I is largely attributable to counting the 2529 individual Footstar cases as a single bankruptcy filing.[166]

2. Old SFAs, No SFAs, and Inaccessible SFAs

One purpose of our research project was to determine the percentage of chapter 11 debtors that disclosed environmental liabilities in Question 17. In a number of the bankruptcy cases examined, however, we could not determine whether the firm actually had environmental liabilities, due to three types of problems that we encountered.

First, some debtors filed the old, rather than the new, SFA.[167] Question 17 on the old SFA asked the debtor to disclose information about individuals or firms that had audited, supervised, or had possession of the debtor's account books and records, as well as entities to which the debtor had provided financial statements.[168] The old SFA contained no environmental information question.[169] As Column C of Table II indicates, in many districts not a single debtor used the old SFA. But, in other districts, a surprising number of debtors filed the old SFA, given that the Judicial Conference of the United States had amended the SFA to include disclosure on environmental liabilities more than two and a half years before the earliest-filed case among our calendar year 2004 search results.[170]

Second, in a number of cases, the bankruptcy case closed, often after the court had dismissed the debtor's petition but before the debtor had filed its SFA.[171] Of course,

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the Central District of California - San Fernando Valley Division, In re Stallion USA LLC, No. 04-08167 (Bankr. M.D. Fla. Aug. 9, 2004) (Docket No. 38).

[166] *See supra* notes 147-49 and accompanying text.

[167] *See, e.g.*, Statement of Financial Affairs, In re Interstate 95 Distrib., Inc., No. 04-24513 (Bankr. D.Md. June 30, 2004) (Docket No. 12); Statement of Financial Affairs, In re 2080 Manneheim, Inc., No. 04-12228 (Bankr. N.D. Ill. March 29, 2004) (Docket No. 1) (filed with petition); Statement of Financial Affairs, In re D.E. Mgmt., Inc., No. 04-25408 (Bankr. D. Utah May 12, 2004) (Docket No. 10) (filed with schedules); Statement of Financial Affairs, In re L J K K Olde Europe LLC, No. 04-00123 (Bankr. E.D. Wash. March 11, 2004) (Docket No. 17).

[168] Official Form 7, BANKRUPTCY CODE, RULES AND FORMS 964, 970 (2001 ed.). Question 19 on the new SFA is the counterpart to the books, records and financial statements question from the old SFA. *See* Official Form 7, BANKRUPTCY CODE, RULES AND FORMS 713, 720-21 (2007 ed.).

[169] *See generally* Official Form 7, BANKRUPTCY CODE, RULES AND FORMS 964-973 (2001 ed.).

[170] *See supra* notes 142-44 and accompanying text. In Maryland, twenty percent of the debtors filed the old, rather than the new, SFA.

[171] *See, e.g.*, Docket, In re Envtl. Land Tech., Ltd., No. 04-00525 (Bankr. D.D.C. March 30, 2004); Docket, In re McEwen Eng'g and Mining, Consultant, Inc., No. 04-41531 (Bankr. W.D. Ky. July 27, 2004); Docket, In re Brake Stuff, Inc., No. 04-46133 (Bankr. D. Mass. Nov. 2, 2004); Docket, In re NEW Energy, LLC, No. 04-22387 (Bankr. D. Wyo. Dec. 13, 2004). In a few cases, the bankruptcy court granted the

in some cases, the debtor's failure to file the required schedules and SFA, in part, precipitated the case dismissal.[172] Column D of Table II provides the number of cases per district in which the debtor did not file an SFA.

Finally, in ten of the ninety-two judicial districts in which we conducted searches, we could not access the SFA because PACER did not provide electronic links to either some or all of the documents listed on the case dockets.[173] Included in this no-access category are a few isolated cases in which the debtor filed an SFA but we could not read Question 17 because the SFA was filed under seal[174] or because relevant pages were missing from the copy of the SFA available on PACER.[175] Column E of Table II provides the district-by-district totals of cases in which the SFA was not accessible.

In conclusion, we had useable data for 74% of the cases-2231 cases of the 3012 cases from the adjusted total in Column D of Table I. Column F of Table II provides a district-by-district total of the cases with useable information from Question 17 of the SFA.

III. FINDINGS

A. Overview

In ninety-three cases,[176] the debtor disclosed in its bankruptcy filings some type of environmental issue.[177] *See* Column B of Table III. The number of cases in which

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debtor a waiver of its obligation to file schedules or the statement of financial affairs. *See, e.g.*, Order (I) Granting Debtors Additional Time To File Schedules And Statements And (II) Permanently Waiving The Requirement To File Schedules And Statements Upon Confirmation Of The Debtors' Plan, In re Applied Extrusion Techn., Inc., No. 04-13388 (Bankr. D. Del. Jan. 24, 2005) (Docket No. 215).

[172] *See, e.g.*, U.S. Trustee's Motion to Dismiss at 1 ¶2, In re Kramer Crop Serv. Trust, No. 04-00105 (Bankr. N.D. Iowa Feb. 4, 2004) (Docket No. 11) (stating that "Debtor did not file the schedules and statement of financial affairs required by Bankruptcy Rule 1007(b)(1)"); United States Trustee's Report on Deficiencies Regarding Administration at 1 ¶3a, In re Charlie's Chicken of Tulsa, LLC, No. 04-13942 (Bankr. N.D. Okla. Sept. 28, 2004) (Docket No. 69) (noting that debtor had failed to file its Statement of Financial Affairs).

[173] The districts with limited or no access to case documents are the following: (1) Northern District of Alabama; (2) Southern District of Florida; (3) Middle District of Georgia; (4) Central District of Illinois; (5) Eastern District of Michigan; (6) Southern District of Mississippi; (7) Eastern District of Tennessee; (8) Middle District of Tennessee; (9) Western District of Virginia; and (10) the District for the Virgin Islands.

[174] *See* Order Authorizing Debtors to File Redacted Copies of Those Portions of Their Schedules G, Certain Portions of Other Schedules and Statements of Financial Affairs Referencing the Identity of Their Clients at 2 ¶C, In re Admin. Employer Group, Inc., No. 04-16088 (Bankr. N.D. Ill. June 2, 2004) (Docket No. 30) (allowing the filing under seal of the Statement of Financial Affairs).

[175] *See, e.g.*, Statement of Financial Affairs, In re Sunco Equipment Company, No. 04-12399 (Bankr. C.D. Cal. April 21, 2004) (Docket No. 26) (skipping from Question 16 to 17c); Statement of Financial Affairs, In re DBR Inc., No. 04-11795 (Bankr. D. Kan. May 7, 2004) (Docket No. 77) (filed with schedules) (skipping from Question 16 to Question 21b).

[176] We found ninety-eight cases, but in five the debtor either was a general partnership or was solely owned by a general partnership. *See* Chapter 11 Voluntary Petition, In re Furnas County Farms, No. 04-81489 (Bankr. D. Neb. May 3, 2004) (Docket No. 1) (general partnership); Chapter 11 Voluntary Petition, MBK P'ship, No. 04-69814 (Bankr. D. Or. Dec. 17, 2004) (Docket No. 2) (general partnership). The Furnas County bankruptcy case involved five related entities, of which four had environmental issues – Furnas County Farms, the general partnership, and three corporations or limited liability companies that were solely owned by the general partnership. *See, e.g.*, Statement of Financial Affairs at 8, In re 7-11 Pork

environmental issues played a role in the debtor's bankruptcy case, however, is even smaller.

First, in twenty-one cases, the debtor clearly had no pending environmental issues at the time of the bankruptcy filing. We discuss these false positive cases below in Part III.B. Second, in only five of 2231 cases, or two-tenths of one percent of the cases did the debtor's environmental liabilities play a role in its decision to file for relief under chapter 11. We address these five cases in Part III.C.

Finally, in Part III.D, we consider those forty-two cases that had a potential environmental issue at the time of bankruptcy filing and that emerged from chapter 11 with a confirmed plan. We examined these forty-two cases to determine the impact of the abandonment power and the ability of the debtor to discharge environmental liabilities under chapter 11. We found only one debtor that successfully abandoned contaminated property in its chapter 11 case. This finding suggests that concerns about misuse of the abandonment power, at least in the context of chapter 11, are without merit. By comparison, the power to discharge environmental liability played a more important role in the cases in our data set than did the abandonment power. But, even assuming the worst-case scenario, in which every single debtor with a confirmed plan discharged some or all of its environmental debts in its bankruptcy case, in only forty-two of 2231 cases, or 1.9% of the cases, were environmental liabilities discharged as a result of the chapter

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Food, Inc., No. 04-81490 (Bankr. D. Neb. May 18, 2004) (Docket No. 48) (filed with schedules). "The discharge of a partnership under section[ ] 1141 . . . does not . . . discharge a general partner of the partnership." *Discharge of Partnership Liabilities*, COLLIER BANKR. PRAC. GUIDE §20.09 (2007). Therefore, the concerns about limited liability entities using bankruptcy in order to evade their environmental obligations do not apply to general partnerships. Unless they file for bankruptcy themselves, the owners of the general partnership are still liable post-bankruptcy for the firm's debts.

[177] In these ninety-three environmental cases, the debtor responded affirmatively to some or all of Question 17. In In re Mr. Green Jade, Inc., while the debtor answered "none" to Question 17, it indicated on Exhibit C to the voluntary petition that there were "gas tanks under main building." Chapter 11 Voluntary Petition, Exh. C, In re Mr. Green Jade, Inc., No. 04-50389 (Bankr. E.D. Mo. Aug. 17, 2004) (Docket No. 2). Exhibit C to the petition requires the debtor to disclose any "dangerous condition" with regard to either real or personal property that "poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety." Official Form 1, Exh. C, BANKRUPTCY CODE, RULES AND FORMS 657, 662 (2007 ed.). For most debtors, we did not examine Exhibit C, which is appended to the debtor's petition. While other debtors also may have attached Exhibit C to their petitions yet answered "no" to Question 17 of the SFA, we do not believe that the number of debtors doing so is significant. First, it is quite unlikely that a debtor would indicate the presence of an environmental hazard that posed an imminent threat to public health or safety without also disclosing that matter under Question 17 of the SFA. Second, our results demonstrate that the SFA is a far more reliable indicator of environmental issues than Exhibit C. In ninety-two of the ninety-three environmental cases, we had access to the petition and, hence, to Exhibit C; in only one of these ninety-two cases did the debtor respond affirmatively to Question 17 and also append Exhibit C to its petition. *See* Chapter 11 Voluntary Petition, Exh. C, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. April 29, 2004) (Docket No. 1) (disclosing the presence of 26,000 tons of tire shred and 220 tons of whole tires that might pose harm to public health or safety if an uncontrolled fire occurred at the debtor's facility). In Amjust, LLC, the debtor clearly misunderstood Question 17; it put its meat processing facility under "Site Name" but answered "none" for governmental unit, date of notice, and environmental law under Question 17a. *See* Statement of Financial Affairs at Q17a, In re Amjust, LLC, No. 04-24829 (Bankr. W.D. Wash. Nov. 18, 2004) (Docket No. 1) (filed with petition). But, the debtor attached Exhibit C to its petition, in which it expressed concern about the possible migration of petrochemicals from an adjoining contaminated Exxon station. *See* Voluntary Chapter 11 Voluntary Petition, Exh. C, In re Amjust, LLC, No. 04-24829 (Bankr. W.D. Wash. Nov. 18, 2004) (Docket No. 1).

11 proceeding. Consequently, it appears that the strategic use of chapter 11 by debtors to circumvent their environmental obligations is an uncommon phenomenon.

B. False Positives

In ninety-three cases, debtors disclosed some form of environmental matter in their bankruptcy filings. This number, however, is misleading, because in twenty-one of those ninety-three cases, the debtor, in effect, had no environmental concerns at the time of the bankruptcy filing. Therefore, in seventy-two cases, or approximately 3.2% of the cases in our data set, the debtor disclosed an environmental notice, violation or liability that possibly was still pending at the time of the bankruptcy filing ("the environmental cases").[178]

In seven cases, the debtor obviously misread the language of Question 17.[179] *See* Table III, Column C. For example, in 162-164 Skillman Street Corp.,[180] the debtor, in his handwritten SFA, circled "none" for Question 17a, but drew a circle and arrow pointing to a barely legible reference to the City of New York Department of Environmental Protection,[181] based on the debtor's liability for water taxes totaling $1136.[182] The debtor in Prestwick Services, Inc., listed, under Question 17b, what appeared to be an insurance certificate issued by a private financial firm's small business lending unit; Question 17b,

[178] We use the word "possibly" because in some cases it appeared that the debtor may have resolved the environmental issue pre-petition although the debtor did not expressly so state on the SFA. *Cf. infra* note 189.

[179] *See* Statement of Financial Affairs at 7, In re Mecklenburg Mill Assocs., LP, No. 04-30212 (Bankr. W.D. N.C. Feb. 20, 2004) (Docket No. 18) (filed with schedules) (stating "N/A" under name of governmental unit and noting that debtor had "conduct[ed] a lead-based paint analysis . . . but [found] no lead based paint hazards at the facility"); Statement of Financial Affairs at 5, In re Womack Contractors, Inc., No. 04-74734 (Bankr. E.D. Va. Sept. 1, 2004) (Docket No. 48) (filed with schedules) (providing only a site name and address under Question 17a with no name for governmental unit and no indication of any environmental violation, notice, or liability). We did not include four other debtors in this category, largely because we could not ascertain whether an environmental violation had or had not occurred. For example, in In re Online, Inc., the debtor listed an August 2003 notice from the Center for Devices and Radiological Health with "21 CFR Subpart B" as the relevant environmental law. *See* Statement of Financial Affairs at Q.17a, In re Online, Inc., No. 04-72474 (Bankr. N.D. Ill. June 14, 2004) (Docket No. 15). Without the C.F.R. section number, we could not determine what regulation the debtor had violated. Chapter 21 of the CFR, however, deals with "Food and Drugs'; therefore, it is likely that the debtor's disclosure did not deal with an environmental violation. In another three cases filed in the Southern District of New York, the debtors – all related entities – each filed two copies of their SFAs, checking "none", leaving blank, or putting a question mark next to Question 17 on the first SFA, and stating, in a handwritten notation on the second SFA, that "only trustee knows." *See, e.g.*, Statement of Financial Affairs at 6 & Q.17, In re 196 Albany Ave. Realty Corp., No. 04-26211 (Bankr. E.D. N.Y. Dec. 2, 2004) (Docket No. 11) (filed with schedules). While the docket contained a notation that "[t]he Receiver may continue asbestos removal," we could not determine if a government notice had triggered the asbestos removal. *See* Docket, In re 196 Albany Ave. Realty Corp., No. 04-26211 (Bankr. E.D. N.Y. Nov. 24, 2004); Docket, In re 1173 Bergen St. Realty Corp., No. 04-26213 (Bankr. E.D. N.Y. Nov. 24, 2004); Docket, In re 720 Livonia Ave. Realty Corp., No. 04-26215 (Bankr. E.D. N.Y. Nov. 24, 2004).

[180] No. 04-23601 (Bankr. E.D. N.Y. Sept. 23, 2004).

[181] *See* Statement of Financial Affairs at Q.17, In re 162-164 Skillman Street Corp., No. 04-23601 (Bankr. E.D. N.Y. Oct. 19, 2004) (Docket No. 11) (filed with schedules).

[182] *See* List of Creditors Holding 20 Largest Unsecured Claims, In re 162-164 Skillman Street Corp., No. 04-23601 (Bankr. E.D. N.Y. Oct. 19, 2004) (Docket No. 11) (filed with schedules).

however, mandates disclosure of debtor notices to governmental entities, not to private firms.[183]

We included in this group of seven debtors those that answered Question 17b affirmatively, even though the notice provided did not indicate a release of hazardous material.[184] For example, the debtor in MJ Research, Inc., noted under Question 17b that on May 10, 2001, it had "filed a Uniform Hazardous Waste Manifest" with both the Massachusetts Department of Environmental Protection and the Arkansas Department of Environmental Quality.[185] But, a Uniform Hazardous Waste Manifest is simply an EPA form used to track shipments of hazardous waste.[186] Filing the manifest is an administrative act that carries no connotation of an environmental violation.

