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Financial Impacts of COVID-19:

Renegotiating Environmental Liabilities Outside Bankruptcy and Managing Environmental Obligations

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Current Financial Perspective — View From Restructuring Counsel

- Assessing federal stimulus packages and the market

- Potential drivers for bankruptcy filings in remainder of 2020:
  - Waning liquidity
  - Inability to continue to service debt long term
  - Strategic

- Why restructure through bankruptcy
  - Achieve a more manageable balance sheet
  - Address significant litigation
  - Reject above-market long-term contracts

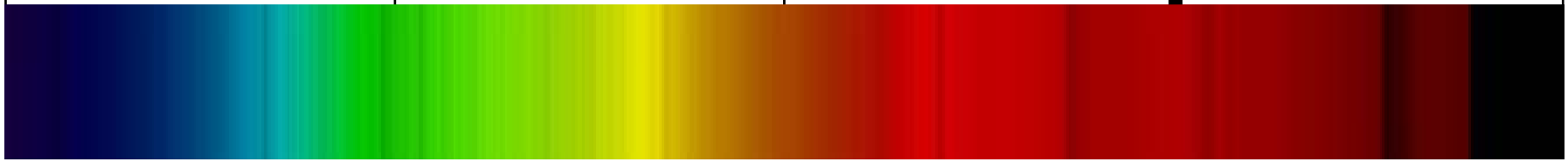
- Competing Policies

Current Financial Perspective — View From Restructuring Counsel (Cont'd)

- Insolvency for purposes of filing for bankruptcy
  - Bankruptcy Code defines "insolvency"
  - Technically, absence of insolvency is not a statutory ground to dismiss a Chapter 11 petition
  - Valid reorganization purpose with respect to property of debtor is required to file for bankruptcy
    - Implies reasonably imminent financial difficulties for the debtor as a whole

The Settlement Spectrum with Environmental Agencies

Normal Conditions	**Financial Distress**	**Severe Financial Distress**	**Bankruptcy**
• Governments generally do not offer any accommodation for macro or micro financial conditions	• Governments may reduce penalties or other liabilities based on demonstrated inability to pay	• In rare cases governments may be willing to offer broad relief or global settlements	• Governments are forced to operate within the four corners of the Bankruptcy Code



Key Government Policies and Areas of Potential Flexibility

- Key General Policies
  - Maintain a level playing field
  - Provide relief for financial distress only where documented
  - Do not push companies out of business or into bankruptcy

- Areas of Potential Flexibility

Least Flexibility	Greatest Flexibility
• Compliance with environmental regulatory and cleanup obligations	• Cost reimbursement (i.e., for government cleanup costs) • Compliance schedules • Penalty amounts • Significant litigation risk

Example — Hecla Limited

- U.S., State of Idaho, and Coeur d'Alene Tribe sued Hecla under CERCLA for response costs and natural resource damages at the Bunker Hill Superfund Site
  - Hecla entered into one consent decree for a limited portion of the site, but otherwise contested liability
- The case had been ongoing since 1991; Hecla had been found liable under CERCLA, but no judgment for costs or damages had been entered yet
- Based its financial condition relative to the size of the claims, Hecla was able to resolve all claims for payments well below its theoretic exposure, using a creative approach including:
  - It committed some lump sum cash payments immediately and others over three years;
  - It committed to contribute some proceeds from the sale of warrants over time; and
  - It preserved the option of delivering shares of its stock in lieu of some cash payments
- The governments valued the deal at $263 million (of potentially billions in government claims)
- In exchange, Hecla received an unusually broad release of past and future liability

Example — ASARCO, Inc.

- U.S. brought a fraudulent conveyance claim against ASARCO related to the proposed sale of a Peruvian subsidiary to an affiliate
- At the time, ASARCO had many pre-existing environmental liabilities pursuant to judgments and consent decrees, largely for environmental remediation
- The parties negotiated a solution to allow the transaction to proceed involving the creation of an Environmental Trust to fund various ASARCO environmental obligations around the country
  - The settlement specified all main terms of the deal
  - The buyer had to assign a promissory note of $100 million to the Environment Trust, to be paid in equal installments over eight years plus interest
  - The ultimate parent of both the buyer and ASARCO had to contribute a corporate guarantee to the Environmental Trust guaranteeing payments on the note
- The Environmental Trust specified how the funds would be used to satisfy ASARCO's environmental liabilities
- In exchange, ASARCO's pre-existing environmental liabilities were reduced
- ASARCO ultimately filed for bankruptcy two years later