Moreover, in another fourteen cases,[187] the debtor, prior to its bankruptcy filing, either had remedied its failure to comply with applicable environmental laws[188] or had

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[183] *See* Statement of Financial Affairs, In re Prestwick Servs., Inc., No. 04-33943 (Bankr. N.D. Tex. April 21, 2004) (Docket No. 8) (filed with schedules).

[184] *See supra* note 144 for language of Question 17.b. *See* Statement of Financial Affairs at 6, In re King's Auto Body, Inc., No.04-50815 (Bankr. D. Nev. April 19, 2004) (Docket No. 12) (listing under Question 17b undated "drum waste notice" to the Nevada EPA); First Amendment to Debtor's Schedules and Statement of Financial Affairs at 2, In re Thompson Printing Co., Inc., No. 04-17330 (Bankr. D. N.J. March 10, 2004) (Docket No. 19) (noting that "Debtor had three (3) substantially and three (3) partially full drums" of hazardous waste that it had to dispose of in compliance with New Jersey law, but not indicating any release of hazardous materials in violation of New Jersey law).

[185] Statement of Financial Affairs at 13, In re MJ Research, Inc., No. 04-50861 (Bankr. D. Nev. May 7, 2004) (Docket No. 247).

[186] *See* United States Envt'l Prot. Agency, The Hazardous Waste Manifest System, http://www.epa.gov/epaoswer/hazwaste/gener/manifest/ (last visited Aug. 16, 2007).

[187] In some cases, we could not determine the status of the environmental matter disclosed on the SFA, because the debtor failed to provide complete or clear information about the environmental agency, law, or violation. Therefore, we included in Table III only those cases in which the debtor gave the status of the environmental issue or administrative or judicial proceeding as settled, resolved, or dismissed.

[188] *See* Statement of Financial Affairs at 31, In re KB Toys, Inc., No. 04-10120 (Bankr. D. Del. March 15, 2004) (Docket No. 481) (noting that there was "[n]o further evidence of release or contamination" after affiliated debtor KB Toys of New Jersey's 1998 remediation and clean up of heating and fuel oil spilled during property's prior use as a farm"); Statement of Financial Affairs at Q.17a, In re Apartment Hunters, Inc, No. 03-08989 (Bankr. M.D. Fla. May 23, 2003) (Docket No. 29) (indicating in letter from Environmental Protection Commission as attachment to SFA in prior 2003 bankruptcy case that the debtor's response to Warning Notice was "satisfactory" and that "Warning Notice [was] now closed"); Statement of Financial Affairs at 6, In re Florida Select Citrus, Inc., No. 04-11050 (Bankr. M.D. Fla. Oct. 29, 2004) (Docket No. 41) (noting that debtor was "now in compliance" after having received notice in July 2004 from the Florida Department of Environmental Protection of its "noncompliance with reporting requirements prior to 7/2004"); Statement of Financial Affairs at 10-11, In re Tiro Acquisition, LLC, No. 04-12938 (Bankr. D. Del. Nov. 16, 2004) (Docket No. 101) (stating that affiliated debtor Tiro Industries' August 2000 20-gallon spill of Phyton-27 fungicide had been "fully contained (with no release to the environment)" and that Minnesota Department of Agriculture had issued a "Case File Closure" letter in May of 2001, and asserting that all further spills were duly reported and that no notices of violation had issued); Statement of Financial Affairs – Amended at 5, In re Conmaco/Rector L.P., No. 04-11248 (Bankr. E.D. La. April 20, 2004) (Docket No. 148) (stating that "no further action was warranted" with regard to exposed block of asbestos, and noting a 2001 OSHA violation with regard to improper ventilation for painters); Statement of Financial Affairs for Perryville Energy Partners, LLC, at 8, In re Perryville Energy Holdings, LLC, No. 04-80109 (Bankr. W.D. La. Feb. 20, 2004) (Docket No. 94) (stating that affiliated debtor Perryville Energy Partners' August 2000 oil and water spill, and October 2001 turbine lube oil spill had been "contained"); Statement of Financial Affairs at 5, In re Good Nite Inn Las Vegas, LLC, No. 04-18019 (Bankr. D. Nev. Sept. 22, 2004) (Docket No. 127) (stating that problem necessitating June 2002

settled an administrative or judicial proceeding instituted against it.[189] *See* Table III, Column D. Consequently, no outstanding environmental issues remained at the time of filing. For example, in KB Toy of Massachusetts, Inc., the debtor filed a Response Action Outcome Statement after cleaning up a 2001 spill of five to eight gallons of motor oil at its Berkshire Distribution Center.[190] KB Toy indicated that after the cleanup "[n]o further action [was] pending" with the Massachusetts Department of Environmental Protection.[191] The debtor in A-Bust Tool and Manufacturing Company, Inc.,[192] disclosed that the Indiana Department of Environmental Management ("IDEM") had filed suit against the debtor in 2002.[193] But, the case was dismissed before the debtor filed its chapter 11 petition, and the IDEM suit was the debtor's sole environmental disclosure on the SFA.[194]

The obvious question is why a debtor would reply affirmatively to Question 17 when it had no pending environmental issues at the time that it filed its bankruptcy petition. The answer lies in Question 17's phrasing.

First, Question 17 specifically contemplates the disclosure of even settled environmental matters.[195] Second, unlike other questions on the SFA, Question 17 places no time restrictions on its mandated disclosure.[196] Thus, several cases in our sample

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abatement notice had been corrected the same month "prior to current ownership"); Statement of Financial Affairs at 5, In re Ronjer Indus., Inc. No. 04-10657 (Bankr. S.D. N.Y. Feb. 18, 2004) (Docket No. 10) (indicating that October 1993 notice concerning CERCLA, RCRA, and Clean Water Act had been "settled $3101.28"); Statement of Financial Affairs – Amended at 5, In re Amber Mgmt. Corp., No. 04-19916 (Bankr. E.D. Pa. July 30, 2004 (Docket No. 11) (indicating "Problem remedied" with regard to June 2001 notice of asbestos on pipe in basement); Statement of Financial Affairs at Q.17a, In re Utex Indus., Inc., No. 04-34427 (Bankr. S.D. Tex. April 23, 2004) (Docket No. 87) (stating that hazardous waste violations had been "corrected and violation[s] considered resolved" with receipt of February 2001 and June 2002 letters from Texas Commission on Environmental Quality); *cf.* Joint Motion to Approve Settlement Agreement and/or Dismiss Bankruptcy Cases at Exh. A, Sch. 5.4, In re Paradox Partners, LLC, No. 04-36279 (Bankr. D. Colo. June 17, 2005) (Docket No. 297) (noting that affiliated debtor BDS International, LLC, had fully remediated diesel spill that occurred in August 2003 and glycol spill that occurred in November 2003, but not indicating whether debtor had completed remediation pre- or post-petition).

[189] *See* Statement of Financial Affairs at Q.17c, Kennedy Mfg. Co., No. 04-30794 (Bankr. N.D. Ohio March 12, 2004) (Docket No. 97) (answering only Question 17c and summarily noting that March, 1996 "docket number" had been "settled"); Statement of Financial Affairs at 8, In re Perryville Energy Holdings, LLC, No. 04-80109 (Bankr. W.D. La. Feb. 20, 2004) (Docket No. 94) (stating that lawsuit involving affiliated debtor Perryville Energy Partners and to which Louisiana Department of Environmental Quality was a party, and that involved "original construction permit issues" for community association had been "resolved"); Statement of Financial Affairs at Q.17a, In re Utex Indus., Inc., No. 04-34427 (Bankr. S.D. Tex. April 23, 2004) (Docket No. 87) (stating that "[f]ailure to [f]ile [c]ompliance [c]ertificate [r]esolved by payment of $1,500 fine per agreed order").

[190] Statement of Financial Affairs for KB Toy of Massachusetts, Inc. at Q17.b & Q.17c, In re KB Toys, Inc., No. 04-10120 (Bankr. D. Del. March 15, 2004) (Docket No. 481).

[191] *Id.* at Q17.c.

[192] No. 04-64206 (N.D. Ind. Aug. 24, 2004).

[193] *See* Statement of Financial Affairs at 6, In re A-Bust Tool and Mfg. Co., No.04-64206 (Bankr. N.D. Ind. Sept. 23, 2004) (Docket No. 38).

[194] *See id.* at 5-6; *see also id.* at 2-3 (listing collection and preference actions under Question 4, the SFA's question on suits and administrative proceedings.

[195] *See, e.g.*, Official Form 7, BANKRUPTCY CODE, RULES AND FORMS 713, 719 (2007 ed.) (requiring the debtor to disclose the status or disposition of judicial and administrative proceedings).

[196] For example, Question 4's inquiry about suits and administrative proceedings, executions, garnishments and attachments is limited to a one-year period preceding the filing of the bankruptcy petition. *See id.* at

include information about environmental issues that pre-dated the debtor's bankruptcy filing by seven to ten years, or more.[197]

The absence of a time restriction in Question 17 makes sense in certain cases. After all, the remediation of environmental hazards and the debtor's concomitant financial responsibility for cleanup easily might extend a decade or more for sites with significant pollution, such as a Superfund site.[198] But, for smaller violations, such as a reporting issue, no continuing violation may exist at the time of the bankruptcy filing, because the debtor corrected the problem pre-petition. Thus, the absence of a date restriction for Question 17, coupled with the lack of a status reporting requirement for subparts (a) and (b), results in over-inclusive disclosure. The downside of such over-inclusiveness is that as the age of the environmental violation increases so does the possibility for vague or incomplete descriptions of the violation at issue.[199]

Thus, our search results initially included cases in which the debtor either mistook the meaning of Question 17 or had resolved pre-petition the environmental issue disclosed under Question 17. But, we narrowed that number down to those cases in which an ongoing environmental issue potentially existed at the time of the bankruptcy filing. Therefore, of the 2231 cases with useable data on Question 17, only seventy-two, or 3.2% of the cases, had a potential environmental issue pending at the time of the chapter 11 filing. In the vast majority of these seventy-two cases, however, the environmental matter disclosed on the SFA affected neither the decision to file for bankruptcy nor the bankruptcy proceedings themselves.

C. The Impact of Environmental Liabilities on the Chapter 11 Filing Decision

1. Introduction

In order to solicit votes on its plan of reorganization, a chapter 11 debtor must file a disclosure statement.[200] The disclosure statement often contains a section in which the debtor describes the events leading up to the filing of the chapter 11 petition. As a result, from the disclosure statements, as well as from motions to dismiss and the nature and size

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715; *see also id*. at 714-15 (requiring, under Question 2, disclosure of income derived from sources other than employment or operation of a business for two-year period preceding the bankruptcy filing, and mandating the disclosure under Question 3 of payments to creditors made within 90 days of the bankruptcy filing).

[197] *See, e.g.*, Statement of Financial Affairs, In re Ronjer Industries, No. 04-10657 (Bankr. S.D. N.Y. Feb. 18, 2004) (Docket No. 10) (noting, in its sole disclosure of environmental liability on the SFA, that the environmental issue related to an October 1993 notice under CERCLA, RCRA, and the Clean Water Act for a York County, Pennsylvania, site, which had been settled for $3101.28).

[198] For Superfund National Priorities List sites, the cleanup "has often been a very lengthy process – in many cases, it has taken 10 to 20 years." GAO REPORT, *supra* note 13, at 7.

[199] *See* Statement of Financial Affairs at Q.17a, In re First San Diego Properties XX, No. 04-05235 (Bankr. S.D. Cal. July 12, 2004) (Docket No. 10) (filed with schedules) (noting that the County of San Diego had given notice in 1990 under an unknown environmental law with regard to property located in San Diego, California); Statement of Financial Affairs, In re Avado Brands, Inc., No. 04-31555 (Bankr. N.D. Tex. March 19, 2004) (Docket No. 311) (filed with schedules) (noting the debtor's May 18, 1993 notice to the Georgia Environmental Protection Division with regard to one of debtor's restaurants in Madison, Georgia, without providing any information about the nature of the environmental violation).

[200] 11 U.S.C. §1125(b) (2000).

of the disclosed environmental liabilities, we were able to determine, for most of the seventy-two environmental cases, the reason for the debtor's chapter 11 filing.[201] In only five cases, however, did environmental liabilities play a role, either alone or in conjunction with other factors, in the debtor's decision to file for bankruptcy.[202] Thus, environmental liabilities or violations played a role in the decision to file for chapter 11 in less than one percent of the cases in our data set.

As a group, these five firms were small- to medium-size entities, with asset values ranging from $591,000 to $27.8 million.[203] None of the businesses was publicly traded and none was a subsidiary. In fact, three of the five firms had a sole stockholder or member.[204] Finally, only three firms emerged from chapter 11 with a confirmed plan.[205] A thumbnail sketch of each debtor follows.

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[201] In five cases, we were unable to determine the reason for the debtor's bankruptcy filing. In four of these cases, the debtor did not file a disclosure statement and the remaining documents in the case provided insufficient information to determine with any certainty the reason for the bankruptcy filing. But, in one case, In re Glady Fork Mining, Inc., No. 04-01865 (Bankr. N.D. W.Va. May 21, 2004), the debtor did file a disclosure statement; that disclosure statement was not helpful in determining the reason for the filing, because the debtor summarily stated that it did "not feel that a restatement of it's [sic] history [was] significant to a voting in this Plan." Disclosure Statement at 6, In re Glady Fork Mining, Inc. No. 04-01865 (Bankr. N.D. W.Va. June 30, 2005) (Docket No. 101). While it was clear that the debtor had ongoing environmental problems, what was not clear was whether those problems played a role in the bankruptcy filing. For example, the West Virginia Department of Environmental Protection filed a proof of claim in the case for $196,571, of which $58,046 constituted "pre-petition civil penalties and permit fees"; the department sought administrative expense priority status for the remaining $138,525, claiming the debtor owed it for "post-petition civil penalties and permit fees." Stephanie R. Timmermeyer, Secretary of the West Virginia Department of Environmental Protection's Proofs of Calim, Request for Administrative Expense Priority Status, and Notice of Outstanding, Ongoing Environmental Violations Being Committed by the Debtor at 2, Glady Fork Mining, Inc., In re Glady Fork Mining, Inc., No. 04-01865 (Bankr. N.D. W.Va. Oct. 20, 2004) (Docket No. 55). In addition, the debtor scheduled fines of $60,000 owed to the Mine Safety and Health Administration. *See* Schedule F at 2, In re Glady Fork Mining, Inc. No. 04-01865 (Bankr. N.D. W.Va. June 7, 2004) (Docket No. 5). But, the debtor's total liabilities exceeded $5.5 million, of which more than $3.5 million were unsecured, priority debts for taxes and workers' compensation contributions. *See* Summary of Schedules, In re Glady Fork Mining, Inc. No. 04-01865 (Bankr. N.D. W.Va. June 7, 2004) (Docket No. 5); *see also* Schedule E at 1, In re Glady Fork Mining, Inc. No. 04-01865 (Bankr. N.D. W.Va. June 7, 2004) (Docket No. 5). Thus, by comparison, the environmental liabilities were small.

[202] Six debtors mentioned environmental issues as a reason for their bankruptcy filing, but one of those six debtors was MBK Partnership. *See supra* note 176. Including MBK in the analysis, however, would not have changed our conclusions. The concerns about abandonment of contaminated property and discharge of environmental liabilities played no role in the MBK bankruptcy, because MBK did not move to abandon polluted property in its case. Moreover, as a general partnership the owners of the firm would have remained liable for firm debts post-confirmation had MBK confirmed a plan. But, MBK did not do so and, therefore, §1141(d)(1)'s discharge provisions simply did not apply to it. Finally, during its bankruptcy case, MBK settled "the claims of the federal and state environmental agencies." *See* Debtor's Motion for Order Dismissing Chapter 11 Case at 1, In re MBK P'ship, No. 04-69814 (Bankr. D. Or. Nov. 22, 2005) (Docket No. 351).