COVID-19 Related Financial Distress

- COVID-19 is uncharted territory
- Environmental agencies are already providing some accommodations in the form of enforcement discretion, but they are largely driven by the *practical not financial* impacts of COVID-19 (i.e., social distancing, sheltering in place)
- Few financial accommodations have been offered thus far — e.g., the Department of Justice's policy on delaying penalty collections for a short period of time
- Government policy may evolve, and agencies have other tools in their kit (such as delaying or avoiding certain types of enforcement actions in the future)
- ***But do not expect broad or categorical financial relief from environmental liabilities due to COVID-19; instead, seek it on a case-by-case basis***

"You don't get what you don't ask for"

Strategies for Maximizing Financial Relief

- Put together a compelling financial story
  - General COVID-19 impacts will not be a persuasive basis for relief
  - Generic concerns about cash flow, market conditions, stock price, and the like are also not likely to be persuasive
  - Be careful not to play brinksmanship with bankruptcy
- Look for the right opportunity
  - Existing settlements (limited approaches)
  - Ongoing negotiations
  - Expected future matters
- Pitch an approach that fits the financial story

Existing Obligations to Private Parties: PRP Groups and Indemnitors

- Many companies have agreements to contribute to investigation/cleanup activity or indemnify (fully or partially) expenses of other companies
- No bright-line financial rule for an indemnitee to assess indemnitor's claim of financial hardship or for an indemnitor to decide how best to make such a claim
  - An entity likely will balance cost of granting the request against risk of receiving nothing if counter-party files for bankruptcy
  - Unsecured claims for the payment of money typically receive little or no payment in bankruptcy
- If a debtor is in serious financial distress, decisions about restructuring to attempt to avoid bankruptcy need to be made quickly

Existing Obligations to Private Parties: PRP Groups and Indemnitors

- In exchange for a reduction in a payment obligation, consider offering or obtaining financial assurance that the remaining obligation will be paid, such as:
  - Bond
  - Letter of credit
  - Escrow
- Financial assurance can convert an “unsecured” obligation into a “secured” one
- Use care in structuring a financial assurance instrument to minimize risk it will be considered property of a debtor’s bankruptcy estate rather available for the intended purpose of paying for the cleanup or other obligation
- If environmental financial relief will be stretching out payments over time, consider what (if any) interest rate to charge

Financial Assurance

- Background
  - Regulations and settlements/orders in a number of environmental programs require financial assurance
  - CERCLA settlements and orders and RCRA regulations are notable examples
  - RCRA regulations have the most well-known suite of financial assurance methods and requirements for using them; CERCLA program, for example, borrows heavily from these regulations
  - Least expensive method generally is a demonstration that the company (or an affiliate giving a guarantee) meets a “financial test” or “self-worth test”
  - Other methods: trust fund; surety bond; letter of credit; insurance policy
- Key issues:
  - Need to monitor and potentially replace financial test as the FA method
  - Monitoring other FA methods
  - When and how can EPA draw on financial assurance?

Financial Assurance — Monitoring the Financial Test

- Annual resubmission of demonstration that the respondent satisfies the test
  - Within 90 days of the end of the fiscal year
- Also must notify EPA within 30 days after it “determines that it no longer satisfies” the test
  - Obligation to “diligently monitor the adequacy of financial assurance”
- EPA also may determine that a company does not satisfy the test
  - Or EPA may ask for information

Financial Assurance — Replacing the Financial Test

- If a respondent no longer can meet the financial test, it must provide another method of financial assurance
  - Model settlement documents give 30-day deadline
  - EPA may extend this deadline, up to a number of days stated in the settlement or order (e.g., 60 days)

Monitoring Other Methods

- No stated schedule — obligation to “diligently monitor”
- How financial assurance methods could fail:
  - Surety or trustee gives notice of intent to cancel or fail to extend the term of an instrument
    - EPA gets these notices, too
  - Provider no longer meets requirements
    - E.g., surety no longer appears on Circular 570

Drawing on Financial Assurance

- In CERCLA program, EPA can draw on financial assurance when a Work Takeover occurs
  - EPA gives notice if it thinks Respondent is not performing Work, is deficient/late, or may cause an endangerment
  - Respondent has time (e.g., 10 days) to cure
  - If no cure, EPA can implement Work Takeover
- EPA can take the full assured amount
- Work Takeover is subject to dispute resolution, but EPA may proceed while dispute is resolved
- If the provider does not pay promptly, EPA may demand that the respondent pay, up to the cost of the remaining work