[203] *See* Summary of Schedules, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. Feb. 12, 2004) (Docket No. 29) (listing total assets of $590,957.17); Summary of Schedules, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. May 27, 2004) (Docket No. 68) (listing total assets of $27,820,827.25).

[204] *See* Statement of Financial Affairs at 10, Q. 21b, In re Gopher State Ethanol LLC, No. 04-34706 (Bankr. D. Minn. Aug. 11, 2004) (Docket No. 1) (filed with petition) (listing Chairman of the Board Bruce Hendry as "100% Shareholder"); Statement of Financial Affairs – Amended at 7, Q. 21b, In re JVH Trucking, Inc.,

a. Technical Coatings Laboratory, LLC

The Technical Coatings Laboratory, LLC case ("TCL")[206] is one of the few examples in our sample in which the debtor failed either to disclose under Question 17 or to schedule as a debt in its bankruptcy case a massive environmental liability.[207] The firm, which manufactured "hot stamping foils, specialty coated products, and specialty paints and resins,"[208] filed its chapter 11 petition on July 12, 2004.[209] At the time of the bankruptcy filing, four individuals and three firms held TCL's common equity,[210] and the firm had assets of approximately $3.22 million, all of which was personal, not real, property.[211]

In its disclosure statement, TCL gave two reasons for its bankruptcy filing, one of which was "extra-operating events, namely, [the need] to manage the risks and potential liabilities associated with an underground tank leakage."[212] In addition, under Question 17a of the SFA, TCL stated that the Connecticut Department of Environmental Protection ("CDEP") had provided notice to the debtor in early 2000 and later in mid-2003 of environmental issues related to two properties located in Avon, Connecticut; the 2003 notice involved Connecticut's hazardous waste regulations.[213] Finally, TCL noted, under

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No. 04-03344 (Bankr. N.D. Ill. March 11, 2004) (Docket No. 64) (listing Joseph J. Vanden Houten, President and director, as sole stockholder); Statement of Financial Affairs at 25, Q. 21b, In re Turbine Chrome Servs., Inc., No. 04-38465 (Bankr. S.D. Tex. June 14, 2004) (Docket No. 1) (filed with petition) (listing C.A. Parrish as "President – Owner" and "100%" shareholder).

[205] *See infra* Part III.C.1.b (New Heights); Part III.C.1.d (Gopher State); and Part III.C.1.e (Turbine Chrome).

[206] No. 04-22105 (Bankr. D. Conn. July 12, 2004).

[207] The debtor in In re American Int'l Petroleum Corp. No. 04-21332 (Bankr. W.D. La. Oct. 7, 2004) ("AIPC") did the same thing. AIPC is not included in our sample, however, because the case remains open at the time of the writing of this Article. In January of 2004, the Florida Department of Environmental Protection ("FDEP") filed suit against AIPC in Florida state court, alleging violations of various state environmental laws at St. Mark's Refinery, which was owned by AIPC. *See* Claim No. 62 at Exh. A, Claims Register, In re American Int'l Refinery, Inc., No. 04-21331(Bankr. W.D. La. Nov. 14, 2005). (Pursuant to the bankruptcy court's joint administration order, In re American International Refinery, Inc. was designated as the lead case; therefore, most AIPC filings were made on the lead case docket.) AIPC filed for bankruptcy nine months later, but failed to list the FDEP lawsuit under either Question 4 (suits) or Question 17 of the SFA. *See* Statement of Financial Affairs, In re American Int'l Petroleum Corp., No. 04-21332 (Bankr. W.D. La. Oct. 7, 2004) (Docket No. 6). Because AIPC failed to list the FDEP on its creditor mailing matrix, the FDEP's claim for $15 million was filed late. *See* Claim No. 62 at Exh. A, Claims Register, In re American Int'l Refinery, Inc., No. 04-21331(Bankr. W.D. La. Nov. 14, 2005). The bankruptcy court, however, allowed the claim. *See* Agreed Order, In re American Int'l Refinery, Inc., No. 04-21331(Bankr. W.D. La. Feb. 14, 2006) (Docket No. 352).

[208] Disclosure Statement at 5, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Sept. 13, 2004) (Docket No. 129) [hereinafter TCL Disclosure].

[209] *See* Chapter 11 Voluntary Petition, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. July 12, 2004) (Docket No. 4).

[210] *See* Statement of Financial Affairs at Q.21a, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Aug. 13, 2004) (Docket No. 103) (filed with schedules) [hereinafter TCL SFA].

[211] *See* Summary of Schedules, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Aug. 13, 2004) (Docket No. 103) (filed with SFA).

[212] *See* TCL Disclosure, *supra* note 208, at 6 §III.B.

[213] *See* TCL SFA, *supra* note 210, at Q.17a. TCL put "Connecticut" under environmental law with regard to the 2000 notice. *See id.*

Question 17b, that it had notified CDEP in October 2003, but offered no information about the environmental law or violation that had triggered the firm's notice.[214]

On its schedules, TCL listed CDEP as an unsecured, non-priority creditor in the amount of $100;[215] this amount vastly underestimated CDEP's actual unsecured claim against the debtor. In early January 2005, CDEP filed a proof of claim in TCL's bankruptcy case for $213,072.50.[216] The agency described the monetary obligation as an unsecured, non-priority claim based on the debtor's violations of various Connecticut environmental laws and regulations.[217]

Moreover, TCL failed to schedule the U.S. EPA as a creditor.[218] Yet, on January 7, 2005, the U.S. Attorney General, on behalf of the EPA, filed a proof of claim for $64 million[219] in order to recover under CERCLA for "environmental cleanup costs incurred and to be incurred by the United States" for "contamination with hazardous substances of the Solvents Recovery Service of New England Superfund Site . . . located in Southington, Connecticut."[220]According to the EPA, the basis of TCL's liability was its relationship to Technical Coatings Laboratories, Inc. ("TCLI"). For a thirty-year period, stretching from 1961 through 1991, TCLI shipped hazardous waste that it had generated at its Avon, Connecticut facility to the Southington Superfund site.[221] The EPA contended that as the "legal successor to TCLI", TCL was liable for cleanup costs at the Superfund site.[222]

TCL also minimized the extent of its environmental liabilities in its disclosure statement; it portrayed its environmental problems as limited to leakage of toluene from underground tanks, which it argued was caused by improper installation of the tanks back in 1991.[223] The debtor failed to mention not only the Southington Superfund site, but also two notices of violation ("NOV") issued by the CDEP post-petition but pre-disclosure statement. The first NOV, issued July 27, 2004, enumerated thirty violations of

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[214] *See id.* at Q.17b.

[215] *See* Schedule F at 17, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Aug. 13, 2004) (Docket No. 103).

[216] Claim No. 143, Claims Register, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Jan. 7, 2005) [hereinafter Claim No. 143].

[217] CDEP stated that TCL "ha[d] violated, and continue[d] to violate, Connecticut's Hazardous Waste Management Regulations, Regulations of Connecticut State Agencies ("R.C.S.A.") §§22a-449(c)-100 through 119 and 22a-449(c)-11, and Connecticut's Underground Storage Tank System Management Regulations, R.C.S.A. §§22a-449(d)-1 and 22a-449(d)-101 through 113." Claim No. 143, *supra* note 216, at Addendum at 1. In addition, CDEP alleged that the debtor had violated "its New Source Review Permit No. 004-0012-0025" and had "discharged to the waters of the State without a permit in violation of Conn. Gen. Stat. §22a-430." *See id.*

[218] Even though the EPA did not appear on TCL's schedules, TCL listed the U.S. Attorney General, Department of Justice, Environmental and Natural Resources Division, Environmental Enforcement Section on its mailing matrix. *See* Creditor Mailing Matrix, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. July 12, 2004). The creditor mailing matrix is one of the reports, in addition to the docket and the claims register, that a user may access on PACER, by inputting the bankruptcy case number.

[219] *See* Claim No. 141, Claims Register, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Jan. 7, 2005) [hereinafter Claim No. 141].

[220] *See id.* at 1 ¶¶1 & 2.

[221] *See id.* at 2 ¶5.

[222] *Id.* at 4 ¶11.

[223] *See* TCL Disclosure, *supra* note 208, at 8-9.

Connecticut's Hazardous Waste Management Regulations.[224] On August 9, 2004, the CDEP issued a second NOV, this time with regard to TCL's "air permit . . . to operate a catalytic oxidizer."[225]

Thus, although the debtor originally proposed a plan of reorganization, not liquidation,[226] it is unclear whether reorganization was ever feasible, given the debtor's significant environmental liabilities and relatively modest assets.[227] For example, TCL clearly did not contemplate paying the EPA in its plan of reorganization. It proposed to pay each unsecured creditor its pro rata share of $435,000, or 7.5% of its claim, which meant that TCL estimated its total unsecured claims at $5.8 million.[228] Yet, the EPA's claim stated that unreimbursed response costs already incurred at the Southington Superfund site were $7.5 million; it projected total response costs to be $64 million.[229]

It is not surprising, then, that at some point during TCL's chapter 11 case, both the U.S. Trustee and CDEP learned that TCL had either "partially or completely shut-down [sic] its business operations"[230] and was functioning in what the U.S. Trustee described as "*silent* liquidation mode."[231] Consequently, the U.S. Trustee moved to dismiss or convert TCL's chapter 11 case.[232] On September 6, 2005, the bankruptcy court dismissed the debtor's case,[233] no doubt because the court's prior order granting the debtor's motion to sell substantially all of its assets[234] meant that no money "remain[ed]

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[224] *See* Objection of Connecticut Department of Environmental Protection to Debtor's Disclosure Statement at 2 & Attachment, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Oct. 21, 2004) (Docket No. 150).

[225] *Id.* at 4; *see also id.* at 2 & Attachment.

[226] *See* TCL Disclosure, *supra* note 208, at 34, ¶V (briefly describing the method for implementing the plan).

[227] At the time of its bankruptcy filing, the firm had assets slightly in excess of $3.2 million. *See supra* note 211 and accompanying text.

[228] *See* TCL Disclosure, *supra* note 208, at 19, ¶IV.C.2.ii. Seven and a half percent of $5.8 million equals $435,000, which is the sum that TCL indicated was available for paying the general unsecured creditors. *See* Plan of Reorganization at 15 ¶3.2 In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Sept. 13, 2004) (Docket No. 128).

[229] *See* Claim No. 141, *supra* note 219, at 3 ¶¶8 & 9.

[230] United States Trustee's Motion to Dismiss the Debtor's Case at 2, ¶5, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. May 12, 2005) (Docket No. 330) [hereinafter TCL Dismissal Motion]; *see* Motion of Connecticut Department of Environmental Protection to Require Debtor to Remove Hazardous Waste at 2 ¶3, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. March 15, 2005) (Docket No. 287) [hereinafter CDEP Hazardous Waste Motion] (noting that it had come to CDEP's "attention that the debtor had ceased its manufacturing operations and [was] in the process of going out of business").

[231] *See* TCL Dismissal Motion, *supra* note 230, at 3 (emphasis in original).

[232] *See id.* The motion is denominated one to dismiss, but the U.S. Trustee argues in the alternative throughout the motion, at times seeking dismissal and at other times advocating for conversion to chapter 7. *Compare id.* at 2 ¶9 (arguing that there was "no reason . . . to convert the case to chapter 7 since there would be nothing for a chapter 7 trustee to administer except for the sole benefit of a secured creditor") *with id.* at 4 (stating that "the inability to propose a viable plan of reorganization . . . supports the conversion of this case to chapter 7").

[233] *See* Order on United States Trustee's Motion to Dismiss Debtor's Case, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Sept. 6, 2005) (Docket No. 410).

[234] *See* Order Granting Motion to Sell Free and Clear, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. July 21, 2005) (Docket No. 397).

to pay administrative expenses of a continuing chapter 11 case . . . or to pay priority or general unsecured creditors."[235]

What happened, then, to CDEP's and the EPA's claims for damages? TCL owned no real property.[236] The lease for its business premises from Old Farms Associates, LLC expired in early February 2005 during TCL's bankruptcy case.[237] While both CDEP and Old Farms filed motions asking the court to allocate funds to address the hazardous waste issues on the debtor's business premises prior to the closing of debtor's business,[238] the docket in TCL's case indicates that the hearing on those motions was called off[239] and no order issued addressing either motion. Moreover, no assets remained to pay unsecured creditors, such as CDEP or the EPA, after the sale of TCL's personal property.[240]

But, because TCL did not emerge from bankruptcy with a confirmed plan, both CDEP's and the EPA's claims survived the bankruptcy case. TCL, however, went out of business. It was formed in Delaware in 1999, but the State of Delaware Division of Corporations lists its current status as "forfeited-resigned," because it did not appoint a new agent after having filed a Certificate of Resignation of registered agent.[241] Also, TCL, which had conducted business in Connecticut, sent a notice of resignation of agent to the Connecticut Secretary of State on November 2, 2005.[242] It is unlikely, then, that either CDEP or the EPA recovered any portion of their claims for damages stemming from TCL's environmental violations.

b. New Heights Recovery & Power, LLC

On April 29, 2004, New Heights Recovery & Power, LLC ("NHRP"), which operated a "tire waste-to-energy facility" in the Village of Ford Heights, Illinois ("Ford Heights facility"), petitioned, once again, for relief under chapter 11 in the bankruptcy court for the district of Delaware.[243] A little over eight years earlier, in March 1996, NHRP had filed its first chapter 11 petition.[244]

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[235] United States Trustee's Objection to Debtor's Motion for an Order Authorizing Sale of Property of the Estate Pursuant to 11 U.S.C. §363(b) at 1¶¶2-3, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. June 17, 2005) (Docket No. 357) [hereinafter Trustee Objection]. The U.S. Trustee contended that the court either should convert or dismiss the case. *See id.* at ¶4.

[236] *See supra* note 211 and accompanying text.

[237] *See* Motion of Old Farms Assocs., LLC to Require Debtor to Allocate Funds for and to Apply Funds for the Proper and Lawful Closure of the Underground Storage Tank System at 205 Old Farms Road, Avon Connecticut at 1 ¶1, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. March 18, 2005) (Docket No. 294).

[238] *See id.* at 3 ¶¶8-9; CDEP Hazardous Waste Motion, *supra* note 230, at 3-4 ¶¶6, 8.

[239] *See* Docket, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. May 12, 2005) (docket notation indicating "Hearing Off" on both CDEP's and Old Farms' motions).

[240] *See* Trustee Objection, *supra* note 235, at 1 ¶¶1-3.

[241] *See* State of Delaware, Dep't of State, Div. of Corporations, http://www.corp.delaware.gov/default.shtml (follow "Information: Get Corporate Status" link). The State of Delaware charges $10 per search to verify the status of a company registered in Delaware. A copy of TCL's status report is on file with the authors.

[242] *See* State of Connecticut, Sec'y of State, Filing History, http://www.concord-sots.ct.gov/CONCORD/InquiryServlet?eid=23&businessID=0643913 (indicating that TCL had filed a notice of resignation of agent on November 2, 2005). While listed as "active" on the Connecticut Secretary of State's website, the firm has not filed an annual report since July 23, 2003. *See id.*

[243] Chapter 11 Voluntary Petition, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. April 29, 2004) (Docket No. 1). Debtor's description of its facility is contained in its disclosure

NHRP attributed its first chapter 11 filing to amendments to the Illinois Retail Rate Law, which "provided that Illinois utility companies . . . purchase electricity produced from qualified facilities, including those combusting waste tires, at rates in excess of market prices . . . in exchange for certain tax credits from the State of Illinois."[245] The 1996 amendments to the Retail Rate Law "eliminated waste tire combustion facilities from the definition of facilities that would qualify under the Retail Rate Law."[246] Therefore, ComEd, an NHRP customer, notified NHRP that it no longer intended to pay the above-market rate for generated electricity.[247] The losses caused by selling electricity at lower rates resulted in the debtor's March 1996 chapter 11 filing.[248]

The 1996 amendments to the Illinois Retail Rate Law, however, also contributed indirectly to the filing of NHRP's 2004 chapter 11 petition.[249] In 1998, the debtor emerged from its first bankruptcy with a confirmed plan. But, it still was involved in costly breach-of-contract litigation with ComEd.[250] While the ComEd case wended its way through the Illinois state court system, a high pressure turbine at the facility failed. The debtor lacked the funds ($2 million) to repair the turbine, due, in part, to the drain on its resources from the continuing ComEd litigation.[251] Therefore, NHRP stopped operations at the Ford Heights facility.[252] But doing so caused the tire shred inventory to accumulate.[253] Therefore, in mid-April 2004, when the Village of Ford Heights shut off the debtor's water supply due to its failure to pay its water bill, the Village's Fire Department sent a shutdown notice to the firm; the lack of water posed a serious hazard in the event that the tire shred inventory caught fire.[254] At about the same time, the Illinois Environmental Protection Agency ("IEPA") also issued a notice of violation ("NOV") to NHRP, detailing nine violations related to the tire shred and tire inventory at the debtor's facility.[255] In order to get its water service reconnected and to avoid the disconnection of other utilities–ComEd had threatened to turn off electric service due to nonpayment of bills–the debtor filed for chapter 11 at the end of April 2004.[256]

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statement. *See* Disclosure Statement for First Amended Liquidating Plan of New Heights Recovery & Power, LLC at 3, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. Sept. 23, 2004) (Docket No. 166) [hereinafter NHRP Disclosure].

[244] *See* NHRP Disclosure, *supra* note 243, at 4. At the time of its first chapter 11 filing, the debtor was known as CGE Ford Heights, LLC. *See id.* at 3. CGE reorganized under its confirmed chapter 11 plan and emerged from bankruptcy as New Heights Recovery & Power, LLC. *See id.* at 4.

[245] *Id.* at 4.

[246] *Id.*

[247] *Id.*

[248] *See id.*

[249] *See id.* at 6-8.

[250] *See id.* at 6-7. The parties had a 20-year contract for the purchase of electricity at the rate prescribed by the pre-amendment Retail Rate Law. *See* Motion in Aid of (A) Sale of Substantially All the Assets of the Estate Pursuant to Confirmed First Amended Liquidating Plan; (B) Final Distribution of Net Proceeds of Such Sale; and (C) Entry of a Final Decree at 2 ¶6, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. Feb. 23, 2005) (Docket No. 235) [hereinafter NHRP Sale Motion].

[251] *See* NHRP Disclosure, *supra* note 243, at 7.

[252] *See id.*

[253] *See id.*

[254] *See id.*

[255] *See id.*

[256] *See id.* at 7-8.

Six months later, on October 26, 2004, the bankruptcy court approved NHRP's liquidating plan.[257] NHRP's plan provided for the liquidation of all of the firm's assets, the resignation of its current board and officers on the plan's effective date, the creation of a four-person uncompensated board to oversee the liquidation of the debtor's assets, and the winding up of the debtor's business.[258] After emerging from bankruptcy, NHRP, which was incorporated in Delaware, filed a certificate of cancellation with the State of Delaware Division of Corporations, thereby terminating its legal existence.[259]

The debtor's plan, however, specifically provided for full remediation of the environmental issues identified by the IEPA in its April 2004 NOV. NHRP along with Grace Brothers, Ltd. and Casella Waste Systems, Inc., which held substantial equity positions in NHRP,[260] jointly proposed the firm's liquidating plan.[261] As the plan's proponents, they agreed to fund the plan by contributing $1 million each on the plan's effective date, with some portion of that contribution set aside to fulfill NHRP's environmental obligations at the Ford Heights facility.[262] The confirmed plan provided for the removal of "all existing tires or tire shred" from the Ford Heights facility by December 31, 2004, and the segregation of a portion of the plan contribution to ensure sufficient funding to bring the facility "into compliance with all relevant environmental laws."[263] In exchange, so long as the debtor satisfied its environmental obligations under the plan, the debtor, Grace Brothers, and Casella each would obtain a broad release of liability for themselves and their "officers, directors, employees, shareholders, affiliates, and agents . . . from any and all claims and causes of action of any kind or nature whatsoever, whether known or unknown, by the IEPA for environmental matters on the Debtor's facility in Ford Heights, Illinois."[264]

In its motion seeking, in part, entry of a final decree in its bankruptcy case, NHRP represented to the court that the IEPA had "indicated to the Debtor that the tire-shred at

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[257] *See* Order Confirming First Amended Liquidating Plan for New Heights Recovery & Power, LLC, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. Oct. 26, 2004) (Docket No. 193) [hereinafter NHRP Confirmation Order].

[258] *See* NHRP Disclosure, *supra* note 243, at 20-21.

[259] *See* State of Delaware, Dep't of State, Div. of Corporations, http://www.corp.delaware.gov/default.shtml (follow "Information: Get Corporate Status" hyperlink). A copy of the status report for NHRP is on file with the authors.

[260] *See* List of Equity Security Holders at 1, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. April 29, 2004) (Docket No. 1) (filed with petition). NH Investors, LLC, c/o Casella Waste Systems, Inc. owned 7,963,500 shares and Grace Brothers, Ltd. held another 3,574,000 shares. *See id.* at 1. Grace Funding Partners LP held 3,955,500 shares; the remaining 33 members of the firm had ownership interests ranging from 2,500 to 91,500 shares. *See id.* at 1-4.

[261] *See* First Amended Liquidating Plan for New Heights Recovery & Power, LLC at 1, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. Sept. 23, 2004) (Docket No. 164) [hereinafter NHRP Plan].

[262] *See id.* at 12-13.

[263] NHRP Disclosure, *supra* note 243, at 10; *see* NHRP Plan, *supra* note 261, at 15-16. Neither the plan nor the disclosure statement specifically addressed the various notices, listed in Question 17a of the SFA, issued by the Metropolitan Water Reclamation District of Greater Chicago. *See* Statement of Financial Affairs at 11, Q.17a, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. May 27, 2004) (Docket No. 69) (listing ten notices from July 19, 2000, through February 6, 2004, for issues such as excess zinc and mercury). Apart from filing a proof of claim for $4,074.52 for "user charges," the district did not otherwise participate in the NHRP bankruptcy case. *See* Claim No. 15, Claims Register, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. July 19, 2004).

[264] NHRP Confirmation Order, *supra* note 257, at 4 ¶8.

issue during the beginning of th[e] bankruptcy case had been resolved to the IEPA's satisfaction."[265] The bankruptcy court for the district of Delaware granted the debtor's motion and entered a final decree in NHRP's case on January 3, 2006.[266] Therefore, while NHRP filed for bankruptcy, in part due to its environmental problems, it apparently had remedied those problems by the time that its bankruptcy case closed in early 2006.

c. JVH Trucking, Inc.

On January 29, 2004, JVH Trucking, Inc. filed its voluntary petition for relief under chapter 11 of the Bankruptcy Code in the bankruptcy court for the Northern District of Illinois.[267] JVH was a small hauling business, with assets totaling approximately $591,000.[268] Joseph J. Vanden Houten was the sole shareholder, as well as the firm's president and a director.[269]

JVH filed for bankruptcy "to stay the actions of its secured creditors from repossessing its rolling stock" or inventory of vehicles,[270] but its financial problems dated back three and a half years to the fall of 2001. In its disclosure statement, JVH stated that the events of 9/11 led to a "substantial downturn in [the] trucking business," resulting in loss of firm revenue.[271] In March 2003, the State of Illinois sued both the firm and the Village of Antioch, Illinois, for damages caused by JVH's release of ferric chloride solution into the [publicly owned treatment works at Antioch] and ultimately into Sequoit Creek."[272] JVH corrected the damage done by the spill prior to filing for bankruptcy; nonetheless, the firm remained liable for civil penalties for violating Illinois environmental laws.[273]

During its bankruptcy case, JVH entered into a consent order with the State of Illinois to pay civil penalties of $36,250 related to the spill, with payment due when distributions were made under JVH's liquidating plan.[274] The consent order called for JVH to pay $27,187.50 of the civil penalties to the Illinois EPA, and $9,062.50 to the treasurer for Lake County, where Antioch is located.[275] The order also required JVH, in the event that it recovered costs associated with the spill, to reimburse the Illinois EPA

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[265] NHRP Sale Motion, *supra* note 250, at 5 ¶16.
[266] *See* Final Decree and Order Closing Chapter 11 Case of New Heights Recovery & Power, LLC at 1, In re New Heights Recovery & Power, LLC, No. 04-11277 (Bankr. D. Del. Jan. 3, 2006) (Docket No. 275).
[267] Chapter 11 Voluntary Petition, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. Jan. 29, 2004) (Docket No. 1).
[268] Summary of Schedules, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. Feb. 12, 2004) (Docket No. 29) [hereinafter JVH Summary].
[269] *See* Statement of Financial Affairs – Amended at 7, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. March 11, 2004) (Docket No. 64).
[270] Amended Disclosure Statement at 6, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. Aug. 23, 2004) (Docket No. 158) [hereinafter JVH Disclosure].
[271] *Id.* at 5. The debtor stated that the downturn occurred "[a]fter September 11, 2002." *Id.* We assume that 2002 was a typographical error.
[272] JVH Trucking, Inc.'s Motion to Approve the Consent Order at Exh. A at 4 ¶2. A, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. July 29, 2004) (Docket No. 152) [hereinafter JVH Consent Order]. On August 16, 2004, the bankruptcy court granted the debtor's motion. *See* Order Granting Motion to Approve, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. Aug. 16, 2004) (Docket No. 154).
[273] *See* JVH Disclosure, *supra* note 270, at 6.
[274] *See* JVH Consent Order, *supra* note 272, at Exh. A at 10-11 ¶VIII.A.1.a.
[275] *See id.* at Exh. A at 11 ¶VIII.A.1.b & c.

and the Illinois Department of Natural Resources for response costs.[276] Finally, because JVH intended to liquidate its business assets in chapter 11, the consent order provided that a "change in ownership, corporate status or operator [did not] alter" the firm's obligations under the order.[277]

JVH proposed a liquidating plan, and on June 15, 2004, the bankruptcy court approved its motion to sell the inventory of vehicles used in its hauling business.[278] But, in late October 2004, the bankruptcy court denied approval of JVH's disclosure statement.[279] At the same time, the United States Trustee moved to dismiss or convert the chapter 11 case.[280] The U.S. Trustee argued that there was a low probability of confirming a chapter 11 plan, given the amount of priority debt owed.[281] In addition, JVH had failed to submit operating reports and to timely pay the U.S. Trustee's quarterly fees.[282] On December 13, 2004, the bankruptcy court granted the U.S. Trustee's motion and dismissed JVH's chapter 11 case.[283]

So, what happened to the civil penalties that the State of Illinois claimed that JVH owed? It is likely that the State of Illinois proved unable to collect the $36,250 in civil penalties from JVH. The firm did not pay the penalties during the bankruptcy case, because the parties' consent order contemplated payment from distributions made pursuant to the liquidating plan,[284] and a plan was not confirmed. Moreover, JVH no longer is in good standing in the State of Illinois. According to the Illinois Secretary of State's website, JVH Trucking was involuntarily dissolved, effective February 2, 2004– three days after JVH had petitioned for relief under chapter 11.[285]

d. Gopher State Ethanol, LLC

Gopher State Ethanol, LLC ("GSE") filed for relief under chapter 11 in the bankruptcy court for the district of Minnesota on August 8, 2004.[286] The firm had one member, Bruce Hendry, who also served as the company's chairman of the board.[287] At

[276] *See id.* at Exh. A at 12-13 ¶¶VIII.B.2 & 3.
[277] *See id.* at Exh. A at 9, ¶IV.B.
[278] *See* Order Granting Motion to Sell, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. June 16, 2004) (Docket No. 143).
[279] *See* Order, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. Oct. 21, 2004) (Docket No. 166).
[280] Notice of Motion and U.S. Trustee's Motion to Convert or Dismiss Case, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. Oct. 21, 2004) (Docket No. 168) [hereinafter JVH Motion to Dismiss].
[281] *See id.* at 1. According to the debtor's summary of schedules, unsecured, priority claims constituted 37% of JVH's total liabilities - $470,000 of $1,260,712.81 in total liabilities. *See* JVH Summary, *supra* note 268.
[282] *See* JVH Motion to Dismiss, *supra* note 280, at 1.
[283] Order Granting Motion to Dismiss Case, In re JVH Trucking, Inc., No. 04-03344 (Bankr. N.D. Ill. Dec. 13, 2004) (Docket No. 186).
[284] *See* JVH Consent Order, *supra* note 272, at Exh. A at 10-11 ¶VIII.A.1.a.
[285] *See* Corporation File Detail Report, CyberDriveIllinois, http://www.ilsos.gov/corporatellc/CorporateLlcController (last visited July 26, 2007).
[286] *See* Chapter 11 Voluntary Petition, In re Gopher State Ethanol, LLC, No. 04-34706 (Bankr. D. Minn. Aug. 11, 2004) (Docket No. 1).
[287] Statement of Financial Affairs at 10, In re Gopher State Ethanol, LLC, No. 04-34706 (Bankr. D. Minn. Aug. 11, 2004) (Docket No. 1) (filed with petition) [hereinafter Gopher SFA].

the time of the bankruptcy filing, the firm's assets totaled a little more than $12 million.[288]

GSE listed the following four government entities under Question 17 of the SFA: (1) the City of St. Paul; (2) Metropolitan Council Environmental Services; (3) the Minnesota Pollution Control Agency ("MPCA"); and (4) the U.S. EPA.[289] The environmental issues included wastewater pretreatment standards under the Clean Water Act,[290] air quality issues under the Clean Air Act,[291] releases related to air and storm water permits,[292] and air emissions, pollution control, and odor mitigation[293] problems related to operation of the debtor's ethanol plant. With one exception, however, the debtor did not list any of these four government entities on its schedules. The City of St. Paul is listed on Schedule F as an unsecured, non-priority creditor in the amount of $10 for "goods and services,"[294] but that listing is unrelated to any environmental claims that the City had against GSE.[295] As a result, it appears that because the government entities, with the exception of the City of St. Paul, were not scheduled, the debtor did not list them on its creditor mailing matrix and, therefore, none received formal notice of the debtor's bankruptcy case.

The fact that none of the government agencies appeared on GSE's schedules suggests that the environmental issues listed under Question 17 of the SFA did not involve monetary obligations. The debtor must list its secured, priority, and unsecured non-priority claims in Schedules D, E, and F, respectively.[296] But, if the government agencies did not have a claim against the estate, then GSE did not have to schedule them.[297] For example, on September 29, 2003, a Stipulation and Order entered against GSE, thereby resolving the City of St. Paul's odor nuisance suit against the debtor.[298] That stipulation did not require GSE to pay damages or fines and, thus, no claim arose, as defined under the Bankruptcy Code.

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[288] Summary of Schedules, In re Gopher State Ethanol LLC, No. 04-34706 (Bankr. D. Minn. Aug. 11, 2004) (Docket No. 1) (filed with petition).

[289] *See* Gopher SFA, *supra* note 287, at 7, Q17a-c.

[290] 33 U.S.C. §§1251-1387 (2000). *See also* Gopher SFA, *supra* note 287, at 7 (listing 2004 notices from the Metropolitan Council Environmental Services related to wastewater pretreatment standards).

[291] 42 U.S.C. §§7401-7671 (2000). *See* Gopher SFA, *supra* note 287, at 7 (listing 2004 notice regarding air quality compliance inspection).

[292] *See* Gopher SFA, *supra* note 287, at 7 (listing three notices by debtor to Minnesota Pollution Control Agency in 2001 and 2002 related to ethanol, ammonia, and ethanol mash releases).

[293] *See id.* at 7 (listing 2001 judicial proceeding by City of St. Paul against debtor for odor and noise mitigation, and 2002 lawsuit by U.S. EPA for air emissions and pollution control).

[294] Schedule F at 4, In re Gopher State Ethanol LLC, No. 04-34706 (Bankr. D. Minn. Aug. 11, 2004) (Docket No. 1) (filed with petition).