Ability to Pay Arguments in Negotiating Settlements

- EPA policies:
  - CERCLA: “General Policy on Superfund Ability to Pay Determinations” (1997)
  - Enforcement settlements: “Guidance on Evaluating a Violator’s Ability to Pay a Civil Penalty in an Administrative Enforcement Action” (2015)
    - Expands on 1986 guidance (“Determining a Violator’s Ability to Pay a Civil Penalty”)
- What does EPA see as an inability to pay?
  - “likely to put a company out of business or otherwise jeopardize its viability . . .” (CERCLA policy)
  - “will deprive a PRP or ordinary and necessary assets or cause a PRP to be unable to pay for ordinary business expenses . . .” (CERCLA policy)
  - “would cause it to suffer an undue financial hardship and prevent it from paying its ordinary and necessary business expenses” (Enforcement policy)

Ability to Pay Arguments in Negotiating Settlements — Process

- Burden is on company to show inability to pay
- Information burden
  - At least three to five years of tax returns with attachments
  - Ability-to-pay questionnaire
  - Follow-up questions
- EPA expects a detailed analysis – cannot just provide tax returns and make conclusory assertion of inability to pay
- EPA uses models (ABEL model, for companies) to analyze ability to pay
- Full financial picture
  - Indemnitors and insurance
  - Ability to sell non-core assets or borrow
  - Dividends and related entities
    - CERCLA policy — consider any material transfers since receiving notice of liability
    - Enforcement policy — consider veil piercing if evidence of international undercapitalization, profit sharing, or acts “at various with [a company’s] official corporate form”

Ability to Pay Arguments — Current Environment

- Slowing down settlement negotiations
  - An ability-to-pay analysis, following EPA's policies, takes time
  - Outcome of an ability-to-pay analysis is highly uncertain, given the great uncertainty that exists currently over financial performance (especially revenue) over the next few quarters
  - As a result, a practical approach if a company is in settlement discussions with EPA may be to let those discussions take time and not hurry to reach an agreement
- Stretching out payments
  - If a settlement is reached in this environment, consider paying large amounts (e.g., CERCLA past-cost payments, NRD or work obligations) over time
  - EPA and DOJ have shown willingness, in large CERCLA settlements, to allow large cash payments in annual installments and to discuss phasing of response actions to manage spend
  - EPA policies require interest on delayed payments
  - Enforcement policy recommends that penalties be fully paid within three years

Reductions in Workforce and Temporary Plant Shutdowns

- Environmental Compliance Issues
  - Comprehensive environmental management systems and checklists are especially important now
  - Review ongoing obligations in permits, plans (e.g., storm water pollution prevention, spill control and countermeasure) and applicable regulations
    - Are monitoring, inspections, reporting, recordkeeping and other requirements being met?
    - How long is hazardous waste being stored before pickup?
    - Are underground storage tanks subject to temporary closure requirements?
    - Other plant-specific issues
  - Consider whether chemicals are safely stored in current facility conditions

EPA's COVID-19 Policy #1 (Enforcement Discretion)

- Must "make every effort to comply with environmental compliance obligations"
- On March 26, EPA issued a policy outlining how it will exercise its enforcement discretion in light of the COVID-19 pandemic, retroactive to March 13
- If compliance is not "reasonably practicable" entities that wish to be covered by enforcement discretion policy should:

a. Act responsibly under the circumstances in order to minimize the effects and duration of any noncompliance caused by COVID-19;
b. Identify the specific nature and dates of the noncompliance;
c. Identify how COVID-19 was the cause of the noncompliance, and the decisions and actions taken in response, including best efforts to comply and steps taken to come into compliance at the earliest opportunity;
d. Return to compliance as soon as possible; and
e. Document the information, action, or condition specified in a. through d.

EPA Policy #1 — What's Covered?

Laws, Regulations and Permits

- Broad categories of relief: EPA does not expect to seek penalties where COVID-19 caused routine monitoring and reporting violations
- Narrow categories relief: EPA will provide certain relief for—
  - Hazardous waste generators that exceed transfer deadlines or threshold amounts due to COVID-19
  - Animal feeding operations that are unable to transfer animals off-site and thus may trigger the regulatory requirements for CAFOs due to COVID-19
- Case-by-case relief: EPA *may* provide relief on a case-by-case basis if conditions met:
  - Imminent and substantial endangerments due to COVID-19
  - Failure of pollution controls or other equipment due to COVID-19
- Possible critical infrastructure relief:
  - "In situations where a facility is essential critical infrastructure, EPA may consider a more tailored short-term No Action Assurance, with conditions to protect the public, if EPA determines it is in the public interest."