[295] The City's inclusion on the schedules is unrelated to the 2003 Stipulation and Order that resolved the City's odor nuisance suit against GSE. *See* Debtor's First Amended Disclosure Statement at 7 ¶2.1, In re Gopher State Ethanol LLC, No. 04-34706 (Bankr. D. Minn. June 22, 2005) (Docket No. 108) [hereinafter Gopher Disclosure].

[296] *See* Official Form 6, BANKRUPTCY CODE, RULES AND FORMS 695 (2007 ed.).

[297] *See supra* notes 97-101 and accompanying text for discussion of the Bankruptcy Code's definition of claim.

[298] *See* Stipulation and Order, City of St. Paul v. Gopher State Ethanol, LLC, No. C1-02-9083 (Minn. D.Ct. Sept. 26, 2003), *in* Response of City of St. Paul to Motion for Order Authorizing Post-Petition Financing and Use of Cash Collateral, In re Gopher State Ethanol LLC, No. 04-34706 (Bankr. D. Minn. Jan. 3, 2005) (Docket No. 57).

Nonetheless, the City of St. Paul had an interest in GSE's bankruptcy, because it disagreed with the debtor's representations to the court that the debtor was in compliance with the 2003 Stipulation and Order.[299] Likewise, both the EPA and the MPCA may have had an interest in the debtor's bankruptcy case. In 2001, the EPA and the MPCA entered into a consent decree with GSE to settle an enforcement action related to emissions from the debtor's ethanol plant; the parties amended that decree in 2003.[300] GSE represented to the bankruptcy court that it was in compliance with the consent decree;[301] if that were not the case, either the EPA or the MPCA may have brought that matter to the bankruptcy court's attention. Moreover, unlike the St. Paul stipulation, the EPA and MPCA consent decree imposed a penalty of $18,904 against GSE.[302] While GSE may have paid the penalty pre-petition, if it did not do so, then both the EPA and MPCA had a claim against the debtor's estate.[303]

On November 10, 2005, the bankruptcy court confirmed GSE's plan of reorganization,[304] which contained two critical components: (1) the sale of GSE's assets, with the exception of ethanol production rights and permits;[305] and (2) a subsequent merger of GS Acquisition, Inc., a wholly-owned subsidiary of Granite Falls Energy,

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[299] *Compare* Notice of Hearing and Motion for Order Authorizing Post-Petition Financing and Use of Cash Collateral at 3 ¶14, In re Gopher State Ethanol, LLC, No. 04-34706 (Bankr. D. Minn. Dec. 29, 2004) (Docket No. 53) [hereinafter GSE Financing Motion] (stating that "Debtor had achieved complete compliance with the terms of the settlement with the City and neighborhood interveners") *with* Response of City of St. Paul to Motion for Order Authorizing Post-Petition Financing and Use of Cash Collateral at 1 ¶2, In re Gopher State Ethanol, LLC, No. 04-34706 (Bankr. D. Minn. Jan. 3, 2005) (Docket No. 57) ("disput[ing] the statements contained in paragraph 14 of the Motion regarding Debtor's compliance with various court orders concerning emissions from the Debtor's ethanol plant").

[300] Gopher Disclosure Statement, *supra* note 295, at 7. There is no entry on the docket for the consent decree among GSE, the EPA, and the MPCA, no doubt because neither government agency participated in the bankruptcy case. An unsigned and undated version of the decree is online on the web page for the MPCA. *See* Amended Consent Decree, United States v. Gopher State Ethanol, LLC, No. 02-CV-3793, http://www.pca.state.mn.us/hot/gopherstate/gopherstate-consentdecree-602470-v1.pdf. [hereinafter Gopher Consent Decree]. We contacted the Region 5 office of the EPA to inquire about the consent decree. Cynthia King, regional counsel for the Region 5 Chicago office, left a message with our research assistant stating that as a result of GSE's bankruptcy case the parties would have to sign a stipulation to terminate the decree. *See* Phone Message from Cynthia King, Regional Counsel, U.S. EPA Region 5 to Kimberly A. Petta (August 16, 2007) (notes on file with authors).

[301] GSE Financing Motion, *supra* note 299, at 3 ¶14 (stating that GSE "had satisfied the requirements of the EPA/MPCA consent decree, as amended"). While the City of St. Paul challenged the debtor's statements, it did so in the context of the stipulation it had entered into with GSE.

[302] *See* Gopher Consent Decree, *supra* note 300, at ¶33.

[303] The penalty was due within 30 days of the entry of the decree. *See id.* In addition, the consent decree provided for stipulated penalties, to be divided 50/50 by the EPA and the MPCA, for continuing violations of the decree's emission standards and other requirements. *See id.* at ¶37.

[304] *See* Order and Notice Confirming Plan and Fixing Time Limits, In re Gopher State Ethanol LLC, No. 04-34706 (Bankr. D. Minn. Nov. 10, 2005) (Docket No. 124).

[305] Apparently, GSE's producer payments were the reason that Granite Falls was interested in the merger. Minnesota created "producer payments" when the ethanol business "was in its infancy as a way to induce farmers and others to invest in what was then viewed as a risky venture." *The Great Corn Rush; State taxpayers get a share of ethanol production bill*, STAR TRIBUNE, SEPT. 24, 2006, at 19A. "Granite Falls Energy, a newer plant that didn't qualify for state producer payments, merged with bankrupt Gopher State Ethanol of St. Paul in hopes of collecting the defunct plant's payments, which were scheduled to last until 2010." *Id.*

LLC, into GSE, with GSE as the surviving entity.[306] Granite Falls Energy formed GS Acquisition for the express purpose of effectuating the merger,[307] and prior to the plan's effective date, Granite Falls "lease[d] the operating assets and business of its ethanol facility" to GS Acquisition."[308] Therefore, even though GSE sold both its real and personal property, including its ethanol production equipment, during the bankruptcy case, it remained in the ethanol production business post-confirmation, albeit as a wholly owned subsidiary of Granite Falls Energy, LLC.

e. Turbine Chrome Services, Inc.

On June 14, 2004, Turbine Chrome Services, Inc., ("TCS") filed for protection under chapter 11 of the Bankruptcy Code.[309] TCS was a small operation-"an old fashioned 'job shop' machine shop"[310]-run by a husband-and-wife team. At the time of the bankruptcy filing, it had assets slightly in excess of $1.1 million[311] and sixteen employees.[312]

TCS previously had filed for chapter 11 in 1997, apparently due to tax obligations.[313] The debtor emerged from bankruptcy in 1999 with a confirmed plan.[314] That plan failed, however, largely due to the cleanup costs associated with a heavy metal spill that occurred in 2000 at the debtor's place of business.[315] Cleanup costs associated with the spill approached $500,000, which "caused the Debtor to default on the payments provided for in th[e] plan and to incur additional liability to the Internal Revenue Service."[316]

In its 2004 bankruptcy case, the debtor had two environmental claimants, only one of which was a governmental entity.[317] The City of Houston held an unsecured, non-priority claim against the debtor for approximately $25,000 based on a 2002 Compromise

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[306] *See* Gopher Disclosure Statement, *supra* note 295, at 3.
[307] *See* Debtor's Modified Plan of Reorganization at Exh. A at 1, In re Gopher State Ethanol LLC, No. 04-34706 (Bankr. D. Minn. June 22, 2005) (Docket No. 109) (describing GS Acquisition, Inc. as "a yet-to-be formed Minnesota company").
[308] *Id.* at Exh. A at 8 ¶5.2.
[309] *See* Chapter 11 Voluntary Petition, In re Turbine Chrome Servs., Inc., No. 04-38465 (Bankr. S.D. Tex. June 14, 2004) (Docket No. 1).
[310] Original Disclosure Statement at 5, In re Turbine Chrome Servs., Inc., No. 04-38465 (Bankr. S.D. Tex. Dec. 14, 2004) (Docket No. 35) [hereinafter Turbine Disclosure Statement].
[311] Summary of Schedules, In re Turbine Chrome Servs., Inc. No. 04-38465 (Bankr. S.D. Tex. Dec. 14, 2004) (Docket No. 1) (filed with petition).
[312] *See* Turbine Disclosure Statement, *supra* note 310, at 5.
[313] *See id.* at 4.
[314] *See id.*
[315] *See id.*
[316] *Id.*
[317] The debtor also owed more than $373,000 to Eagle Construction & Environmental Services, L.P., a private firm specializing in environmental remediation. *See* Agreed Order on Motion for Relief from the Automatic Stay or, in the Alternative, for Adequate Protection at ¶6, In re Turbine Chrome Servs., Inc., No. 04-38465 (Bankr. S.D. Tex. Feb. 23, 2005) (Docket No. 50). The debtor's plan provided for the payment in full of Eagle's secured claim over a ten-year period of time at an annual compound interest rate of 8%. *See* Second Amended Plan of Reorganization at 6 ¶4.1.3, In re Turbine Chrome Servs., Inc., No. 04-38465 (Bankr. S.D. Tex. April 6, 2005) (Docket No. 73) [hereinafter Turbine Plan].

and Settlement Agreement related to environmental cleanup at the debtor's place of business.[318]

On April 7, 2005, less than a year after petitioning for relief under chapter 11, the bankruptcy court confirmed the debtor's plan of reorganization.[319] The plan left intact the $666 per month payment schedule from the debtor's 2002 Compromise and Settlement Agreement with the City of Houston.[320] As of the writing of this Article, the debtor had not filed again for bankruptcy, either under chapter 11 or chapter 7, at least in the Southern District of Texas.[321]

2. What the cases tell us

Five of the firms in our sample disclosed that environmental liabilities played some role in their decision to file for relief under chapter 11. But, did the Bankruptcy Code provide these five debtors with the ability to shift the costs of environmental remediation from firm coffers to the public purse? We conclude that, by and large, it did not do so. In three of the five cases, the debtor either had resolved or settled its environmental problems before the bankruptcy case closed, or promised to do so in its plan of reorganization or liquidation. Therefore, the debtor assumed responsibility for its environmental violations.

In both the New Heights Recovery and the Turbine Chrome bankruptcy cases, the debtor emerged from chapter 11 with a confirmed plan that fully addressed the environmental violations that led, in part, to their bankruptcy filings. In New Heights, the debtor's plan provided for remediation of the violations related to the tire and tire-shred inventory at the debtor's plant.[322] In fact, by the time that the debtor's bankruptcy case had closed, the Illinois EPA was satisfied that the "tire-shred at issue during the beginning of th[e] bankruptcy case had been resolved."[323] In Turbine Chrome, the debtor emerged from bankruptcy much as it had entered bankruptcy–agreeing to pay more than $25,000 to the City of Houston for environmental cleanup costs. While bankruptcy delayed payment on the principal balance owed to the City of Houston, it did not reduce or eliminate the debtor's responsibility for that payment.

JVH Trucking, on the other hand, did not confirm a chapter 11 plan. But, during its bankruptcy case, it entered into a consent decree with the State of Illinois to pay a civil penalty of $36,250 related to the firm's spill of ferric chloride solution.[324] While it appears that the firm dissolved before paying that penalty, JVH had remedied the

[318] *See* Claims Register, Claim No. 15, In re Turbine Chrome Servs., Inc., No. 04-38465 (Bankr. S.D. Tex. Dec. 7, 2004) [hereinafter Claim No. 15]; *see also* Turbine Disclosure Statement, *supra* note 310, at 9, ¶9.3.7.
[319] *See* Order Confirming Second Amended Chapter 11 Plan, In re Turbine Chrome Servs., Inc., No. 04-38465 (Bankr. S.D. Tex. April 7, 2005) (Docket No. 73).
[320] *Compare* Turbine Plan, *supra* note 317, at 7 ¶4.1.5 *with* Claim No. 15, *supra* note 318, at Exh. A.
[321] C.A. Parrish, the owner of TCS, and his wife Elsie, who ran the business with him, filed for relief under chapter 13 on November 10, 2004. The bankruptcy court for the Southern District of Texas confirmed their chapter 13 plan on September 30, 2005. *See* In re Parrish, No. 04-46168 (Bankr. S.D. Tex. Nov. 10, 2004).
[322] *See supra* notes 260-63 and accompanying text.
[323] NHRP Sale Motion, *supra* note 250, at 5 ¶16.
[324] *See supra* notes 274-77 and accompanying text.

environmental damage done as a result of the spill even before filing its petition for relief under chapter 11.[325]

But, in two cases–Technical Coatings Laboratory ("TCL") and Gopher State Ethanol ("GSE")–the debtor's conduct proved more controversial. In TCL, the debtor omitted significant potential environmental liabilities, totaling more than $64 million, from its schedules. During its bankruptcy case, it did not reach a settlement with either the Connecticut Department of Environmental Protection ("CDEP") or the EPA, and it appears that neither agency collected any money from the debtor. During the bankruptcy case, the court approved the debtor's motion to sell substantially all of its assets; doing so left nothing for unsecured creditors, such as the environmental agencies. With no assets and no continuing operations, the debtor could not pay its environmental creditors, even after emerging from bankruptcy.

But, would CDEP and the EPA have been in a different position had TCL not petitioned for relief under chapter 11? TCL could have dissolved its business after having sold its personal property (or had the property repossessed) outside of bankruptcy; the firm owned no real property.[326] After paying off its largest and only secured creditor - Citizens Bank of Connecticut-$134,006 would have remained.[327] Of course, the firm could have used that money to remove the 800 drums of hazardous waste at its Avon, Connecticut facility before closing down its operations.[328] But, there is no guarantee that TCL would have done so. In fact, even while under the jurisdiction of the bankruptcy court, the firm's owners apparently failed to comply with the requirements of Connecticut law with regard to closure of the firm's facility.[329]

More importantly, however, TCL did not emerge from chapter 11 "leaner and meaner" and ready to carry on with business as usual, having foisted onto the taxpayer the costs of its environmental cleanup. The firm went out of business. The impression created, however, is that the debtor got "away with something."[330] Of course, when the debtor fails to schedule significant environmental liabilities and uses chapter 11 to liquidate without informing the bankruptcy court or filing a plan of liquidation,[331] that impression is reinforced. But, the reality is that TCL had few unencumbered assets and potentially massive environmental liability. Liquidation was likely, either inside or outside of bankruptcy. Had TCL listed CDEP or the EPA as creditors on its schedules, the U.S. Trustee likely would have moved early in the case to dismiss or convert, because

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[325] *See supra* note 273 and accompanying text.
[326] *See* Schedule A, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Aug. 13, 2004).
[327] *See* Schedule D, In re Technical Coatings Lab., LLC, No. 04-22105 (Bankr. D. Conn. Aug. 13, 2004) (Docket No. 103).
[328] *See* CDEP Hazardous Waste Motion, *supra* note 230, at 2 ¶3 (stating that because debtor was going out of business it had to "perform 'generator closure' of its facility pursuant to the Connecticut Hazardous Waste Management Regulations").
[329] *See* CDEP Hazardous Waste Motion, *supra* note 230, at 2 ¶3, 3 ¶6 (noting that it had come to the attention of the Connecticut DEP that Technical Coatings was going out of business, and that the agency's attempts "to obtain firm assurances from the debtor that it [would] address the[] generator closure items" had been "unsuccessful"); *see also* TCL Dismissal Motion, *supra* note 230, at 1-2 ¶¶5, 7 (noting that while the debtor was shutting down operations, it had "not reported this officially to the Court or the UST[rustee]" and that "[t]he Court ha[d] not approved any plan of liquidation [and] the debtor ha[d] not even filed a plan of reorganization which contemplate[d] liquidation").
[330] *See* Heidt, *supra* note 24, at 125 (note omitted).
[331] *See supra* Part III.C.1.a.

reorganization was not feasible. In that event, however, the result would have been much the same – no recovery for CDEP or the EPA, and the shifting of TCL's environmental cleanup costs to the taxpayer.

But, what about the GSE bankruptcy case? Unlike TCL, GSE did emerge from bankruptcy as a going concern, albeit as a wholly-owned subsidiary of another company, Granite Falls Energy. While it is unclear whether GSE avoid paying penalties owed to the EPA and the MPCA, the City of St. Paul asserted that GSE had not complied with the terms of the parties' stipulation. Should the debtor's failure to comply with the stipulation (or possibly the consent decree) have precluded it from reorganizing under chapter 11?