Overarching Perspective

History suggests that, post COVID-19, all levels of government are likely to take a reasonable approach to unavoidable noncompliance with environmental obligations during the pandemic so long as:

1. Reasonable measures were taken to maintain compliance
2. Applicable agencies were kept informed about any compliance challenges
3. Any noncompliance had a substantial causal link to COVID-19 that was well-documented
4. The noncompliance was not a choice driven by economic motivation
5. No criminal conduct was involved
6. No major incident occurred (e.g., a significant release or injuries)

But governments will likely take a hard look at major incidents, avoidable violations, and the like

Arkema Plant in Crosby, TX post Hurricane Harvey

Plant Closure — Environmental Obligations

- Environmental obligations triggered by plant closures merit consideration in strategic decision-making
- While Phase I environmental site assessments and compliance audits are standard tools to identify environmental issues for transfers of ongoing businesses, similar guidance is not available to identify closure obligations
- Depending on plant operations and regulatory status, examples of obligations that can be triggered by plant shut-down include:
  - Closure of hazardous waste treatment, storage or disposal facilities, tanks and landfills
  - Proper handling and removal of chemicals, waste and equipment impacted by chemicals
  - Proper identification and handling of asbestos, lead-based paint, PCBs and mercury during building demolition
- Cessation of operations of an “industrial establishment” in New Jersey can trigger investigation and remedial requirements under the Industrial Site Recovery Act
- Consider whether shutdown will generate emission credits

COVID-19: Addressing Environmental Issues in Transactions

- Be prepared to quickly address diligence needs as seller, buyer or borrower
  - Determine whether a standard diligence team is in place and how diligence documents can be accessed
  - Update standard diligence questionnaires and be ready to address new issues:
    - How has COVID-19 impacted a facility's environmental compliance?
    - Are assertions about inability to pay environmental indemnification or PRP group obligations being made or received?
    - If a company is selling a pesticide addressing COVID-19, how is it complying with EPA requirements?
  - Consider whether standard environmental contract provisions should be updated
  - Clarify with colleagues who will address COVID-19 health and safety issues

ASTM Phase I Environmental Site Assessments

- Necessary to satisfy “all appropriate inquiries” requirement of CERCLA innocent purchaser, bona fide prospective purchaser and contiguous property owner defenses
- Site visits are an important element of the assessments
- How a state or local stay-at-home order prohibiting all but “essential” activities impacts environmental site visits depends on the specifics of the order and is subject to interpretation
  - Illinois Executive Order 2020-10 identifies essential services as including “professional services” such as legal and real estate services
  - New York guidance states: “Real estate services shall be conducted remotely for all transactions . . . ; provided, however, that any services and parts therein may be conducted in-person only to the extent legally necessary and in accordance with appropriate social distancing and cleaning/disinfecting protocols” https://esd.ny.gov/guidance-executive-order-2026
  - While some orders allow for investigation as part of remediation, that may not encompass the typical Phase I site visit
- Some consultants have suggested remote visits through video technology

Environmental Diligence Challenges

- Stay-at-home orders impact environmental compliance audits and Phase II sampling

- If on-site visits cannot be performed, consider other sources of information and risk management:
  - Consultants may identify additional information through expanded use of database searches and photographic records
  - Conduct more interviews than has been customary
  - Experienced consultants' judgment in assessing risk and estimating cost is important
  - Seek environmental indemnification backstopped by an escrow

- Creatively addressing environmental diligence challenges will facilitate transactions during COVID-19

Q&A

THANK YOU FOR JOINING US

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TIMOTHY K. WEBSTER is co-leader of the firm's environmental practice. He joined the firm's Washington, D.C. office from the U.S. Department of Justice where he served as a Trial Attorney in the Environmental Enforcement Section. His practice includes both civil and criminal environmental enforcement defense, as well as challenges to government actions, internal investigations, and regulatory advocacy and compliance counseling. Tim has handled a wide variety of civil and criminal cases under statutes such as the Clean Air Act (including stationary sources, mobile sources, greenhouse gases, and stratospheric ozone, and the Risk Management Program), the Clean Water Act (including oil spills and permit violations), CERCLA (including cost recovery, contribution, and release reporting), the Federal Insecticide, Fungicide, and Rodenticide Act (misapplication and misbranding), as well as "toxic tort" and other matters.