On the one hand, Gopher State's ethanol facility had polluted the air. Simply because it had stopped polluting when it ceased operations does not mean that it had not caused harm to the environment.

On the other hand, however, the reorganization likely stopped the continued pollution from GSE's plant. GSE could not afford to make the modifications to its ethanol facility mandated, at a minimum, by the stipulation entered into with the City of St. Paul.[332] It sold its real and personal property during the bankruptcy case; a Minnesota brewery purchased the real property while a Kansas limited liability company bought the ethanol production equipment.[333] Since a brewery purchased the real property, it is likely that post-confirmation the facility no longer operated as an ethanol production plant, and the malodorous and polluting emissions from GSE's ethanol production ceased.[334] Moreover, because GSE remained in the ethanol production business, albeit as a wholly owned subsidiary of Granite Falls, it still had to comply with the requirements of state and federal law with regard to its operation of the Granite Falls' ethanol production facility.

Furthermore, GSE discharged no claim owed, at least to the City of St. Paul, because it owed the City no damages, penalties or fines. In addition, GSE owed no compensatory damages to either the EPA or the MPCA. If either agency had a claim for pre-petition penalties against the debtor, confirmation of the debtor's plan would not necessarily relieve the debtor of its obligation to pay that claim; discharge would depend on whether the agencies had notice of the debtor's bankruptcy case.[335] But, if Gopher State owed no damages, fines, or penalties to any of the environmental agencies or governmental units listed in Question 17 of the SFA, then no debt was discharged in its bankruptcy case.

Therefore, we conclude that the outcome in GSE was a rational one. The firm could not afford to bring its facility into compliance with the stipulation. Liquidation of the firm, either in chapter 7 or chapter 11 was possible, but meant that the firm would go out of business. The reorganization preserved the business while stopping the pollution.

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[332] *See* Gopher Disclosure Statement, *supra* note 295, at 7 (noting that the settlement with the City "required Debtor to take expensive remediation measures and make significant capital improvements in its facility").

[333] *See id.* at 9, ¶2.3.

[334] There is no indication anywhere in the case about the status of the March 2004 notice by the Metropolitan Council Environmental Services to the debtor regarding the wastewater pretreatment standards. *See* Gopher SFA, *supra* note 287, at 7, Q.17a.

[335] *See* Alan N. Resnick, *Appropriate Notice of Order for Relief, in* 3-342 COLLIER ON BANKRUPTCY §342.02 (15th rev. ed. 2007).

Moreover, apart from any possible penalties owed to the EPA or the MPCA, GSE did not pass the costs of environmental cleanup to the taxpayer.

D. The Bankruptcy "Loophole": Abandonment and Discharge

1. Introduction

Of the seventy-two cases that possibly had ongoing environmental liability at the time of the bankruptcy filing, forty-two emerged from bankruptcy with a confirmed plan (the "confirmed-plan cases"). That number, however, overstates the true level of plan confirmation because twenty of those forty-two cases were part of four separate jointly administered cases with joint plans of reorganization or liquidation.[336] Thus, for purposes of counting plan confirmations, it is more accurate to say that twenty-six of the seventy-two cases resulted in a confirmed chapter 11 plan.[337]

For the ensuing discussion on abandonment and discharge, we examined only the confirmed-plan cases. The reason for doing so is that a debtor in chapter 11 does not obtain a discharge if it fails to confirm a plan.[338] Moreover, abandonment really only works for confirmed liquidating plans in chapter 11.[339] It makes little sense, then, to analyze the impact of the discharge or the abandonment power in the context of cases dismissed out of chapter 11 prior to plan confirmation.

2. The Abandonment Power

Not surprisingly, our data indicates that abandonment of contaminated property in chapter 11 is an extremely rare event. In only four of the confirmed-plan cases did the debtor file a motion for abandonment of property. Moreover, in three of those four cases, the motions dealt with the abandonment of uncontaminated personal, not polluted real, property.[340] Only in DB Companies, Inc.,[341] did the debtor successfully abandon

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[336] *See* Second Amended Plan, In re ONCO Investment Co., No. 04-10558 (Bankr. D. Del. July 30, 2004) (Docket No. 1422) (covering fourteen cases with Question 17 disclosures); Joint Prepackaged Plan of Reorganization of Clark Group, Inc. and its Affiliated Debtors, In re Clark Group, Inc., No. 04-52536 (Bankr. E.D. Mo. Oct. 5, 2004) (Docket No. 39) (covering two cases with environmental disclosures under Question 17); Debtors' Second Amended and Restated Joint Plan of Reorganization, In re International Wire Group, Inc., No. 04-11991 (Bankr. S.D. N.Y. June 24, 2004) (Docket No. 186) (covering two cases with Question 17 disclosures); Joint Plan of Reorganization of US Airways, Inc. and Its Affiliated Debtors and Debtors-in-Possession, In re US Airways, Inc., No. 04-13819 (Bankr. E.D. Va. June 30, 2005) (Docket No. 2339) (covering two cases with environmental disclosures under Question 17).

[337] We arrived at this number by counting each jointly administered case with a joint plan as one case and, therefore, subtracted sixteen from forty-two.

[338] *See* 11 U.S.C.§1141(d)(1)(A) (2007) (stating that "the confirmation of a plan discharges the debtor").

[339] *See supra* Part I.C.1.a.

[340] *See, e.g.*, Motion to Authorize (i) the Rejection of Certain Unexpired Real Property Leases Pursuant to 11 U.S.C. Section 365(a) and (ii) the Abandonment of Certain Personal Property Pursuant to 11U.S.C. Section 554 at 2, US Airways, Inc., No. 04-13810 (Bankr. E.D. Va. Jan. 17, 2005) (Docket No. 1609) (note omitted) (seeking to abandon "miscellaneous furniture and signage of inconsequential value"); Motion to Reject /(A) Approving the Debtors' Rejection of Real Property Leases in Eden Prairie, Minnesota (Hops #76), Colorado Springs, Colorado (Hops #20) and Clearwater, Florida (Hops #1) and (B) Approving Abandonment of Personal Property Filed by Debtor In Possession Avado Brands, Inc. at 3 ¶6, In re Avado Brands, Inc., No. 04-31555 (Bankr. N.D. Tex. Oct. 19, 2004) (Docket No. 1099) (seeking to abandon

contaminated real property.[342] Interestingly enough, in the DB Companies case, it was the parent corporation DB, not the subsidiaries, with the environmental liabilities.[343]

After confirmation of the debtors' joint liquidating plan,[344] DB moved to abandon real property located in Hanover, Massachusetts.[345] The firm had operated a gas station on the site until 1998, but had "been unable to develop or sell the Property since that time."[346] In 1997, it reported a gas leak from an underground storage tank on the property to the Massachusetts Department of Environmental Protection ("MADEP") and began remediation, which ended with the filing of the bankruptcy case.[347]

MADEP notified DB of its intent to object to the abandonment motion if the debtor failed to "address the DEP's concerns relating to the environmental contamination."[348] MADEP contended that the migration of petroleum products from the debtor's gas station towards the city's wells precluded abandonment of the property, because doing so posed "'imminent and identifiable harm' to public health and safety."[349] While DB disagreed with MADEP about the degree of harm caused by the 1997 gas leak, it negotiated with the agency and the parties reached a compromise entailing the imposition of certain conditions to the abandonment of the gas station property.

First, the joint debtors–DB and its subsidiaries-agreed to pay $61,000 into an expendable trust over which MADEP had spending control.[350] Second, they agreed that the abandonment order would provide for the retention by the debtors of "legal power to convey title to the Property until December 31, 2007."[351] The reason for doing so was to

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"trade fixtures or other personal property of *de minimus* [sic] value"); Motion for an Order Authorizing the Sale, Transfer or Abandonment of Certain Miscellaneous Assets Free and Clear of All Liens, Claims and Encumbrances Pursuant to Sections 363 and 554(a) of the Bankruptcy Code at 3 ¶6, Exh. A, In re KB Toys, Inc., No. 04-10120 (Bankr. D. Del. July 2, 2004) (Docket No. 1180) (seeking "authority to sell, transfer or abandon (or donate to charity)" furniture and computer equipment).

[341] No. 04-11618 (Bankr. D. Del. June 6, 2004).

[342] DB Companies was the lead case for the bankruptcy filings of five related entities. *See* Order Granting Motion for Joint Administration of Case Numbers 04-11617 through 04-11619 and 04-11621 through 04-11622, In re DB Cos., Inc., No. 04-11618 (Bankr. D. Del. June 3, 2004) (Docket No. 22).

[343] *See* Disclosure Statement at 1, DB Cos., Inc., No. 04-1618 (Bankr. D. Del. March 8, 2005) (Docket No. 1292). Compare Statement of Financial Affairs at Q.17, DB Cos., Inc. No. 04-11618 (Bankr. D. Del. July 24, 2004) (Docket No. 225) (nine pages of disclosure regarding environmental matters) *with* Statement of Financial Affairs at Q.17, DB Motor Fuels, Inc. No. 04-11618 (Bankr. D. Del. July 23, 2004) (Docket No. 221) (checking "none" for Questions 17a-c).

[344] The bankruptcy court for the district of Delaware confirmed the debtors' plan on April 21, 2005. *See* Order Confirming First Amended Joint Liquidating Chapter 11 Plan of Debtors and Official Committee of Unsecured Creditors, as Modified, In re DB Cos., Inc., No. 04-11618 (Bankr. D. Del. April 21, 2005) (Docket No. 1500).

[345] *See* Debtors' Assented-To Motion to Abandon Certain Real Property, In re DB Cos., Inc., No. 04-11618 (Bankr. D. Del. June 20, 2006) (Docket No. 1968) [hereinafter Abandonment Motion]. The Official Committee of Unsecured Creditors assented to the motion. *See id.* at 1.

[346] *Id.* at 2 ¶3.

[347] Debtors' Motion for Approval of Compromise Regarding Abandonment of Property, In re DB Cos., Inc., No. 04-11618 (Bankr. D. Del. Nov. 13, 2006) (Docket No. 2003)[hereinafter Compromise Motion]. In their original motion, however, the debtors failed to mention the presence of any environmental issue on the to-be-abandoned property. *See generally* Abandonment Motion, *supra* note 345.

[348] Compromise Motion, *supra* note 347, at 3 ¶4.

[349] *Id.* (quoting Midtlantic Nat'l Bank v. New Jersey Dep't of Env. Protection, 474 U.S. 494, 507 n.9 (1986)).

[350] *Id.* at 4 ¶5.

[351] *Id.* at 4 ¶7.

alleviate concerns raised by MADEP about the ability to transfer title post-abandonment to a purchaser of the real property.[352] In exchange, the abandonment order provided the debtors with a broad release of and discharge from liability for environmental obligations related to the real property.[353]

So, is DB Companies a case in which the debtors used the abandonment power to shift the costs of environmental remediation onto the taxpayers of Massachusetts? We could not make that determination from the documents filed in the bankruptcy case. We do know that the debtors did not walk away completely; they paid $61,000 into a trust fund to be managed by MADEP. It is possible that this sum of money covered the costs of remediation at the abandoned property. It also is possible that MADEP settled for less than the full amount of remediation,[354] knowing that in a liquidation case the prospect of greater recovery was small.

But, even assuming that MADEP settled for less than the full costs of remediation, our data demonstrate that debtors in chapter 11 rarely invoke the abandonment power to shed contaminated property. The DB Companies case is the only example that we found, in a sample of 2231 cases in which we had access to the SFA, in which the debtor abandoned polluted property and potentially reduced its liability for environmental remediation. Thus, based on our findings, we conclude that there is no need to limit the use of the abandonment power in chapter 11.[355]

3. Discharge of Environmental Liabilities

Determining what happened to the varied environmental obligations in the confirmed-plan cases proved to be a difficult task. In some cases, we were able to determine precisely what occurred to the environmental obligation inside the chapter 11 case. Some debtors, such as New Heights Recovery & Power and Turbine Chrome, provided in their plans of reorganization or liquidation for cleanup of the environmental hazard[356] or payment in full of the pre-petition environmental obligation.[357] In other

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[352] *Id.*

[353] Consent Order Granting Debtors' Assented-To Motion to Abandon Certain Real Property, In re DB Cos., Inc., Not. 04-11618 (Bankr. D. Del. Dec. 1, 2006) (Docket No. 2009).

[354] *See* Compromise Motion, *supra* note 347, at 5 ¶9 (stating that if the "Court were to condition abandonment on compliance with a remediation and monitoring program determined by the DEP, the costs could run into the hundreds of thousands of dollars").

[355] One case out of 2231 means that the abandonment power was used in only .04% of the chapter 11 cases in our data set.

[356] *See supra* Part III.C.1.b; *see also* Motion to Approve Second Amended Disclosure Statement & Schedule Hearing to Confirm Plan of Reorganization at 30-31, In re Royal Hawaiian, No. 04-01747 (Bankr. D. Haw. Feb. 23, 2005) (Docket No. 146) (stating that debtor sought to "install a new 'rubber-lined' trap to eliminate ricochets and lead contamination at shooting club and that plan proponent would "consummate the Plan even if a new 'gun trap' [were] required"); *cf.* Stipulation Between Reorganized Debtors, the U.S. Environmental Protection Agency, and the Indiana Department of Environmental Management Resolving Proof of Claim Numbers 514, 526, and 530 at 3 ¶2, In re Haynes Int'l, Inc., No. 04-05364 (Bankr. S.D. Ind. Feb. 1, 2005) (Docket No. 601) [hereinafter Haynes Stipulation] (stipulating that the environmental agencies would withdraw their proofs of claim and that debtor would comply with its obligations under the RCRA).

[357] *See supra* Part III.C.1.e*; cf.* Motion for an Order Approving Settlement Agreement with Indiana Department of Environmental Management at 3-4, In re Haynes Int'l, No. 04-05364 (Bankr. S.D. Ind. June 29, 2004) (Docket No. 331) (settling agency's pre-petition claims by agreeing to pay civil penalty of

cases, such as In re Prime Interest, Inc.,[358] the obligation was not subject to discharge, because it was non-monetary and, hence, did not constitute a claim.[359] But, in a number of cases, we could not ascertain with certainty the amounts of any potentially dischargeable debts. The problem stems, in large part, from the open-ended nature of the disclosures required under Question 17.

Question 17 contains no time limitation.[360] Therefore, a debtor might disclose environmental violations that occurred in 1990, but that it remedied prior to the bankruptcy filing. Compounding the problem is the fact that neither Question 17a nor Question 17b requires the debtor to state the current status of the environmental matter disclosed.[361] Finding the relevant environmental issues becomes significantly more difficult when the debtor must disclose every violation or notice for a ten-year period of time, regardless of the nature or status of the environmental violation at issue. The result is that the disclosures for large debtors with multiple environmental notices become meaningless–the equivalent of dumping hundreds of boxes of materials on an adversary in response to a discovery request.

Consider the case of GEO Specialty Chemicals, Inc.[362] GEO's Question 17 disclosures ran eight pages long and covered notices from and to at least sixteen federal, state, and local environmental agencies over a ten-year period of time.[363] GEO provided detailed information about the relevant environmental law in many cases.[364] As a result, we could determine the nature of some violations and, hence, whether they might give rise to a claim in the bankruptcy case.[365] But, for other disclosures, GEO provided a general and, hence, meaningless reference to the name of the environmental statute, e.g.,

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$75,000, to perform a "supplemental environmental project", costing approximately $150,000, and to perform a "compliance stack test").

[358] *See* Schedule F at 3, In re Prime Interest, Inc., No.04-10088 (D. N.J. Jan. 2, 2004) (Docket No. 1) (filed with petition) (listing the State of New Jersey Department of Environmental Protection Division of Environmental Safety as $0 for "Notice Purposes Only" related to Community Right to Know Survey); *see also* Statement of Financial Affairs at Q.17a, In re Royal Hawaiian, No. 04-01747 (D. Haw. July 27, 2004) (Docket No. 32) (filed with schedules) (stating that the Hawaii Department of Health had issued a May 25, 2004 notice concerning Hawaii law governing the furnishing of information, and the entry and inspection of premises for parties that generate, dispose of, transport, or handle hazardous waste); Haynes Stipulation, *supra* note 356, at 2 ¶D (stating that the debtor's "obligation to comply with the RCRA permits . . . [was] a mandatory, nondischargeable injunctive obligation").