In 2015, Tim was sworn in as the 44th President of the District of Columbia Bar, as position he served in for a year while remaining a partner at the firm. This "unified" bar is the mandatory licensing authority for all District of Columbia lawyers and has over 100,000 members and about 150 employees. He also led the D.C. Bar Pro Bono Center, an affiliated 501(c)(3) entity that recruits, trains, and mobilizes volunteer attorneys to take pro bono cases serving individuals living in poverty. Tim remains active with the D.C. Bar, chairing its Strategic Planning Committee for 2020 and participating as a co-chair of its Leadership Development Committee and as a member of the Pro Bono Committee. In addition, Tim served as outside pro bono General Counsel of the D.C. Bar from 2004–2010, advising on business matters and defending the Bar and its employees in litigation.

Tim is listed in *Who's Who Legal*, *Chambers USA* and *The Best Lawyers in America*. He is also a Fellow of the American Bar Foundation.

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DUSTON MCFAUL has primary experience advising clients through complex restructurings, negotiated workouts, distressed investments and contested proceedings. As a local practice leader in Texas of Sidley's global restructuring group, his focus involves representing debtors, lenders/creditors, sponsors, boards and buyers in all aspects of Chapter 11 cases, out-of-court restructurings and transaction strategies. In addition, he has prosecuted and defended a full array of matters based upon alleged breach, business torts, claim priority, valuation, fraudulent transfer, lifting of stay, rejection/assumption, conversion, cramdown, fiduciary duties and challenges to commercial transactions.

Duston frequently is recognized for his work and guidance. Noting his "reputation as a thoughtful and creative problem solver," he is included in *Chambers USA* for his Bankruptcy/Restructuring Law practice (2013–2019). *Chambers USA* also highlights "his well-earned reputation as a strong presence in bankruptcy litigation," and notes that Duston is "valued by clients for his work ethic and excellent grasp of the financial aspects of situations…and praised by clients for his great guidance and insights in negotiations." Duston also is recognized by *The Legal 500 US* in the area of Corporate Restructuring (2013–2019) and by The Best Lawyers in America in the categories of Bankruptcy and Creditor Debtor Rights (2010–2020) and Litigation — Bankruptcy (2011–2020), and was selected as a Texas Super Lawyer (2013, 2017–2019), "Top Lawyers" by Houstonia (2018–2019) and a Super Lawyers "Rising Star" (2005–2006, 2008–2010). He was a Keeton Fellow and was named to the "Lawyers on the Fast Track," by H Texas (2004). Duston has recently been active in public matters such as Legacy Reserves, M&G Chemicals, EMAS Subsea, Preferred Sands, O'Benco, Rex Energy, Beauty Brands, Bristow Group, Shoreline Energy, Southcross Holdings, Vanguard Resources, Key Energy Services, C&J Energy, Mossi & Ghisolfi, Ultra Petroleum, Miller Energy Resources, Linn/Berry Petroleum, Trinity River Resources, Exploration Partners, CHC, Black Elk Resources, Buccaneer Resources, New Gulf, and Hanjin Shipping, as well as leading dozens of private restructurings in the energy sector. Duston also serves as the Houston Chair of a firmwide administrative committee.

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JOHN M. HEYDE'S practice includes civil and administrative litigation concerning various federal environmental statutes, with an emphasis on contaminated waterbodies and other sites and complex scientific issues. John has also provided regulatory advice, especially regarding the Emergency Planning and Community Right-to-Know Act, and assisted with internal investigations and environmental audits.

John has represented several clients in complex cases arising from contaminated river and bay sediment, advocating client positions on scientific issues such as the toxicity of environmental contaminants, the fate and transport of contaminated sediment, and the efficacy and cost-effectiveness of various alternatives for managing sediment. John has also counseled clients in risk-based corrective actions and in natural resource damages matters.

John's litigation experience includes cases in federal and state courts arising from environmental contamination, including Superfund, citizen suits under the Resource Conservation and Recovery Act, and various state-law claims.

Prior to his legal career, John was the environmental policy director for the Council of Great Lakes Governors, an association of the eight Great Lakes state governors. In that role, John negotiated a government-industry partnership to prevent oil spills. John has given numerous presentations at professional seminars on hazardous substance policy issues and hazardous release reporting requirements. John first addressed natural resource damages issues in a law review comment entitled, "Is Contingent Valuation Worth the Trouble?" (62 U. Chi. L. Rev. 331)

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