[359] *See supra* notes 97-101 and accompanying text.

[360] *See supra* note 196 and accompanying text.

[361] By contrast, Question 17c specifically requires the debtor to provide the "status or disposition" of any environmental proceeding. *See* Official Form 7, BANKRUPTCY CODE, RULES AND FORMS 535 (2007 ed.).

[362] No. 04-19148 (Bankr. D. N.J. March 18, 2004).

[363] *See* Statement of Financial Affairs at 18-25, In re GEO Specialty Chemicals, Inc., No. 04-19148 (Bankr. D. N.J. May 17, 2004) (Docket No. 245) [hereinafter GEO SFA]; *see also* Statement of Financial Affairs at 33-48, In re US Airways, Inc., No. 04-13819 (Bankr E.D. Va. Oct. 27, 2004) (Docket No. 600) (listing notices from multiple state and federal agencies covering a fifteen-year period from 1989 through 2004).

[364] *See, e.g.*, GEO SFA, *supra* note 363, at 19 (providing pinpoint citations to Code of Federal Regulations).

[365] For example, GEO listed 40 CFR §265.52 as the environmental regulation with regard to an August 26, 1999 notice from the Georgia Department of Environmental Protection. *See* GEO SFA, *supra* note 363, at 19. Section 265.52 describes the required content for contingency plans that hazardous waste facilities must maintain in the event of an unplanned release of hazardous material. *See* Content of Contingency Plans, 40 C.F.R. §265.52 (2007). The specific reference to the Code of Federal Regulations allowed us to determine that the debtor likely remedied this violation pre-petition and even had it not done so the obligation to comply would not constitute a dischargeable obligation in the bankruptcy case.

Clean Water Act.[366] Moreover, GEO scheduled its environmental creditors as "unliquidated" and "disputed", either leaving blank the amount of the claim or stating the amount as "unknown".[367] Unless the environmental agency filed a proof of claim in the case, as did the Louisiana Department of Environmental Quality, we had no way of determining the contested amount, if any, at issue.[368] Other documents in the bankruptcy case, such as the disclosure statement, also failed to shed any light on which environmental matters remained pending on the date of the petition.[369]

Moreover, in another sixteen of the confirmed-plan cases, we found voluminous, vague, or seemingly dated disclosures under Question 17 coupled with the debtor's scheduling of the environmental agencies' claims as contingent, unliquidated, or disputed.[370] Normally in a chapter 11 case, a scheduled creditor need not file a proof of claim to participate in the case.[371] But, if the debtor schedules the debt as contingent, unliquidated, or disputed, then the creditor either must file a proof of claim or it will "not

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[366] *See* GEO SFA, *supra* note 363, at 19, 20, 21-24 (listing environmental law as RCRA or Clean Water Act)

[367] *See infra* notes 371-72 and accompanying text.

[368] *See* Claim No. 679, Claims Register, In re GEO Specialty Chemicals, Inc., No. 04-19148 (Bankr. D. N.J. Sept. 2, 2004) (Docket No. 1275) (allowed unsecured claim for $9,111).

[369] In its disclosure statement, GEO devoted only one page to and provided a vague discussion of its environmental obligations. *See* Disclosure Statement with Respect to Third Modified Joint Plan of Reorganization at 86-7, In re GEO Specialty Chemicals, Inc., No. 04-19148 (Bankr. D. N.J. Nov. 22, 2004) (Docket No. 874). GEO did estimate its accrued environmental liabilities at a little less than $2 million at the end of 2003. *See id.* at 87. Compared with outstanding liabilities in excess of $245 million, however, GEO's environmental liabilities were insignificant (less than 1% of total debt). *See* Summary of Schedules, In re GEO Specialty Chemicals, Inc., No. 04-19148 (Bankr. D. N.J. July 6, 2004) (Docket No. 427). We were unable to locate any discussion of environmental liabilities in the disclosure statement for US Airways. *See* Second Amended Disclosure Statement with Respect to Joint Plan of Reorganization of US Airways, Inc. and Its Affiliated Debtors and Debtors-in-Possession, In re US Airways, Inc., No. 04-13819 (Bankr. E.D. Va. Aug. 7, 2005) (Docket No. 2755).

[370] *Compare* Statement of Financial Affairs at Q.17b, In re Avado Brands, Inc., No. 04-31555 (Bankr. N.D. Tex. March 19, 2004) (Docket No. 311) (providing no information about the nature of the 1993 notice to the Georgia Environmental Protection Division) *with* Schedule F at Exh. F-8, In re Avado Brands, Inc., No. 04-31555 (Bankr. N.D. Tex. March 19, 2004) (Docket No. 311) (listing Georgia Environmental Protection Division for $0 as contingent, unliquidated, and disputed unsecured, non-priority claim); *compare* Statement of Financial Affairs at Q.17a, In re Fujita Corp. USA, No. 04-27072 (Bankr. C.D. Cal. Aug. 12, 2004) (Docket No. 32) (listing phase 1 environmental site assessment with law unknown for two 1993 local government notices) *with* Schedule F at 8, 12, In re Fujita Corp. USA, No. 04-27072 (Bankr. C.D. Cal. Aug. 12, 2004) (Docket No. 39) (scheduling local agencies for "$0" contingent, unliquidated, disputed claim). In addition, all fourteen debtors in the ONCO Investment Company consolidated bankruptcy case ("ONCO") also employed this strategy of scheduling the vast majority of their environmental agency claims as unliquidated and disputed. *See, e.g.*, Schedule F at 15-16, 43-44, Schedules of Global Stone Filler Products, Inc. - Case No. 04-10565, In re ONCO Inv. Co., No. 04-10558 (Bankr. D. Del. April 24, 2004) (Docket No. 440) (scheduling the Georgia Department of Natural Resources, the Mine Safety and Health Administration, the U.S. EPA's Office of Solid Waste, and the Virginia Department of Environmental Quality as holding unliquidated and disputed claims). The Michigan Department of Environmental Quality ("MDEQ") was the only environmental agency that filed a proof of claim in the ONCO case. It filed an unsecured, non-priority claim for $2,734,225, *see* Claim No. 548, Claims Register, In re ONCO Inv. Co., No. 04-10558 (Bankr. D. Del. Jan. 24, 2005) (Docket No. 2547), but later withdrew it. *See* In re ONCO Inv. Co., No. 04-10558 (Bankr. D. Del. March 21, 2005) (Docket No. 2316).

[371] *See* FED. R. BANKR. P. 3003(b)(1) (2007).

be treated as a creditor with respect to such claim for the purposes of voting and distribution."[372]

We could not determine why the relevant agencies failed to file proofs of claim. But, there are two possible explanations. One is that the agencies had no claims against the estate, or that the amounts of their claims were insignificant, thereby not meriting the time or resources necessary to pursue them.[373] Another possibility is that problems with the agencies' databases prevented them from identifying those cases in which proofs of claim should have been filed.[374] By not filing proofs of claim, however, the agencies lost their right to recover anything from the estate and had any debts owed to them discharged upon confirmation of the debtors' chapter 11 plans.

Even assuming, however, that all forty-two[375] confirmed-plan debtors discharged some or all of their environmental liabilities inside chapter 11, the shedding of environmental liabilities through the bankruptcy discharge simply is not a significant problem. We examined the SFAs of 2231 debtors; in only forty-two cases did the debtor answer Question 17 in the affirmative *and* emerge from bankruptcy with a confirmed plan. We know that all forty-two debtors did not discharge their environmental obligations in their chapter 11 cases.[376] But, even if we assumed that all forty-two debtors had done so, then the discharge of environmental debts occurred in less than 2% of the cases from our database of 2004 chapter 11 filings.

Of course, the discharge issue has two components: (1) the frequency with which debtors discharge environmental debts in chapter 11, and (2) the magnitude of those debts. Our data indicates that the discharge of environmental obligations is an infrequent phenomenon in chapter 11. But, in at least one case-the consolidated US Airways filing–plan confirmation will discharge a significant environmental claim.[377]

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[372] FED. R. BANKR. P. 3003(c)(2) (2007).

[373] *Cf.* EPA Participation in Bankruptcy Cases at 1-6 (Sept. 30, 1997), *available at* http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/epapar-bankrt-mem.pdf (setting forth factors for evaluating whether to pursue a claim in bankruptcy, including the size and priority of the claim and the value of unencumbered assets in the bankruptcy estate).

[374] *See* GAO REPORT, *supra* note 13, at 30 (describing "[d]ata quality problems in EPA's Superfund database" and difficulties that the EPA has in "identifying from its program and enforcement databases which companies have large liabilities").

[375] We used forty-two cases for the denominator in this calculation, rather than twenty-six, because we needed a figure representing the frequency of discharge, not the frequency of plan confirmation. *Cf. supra* notes 336-37 and accompanying text.

[376] *See supra* notes 356-59 and accompanying text.

[377] In a few cases, the debt discharged was quite small. For example, in In re Albanil Dyestuff Corp., No. 04-18222 (Bankr. D. N.J. March 10, 2004), the debtor reached a settlement with the EPA of an administrative action against the debtor. *See* Motion of the Debtor for the Entry of an Order Approving Consent Agreement and Final Order with the United States Environmental Protection Agency, In re Albanil Dyestuff Corp., No. 04-18222 (Bankr. D. N.J. Sept. 30, 2004) (Docket No. 141). The settlement "provide[d] the EPA with an allowed, unsecured non-priority claim in the amount of $15,000." *See id.* at 3 ¶9. Under the terms of the debtor's confirmed plan, the EPA would receive $2250 over a two-year time period. *See* First Modified Plan of Reorganization at 13, In re Albanil Dyestuff Corp., No. 04-18222 (Bankr. D. N.J. Jan. 12, 2005) (Docket No. 202) (providing that general unsecured creditors would receive 15% of their claim in three payments of 5% with the last payment occurring two years from effective date of plan). Thus, confirmation of the Albanil plan discharged approximately $13,000 of the EPA's allowed claim.

In order to understand what happened in US Airways, it is necessary to go back to 2002, when US Airways and Piedmont Airlines, an affiliated debtor, originally filed for relief under chapter 11.[378] In the 2002 bankruptcy case, the Maryland Department of Environment ("MDE") filed a proof of claim for $10,450,000, based on violations of Maryland law.[379] The MDE sought cleanup costs from US Airways and Piedmont (the "debtors") for "significant environmental contamination in and around" a fuel storage and transfer facility located at the Baltimore/Washington International Airport ("BWI").[380] The debtors settled with MDE; MDE agreed to withdraw its proof of claim and not receive payment under the debtors' 2002 chapter 11 plan in exchange for not having its debt discharged by virtue of confirmation of that plan.[381]

US Airways and Piedmont once again filed for relief under chapter 11 on September 12, 2004.[382] MDE filed a proof of claim in the 2004 case for $23,343,868; that claim has unsecured, non-priority status.[383] The debtors objected to MDE's claim, along with the claims of a number of other governmental, tax, and environmental authorities, basing their objection on a general statement that they did "not believe they owe[d] any liability" and that the claimed amounts were "grossly overstated."[384] The debtors' objection to MDE's claim is still pending.[385]

Even if MDE's claim is allowed in its entirety, however, the debtors' plan provides for a maximum estimated recovery of 17.4% for the claims of unsecured creditors.[386] Therefore, unless MDE negotiates with the debtors, as it did in US Airways' 2002 bankruptcy case, to withdraw its claim in exchange for preserving that claim post-confirmation, MDE will receive no more than $4,061,833 on its $23 million claim. In other words, confirmation of the debtors' plan effectively discharges more than $19 million of MDE's asserted claim for cleanup costs at BWI.

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[378] *See* US Airways Group, Inc., No. 02-83984 (Bankr. E.D. Va. Aug. 11, 2002).

[379] *See* Maryland Department of the Environment's Response to Debtors' Fourth Omnibus Objection to Certain (I) Duplicative Claims and Amended Claims; (II) Equity Claims; (III) No Liability Claims (Books and Records): (IV) Tax, Governmental, and Environmental Claims; and (V) Modify Debtor and Amount Claims and Request for Hearing Exh. F at Exh. B, In re US Airways, Inc., No. 04-13819 (Bankr. E.D. Va. Aug. 30, 2005) (Docket No. 2993) [hereinafter Maryland's Response].

[380] *Id.* at 2 ¶¶1, 3; *id.* at 3 ¶B.

[381] *Id.* at Exh. F, at Exh. B ¶¶1, 3.

[382] *See* Chapter 11 Voluntary Petition, US Airways, Inc., No. 04-13819 (E.D. Va. Sept. 12, 2004) (Docket No. 1); Chapter 11 Voluntary Petition, Piedmont Airlines, Inc., No. 04-13822 (E.D. Va. Sept. 12, 2004) (Docket No. 1). Three other related entities - US Airways Group, Inc., PSA Airlines, Inc., and Material Services Company, Inc. – also filed for relief on the same day. US Airways was the lead case.

[383] Donlin, Recano and Company served as the claims and noticing agent in the US Airways bankruptcy case. The MDE claim can be found on the Donlin, Recano website. *See* Proof of Claim No. 5083, In re US Airways, Inc., No. 04-13819 (Bankr. E.D. Va. March 10, 2005), http://www.donlinrecano.net/cases/claims.aspx?type=number&f=5083&l=&cl=mwc [hereinafter Claim No. 5083].

[384] Debtors' Fourth Omnibus Objection to Certain (I) Duplicative Claims and Amended Claims; (II) Equity Claims; (III) No Liability Claims (Books and Records): (IV) Tax, Governmental, and Environmental Claims; and (V) Modify Debtor and Amount Claims at 8 ¶26, In re US Airways, Inc., No. 04-13819 (Bankr. E.D. Va. July 29, 2005) (Docket No. 2659).

[385] *See* Claim No. 5083, *supra* note 383.

[386] *See* Second Amended Disclosure Statement with Respect to Joint Plan of Reorganization of US Airways, Inc. and Its Affiliated Debtors and Debtors-in-Possession at vi, In re US Airways, Inc., No. 04-13819 (Bankr. E.D. Va. Aug. 7, 2005) (Docket No. 2755).

The US Airways case, then, is *the* scary story. The debtors filed for bankruptcy twice within a two-year time period. They deferred payment of their environmental obligations by negotiating a settlement with MDE in their 2002 bankruptcy case. But, according to MDE, they did not pay on that settlement. Moreover, they once again filed for relief under chapter 11 only seventeen months after the order confirming their 2002 plan[387] and three months *before* their 2002 bankruptcy case closed.[388] If MDE's estimate is accurate,[389] then the debtors will discharge more than $19 million of cleanup costs, thereby shifting those costs to the taxpayer.

Thus, while debtors do not normally end up discharging environmental obligations inside chapter 11, when they do so the debt discharged may prove considerable. But, does an infrequent but large discharge of environmental debt merit a major reform of bankruptcy or environmental law, or of corporate law concepts of limited liability? We turn our attention to that question next.

IV. CONCLUSION

No system is perfect. There always will be debtors who use the legal system in strategic ways in order to evade their obligations under both state and federal environmental law. The issue is not whether debtors do so, but the extent of the problem. As Professor Epstein has stated:

> First-best solutions are rarely if ever, possible; thus the beginning of wisdom is to seek rules that minimize the level of imperfections, not to pretend that these do not exist. . . Bad outcomes are therefore consistent with good institutions and we cannot discredit these institutions with carefully selected illustrations of their failures. Counterexamples may be brought to bear against any set of human institutions. The social question, however, is concerned with the extent of the fall from grace.[390]

Our findings strongly suggest that the "fall from grace" is small. There are bad outcomes, such as the Asarco or US Airways cases. But, our data suggests that bad outcomes occur infrequently. This conclusion is not surprising, given the fact that the vast majority of debtors report no pending environmental obligations at the time that they file for chapter 11. In addition, in more than ninety-nine percent of the cases in our data set, environmental liabilities played no role in the debtor's decision to file for bankruptcy.

Inside the chapter 11 bankruptcy case, the picture is not much different. Debtors rarely invoke the abandonment power. Some debtors do discharge part or all of their environmental debts in chapter 11. But, our findings indicate that the wholesale discharge of significant environmental liability is an uncommon event. Finally, the data we

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[387] *See* Order Confirming Chapter 11 Plan, US Airways Group, Inc., No. 02-83984 (Bankr. E.D. March 18, 2003) (Docket No. 2986).

[388] *See* Case Closed, US Airways Group, Inc., No. 02-83984 (Bankr. E.D. Dec. 6, 2005) (Docket No. 5304).

[389] *See* Maryland's Response, *supra* note 379, at 4 ¶II.A (stating that an outside consultant's report "fully substantiates the $23,343,868.00 claims amount"). The outside consultant is EA Engineering, Science, and Technology, Inc., and its website address is http://www.eaest.com/.

[390] RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 32 (1995).

examined simply do not support the claim that the world of chapter 11 is disproportionately populated by shell subsidiary corporations with significant environmental liabilities.

We are not unmindful, however, of the pull of the dramatic story of abuse. But, legislative reform is not the answer. For example, amending the Bankruptcy Code to accord administrative expense priority status to environmental creditors may have unintended consequences by making it more difficult for a debtor to obtain confirmation of its plan of reorganization. In chapter 11, administrative expenses must be paid in cash in full on the plan's effective date.[391] Therefore, if the administrative expense claim is significant, e.g., large environmental remediation costs, the debtor may prove unable to pay, thereby derailing the chapter 11 case.[392] Forcing the debtor into liquidation, however, may not well serve the creditors, including any environmental claimants. The firm may have more value as a going concern, which redounds to the benefit of all creditors in the chapter 11 case.[393] Moreover, if a firm closes its doors, its employees are out of work; they have no jobs and no benefits and the taxpayer, albeit indirectly, picks up the associated costs.

While we counsel against wholesale changes to bankruptcy, corporate, or environmental law, we do have two modest suggestions. First, there is a gap in the current bankruptcy notice scheme, as evidenced by the Gopher State Ethanol chapter 11 case. Environmental agencies that are not "creditors" and, hence, not scheduled may not receive notice of the debtor's bankruptcy proceeding. Nonetheless, the agencies may have a stake in the outcome of the debtor's case. Therefore, we recommend that debtors be required to include on their creditor mailing matrix any environmental entity with which the debtor has a consent decree, or a pending or ongoing environmental dispute. Second, the Judicial Conference needs to revise Questions 17a and b of the SFA. Currently, debtors are not required to disclose the status or disposition of the environmental notices or violations mentioned under subparts a or b of Question 17. For debtors with significant regulatory oversight, the filing of a bankruptcy petition may elicit pages of environmental notices or violations, many of which the debtor may have cured pre-petition. Pages of notices or violations, some dating back a decade or more, ill serve the needs of the creditors, the U.S. Trustee, and the bankruptcy court for accurate and relevant information.

Finally, we recognize the limitations of our data. Our conclusions are based on a subset of chapter 11 cases–only those chapter 11 cases filed in 2004 and closed by the middle of 2006. Moreover, it appears that an anomaly with PACER precluded us from retrieving all closed chapter 11 cases that fit within our search parameters.[394] Nonetheless, there is no indication that the data retrieved is not representative of the total set of chapter 11 cases filed in 2004. Obviously, this Article does not address every issue raised by the intersection of bankruptcy, corporate, and environmental law. But, it does provide the beginning of a more grounded approach to the discussion about the need for

[391] 11 U.S.C. §1129(a)(9)(A)(2000).
[392] *See* Hillinger & Hillinger, *supra* note 27, at 390 ("[G]ranting administrative expense priority to environmental obligations can upset the bankruptcy game plan [and] undermine a debtor's opportunity to reorganize").
[393] *See* Heidt, *supra* note 24, at 125.
[394] *See supra* note 141.

reform. Without any empirical evidence demonstrating more widespread abuse, the calls for reform of bankruptcy, environmental, or corporate law are based on nothing more than scary stories.

TABLE I
ADJUSTMENTS TO SEARCH RESULT TOTALS

-A- STATE AND DISTRICT	-B- ORIGINAL TOTAL	-C- ADJUSTMENTS	-D- ADJUSTED TOTAL
Alabama: Middle	2	0	2
Alabama: Northern	36	3	33
Alabama: Southern	12	0	12
Alaska	4	0	4
Arkansas: Eastern	17	0	17
Arkansas: Western	10	0	10
Arizona	75	4	71
California: Central	116	2	114
California: Eastern	35	1	34
California: Northern	37	2	35
California: Southern	14	0	14
Colorado	39	2	37
Connecticut	21	1	20
Delaware	165	21	144
District of Columbia	7	0	7
Florida: Middle	93	4	89
Florida: Northern	11	0	11
Florida: Southern	69	1	68
Georgia: Middle	15	0	15
Georgia: Northern	95	3	92
Georgia: Southern	13	0	13
Hawaii	8	0	8
Idaho	8	0	8
Illinois: Central	4	0	4
Illinois: Northern	90	1	89
Illinois: Southern	8	0	8

-A- STATE AND DISTRICT	-B- ORIGINAL TOTAL	-C- ADJUSTMENTS	-D- ADJUSTED TOTAL
Indiana: Northern	12	0	12
Indiana: Southern	36	7	29
Iowa: Northern	3	0	3
Iowa: Southern	9	0	9
Kansas	13	0	13
Kentucky: Eastern	8	1	7
Kentucky: Western	22	2	20
Louisiana: Middle	11	0	11
Louisiana: Eastern	20	0	20
Louisiana: Western	13	4	9
Maine	8	0	8
Maryland	49	4	45
Massachusetts	39	0	39
Michigan: Eastern	119	9	110
Michigan: Western	10	0	10
Minnesota	84	3	81
Mississippi: Northern	3	0	3
Mississippi: Southern	11	1	10
Missouri: Eastern	25	0	25
Missouri: Western	16	0	16
Montana	9	1	8
Nebraska	13	0	13
Nevada	42	1	41
New Hampshire	4	0	4
New Mexico	15	0	15

-A- STATE AND DISTRICT	-B- ORIGINAL TOTAL	-C- ADJUSTMENTS	-D- ADJUSTED TOTAL
New Jersey	106	6	100
New York: Eastern	98	6	92
New York: Western	24	0	24
New York: Northern	8	0	8
New York: Southern	2725	2534	191
North Carolina: Eastern	31	0	31
North Carolina: Middle	6	0	6
North Carolina: Western	23	0	23
North Dakota	3	0	3
Ohio: Northern	26	3	23
Ohio: Southern	22	1	21
Oklahoma: Eastern	2	0	2
Oklahoma: Northern	4	0	4
Oklahoma: Western	9	0	9
Oregon	21	3	18
Pennsylvania: Eastern	93	0	93
Pennsylvania: Middle	14	0	14
Pennsylvania: Western	55	0	55
Puerto Rico	45	0	45
Rhode Island	5	0	5
South Carolina	23	0	23
South Dakota	5	0	5
Tennessee: Eastern	11	0	11
Tennessee: Middle	19	0	19
Tennessee: Western	22	0	22

-A- STATE AND DISTRICT	-B- ORIGINAL TOTAL	-C- ADJUSTMENTS	-D- ADJUSTED TOTAL
Texas: Eastern	24	0	24
Texas: Northern	216	4	212
Texas: Western	98	1	97
Texas: Southern	126	2	124
Utah	24	0	24
Vermont	4	0	4
Virgin Islands	3	0	3
Virginia: Eastern	48	0	48
Virginia: Western	17	0	17
Washington: Eastern	18	0	18
Washington: Western	45	0	45
West Virginia: Northern	3	0	3
West Virginia: Southern	3	0	3
Wisconsin: Eastern	6	0	6
Wisconsin: Western	12	1	11
Wyoming	6	0	6
TOTALS	**5651**	**2639**	**3012**

TABLE II
PROBLEMS WITH THE STATEMENTS OF FINANCIAL AFFAIRS

-A- STATE AND JUDICIAL DISTRICT	-B- ADJUSTED TOTAL	-C- OLD SFA	-D- NO SFA	-E- NO ACCESS TO SFA	-F- TOTAL
Alabama: Middle	2	0	0	0	2
Alabama: Northern	33	0	5	17	11
Alabama: Southern	12	1	0	0	11
Alaska	4	0	0	0	4
Arkansas: Eastern	17	2	1	0	14
Arkansas: Western	10	0	0	0	10
Arizona	71	1	20	0	50
California: Central	114	1	22	1	90
California: Eastern	34	0	5	1	28
California: Northern	35	0	7	21	7
California: Southern	14	0	3	0	11
Colorado	37	0	8	0	29
Connecticut	20	1	6	0	13
Delaware	144	0	3	0	141
District of Columbia	7	0	2	0	5
Florida: Middle	89	3	9	0	77
Florida: Northern	11	0	0	0	11
Florida: Southern	68	0	12	56	0
Georgia: Middle	15	1	3	10	1
Georgia: Northern	92	9	25	0	58
Georgia: Southern	13	0	2	0	11
Hawaii	8	0	0	0	8
Idaho	8	2	0	0	6

-A- STATE AND DISTRICT	-B- ADJUSTED TOTAL	-C- OLD SFA	-D- NO SFA	-E- NO ACCESS TO SFA	-F- TOTAL
Illinois: Central	4	0	1	3	0
Illinois: Northern	89	3	13	1	72
Illinois: Southern	8	0	0	0	8
Indiana: Northern	12	1	2	0	9
Indiana: Southern	29	0	2	0	27
Iowa: Northern	3	0	1	0	2
Iowa: Southern	9	0	0	0	9
Kansas	13	0	2	0	11
Kentucky: Eastern	7	0	0	0	7
Kentucky: Western	20	0	3	0	17
Louisiana: Middle	11	0	0	0	11
Louisiana: Eastern	20	0	2	0	18
Louisiana: Western	9	0	0	0	9
Maine	8	0	5	0	3
Maryland	45	9	4	0	32
Massachusetts	39	2	10	0	27
Michigan: Eastern	110	0	6	104	0
Michigan: Western	10	2	0	0	8
Minnesota	81	0	2	0	79
Mississippi: Northern	3	0	1	0	2
Mississippi: Southern	10	0	2	8	0
Missouri: Eastern	25	0	10	0	15
Missouri: Western	16	0	0	0	16
Montana	8	0	1	0	7
Nebraska	13	0	0	0	13
Nevada	41	1	10	0	30

-A- STATE AND DISTRICT	-B- ADJUSTED TOTAL	-C- OLD SFA	-D- NO SFA	-E- NO ACCESS TO SFA	-F- TOTAL
New Hampshire	4	0	1	0	3
New Mexico	15	0	1	0	14
New Jersey	100	4	14	0	82
New York: Eastern	92	2	20	0	70
New York: Western	24	0	3	0	21
New York: Northern	8	1	0	0	7
New York: Southern	191	5	37	0	149
North Carolina: Eastern	31	0	0	0	31
North Carolina: Middle	6	0	4	0	2
North Carolina: Western	23	0	1	0	22
North Dakota	3	0	0	0	3
Ohio: Northern	23	0	0	0	23
Ohio: Southern	21	1	1	0	19
Oklahoma: Eastern	2	0	0	0	2
Oklahoma: Northern	4	0	1	0	3
Oklahoma: Western	9	1	1	0	7
Oregon	18	0	5	0	13
Pennsylvania: Eastern	93	2	34	0	57
Pennsylvania: Middle	14	0	5	2	7
Pennsylvania: Western	55	1	8	1	45
Puerto Rico	45	1	7	1	36
Rhode Island	5	0	2	0	3
South Carolina	23	0	3	0	20
South Dakota	5	0	0	0	5
Tennessee: Eastern	11	0	1	10	0
Tennessee: Middle	19	0	4	12	3
Tennessee: Western	22	0	5	0	17

-A- STATE AND DISTRICT	-B- ADJUSTED TOTAL	-C- OLD SFA	-D- NO SFA	-E- NO ACCESS TO SFA	-F- TOTAL
Texas: Eastern	24	0	3	0	21
Texas: Northern	212	0	14	0	198
Texas: Western	97	2	6	0	89
Texas: Southern	124	10	20	0	94
Utah	24	2	7	0	15
Vermont	4	0	0	0	4
Virgin Islands	3	0	0	3	0
Virginia: Eastern	48	1	9	0	38
Virginia: Western	17	0	6	11	0
Washington: Eastern	18	1	2	0	15
Washington: Western	45	1	5	0	39
West Virginia: Northern	3	0	0	0	3
West Virginia: Southern	3	0	0	0	3
Wisconsin: Eastern	6	1	1	0	4
Wisconsin: Western	11	0	1	0	10
Wyoming	6	1	1	0	4
TOTALS	**3012**	**76**	**443**	**262**	**2231**

TABLE III
CASES WITH ENVIRONMENTAL ISSUES

-A- STATE AND DISTRICT	-B- TOTAL	-C- MISREAD Q.17	-D- RESOLVED OR SETTLED	-E- NEW TOTAL
Alabama: Middle	1	0	0	1
Alabama: Northern	1	0	0	1
Arizona	1	0	0	1
California: Central	2	0	0	2
California: Southern	1	0	0	1
Colorado	1	0	1[395]	0
Connecticut	1	0	0	1
Delaware	21	0	3	18
Florida: Middle	2	0	2	0
Hawaii	1	0	0	1
Illinois: Northern	3	0	0	3
Indiana: Northern	1	0	1	0
Indiana: Southern	1	0	0	1
Louisiana: Eastern	1	0	1	0
Louisiana: Western	1	0	1	0
Michigan: Eastern[396]	1	0	0	1

[395] We included In re BDS International, LLC, No.04-36281 (D. Colo. Dec. 3, 2004) in this category, even though the debtor did not specifically state that it had completed remediation of a diesel and glycol spill pre-petition. *See supra* note 188.

[396] In the eastern district of Michigan, PACER provided access to a limited number of documents. But, our review of the cases revealed a significant environmental liability in In re Alternative Fuels, L.C., No. 04-21822 (Bankr. E.D. Mich. May 4, 2004). The Michigan Department of Environmental Quality ("MDEQ") filed a proof of claim amounting to almost $6.3 million based on state court judgments resulting from the firm's environmental violations. *See* Statement of Claim at 1-2 ¶1-6, In re Alternative Fuels, L.C., No. 04-21822 (Bankr. E.D. Mich. Oct. 31, 2005) (Docket No. 62). The MDEQ's claim was the only document in the Alternative Fuels case that was accessible on PACER. The docket indicates that the case was dismissed without confirmation of a plan. *See* Docket, In re Alternative Fuels, L.C., No.04-21882 (Bankr. E.D. Mich. May 4, 2004).

-A- STATE AND DISTRICT	-B- TOTAL	-C- MISREAD Q.17	-D- RESOLVED OR SETTLED	-E- NEW TOTAL
Minnesota	1	0	0	1
Missouri: Eastern	3	0	0	3
New Jersey	6	1	0	5
Nevada	4	2	1	1
New York: Eastern	7	1	0	6
New York: Western	1	0	0	1
New York: Northern	2	0	0	2
New York: Southern	6	0	1	5
North Carolina: Eastern	1	0	0	1
North Carolina: Western	1	1	0	0
Ohio: Northern	1	0	1	0
Ohio: Southern	1	0	0	1
Pennsylvania: Eastern	3	0	1	2
Puerto Rico	1	0	0	1
Rhode Island	1	0	0	1
Texas: Northern	6	1	0	5
Texas: Southern	2	0	1	1
Virginia: Eastern	3	1	0	2
Washington: Western	1	0	0	1
West Virginia: Northern	1	0	0	1
Wisconsin: Eastern	1	0	0	1
TOTALS	93	7	14	72