COVID-19 WEBINAR SERIES

May 18, 2020

Financial Impacts of COVID-19:
Environmental Issues in Bankruptcy (Part 2)

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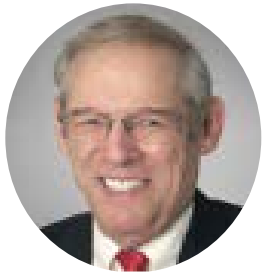

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Agenda

- Discharge of environmental claims
- Abandonment of contaminated property
- Use of trusts to settle environmental claims
- Transfer of real estate during 363 sales

Notice to Creditors

- Importance: ascertains creditors and discharge of liability
  - Rooted in due process; requires notice of important dates and deadlines: bar date, confirmation and discharge objections
  - If a debtor fails to serve a known creditor with notice or fails to sufficiently publish notice to unknown creditors, a claimant without actual notice may not be discharged
- Notice inquiries are two-fold:
  - Identification of the known and unknown universe of claimants
  - The content and scope of the notice itself
    - highly fact-intensive inquiry, unique to circumstances of each case
- Two types of notice: actual and constructive
  - If a creditor is known, a court will require actual written notice (a physical mailing)
  - A creditor is known if actually known or should have been “reasonably ascertainable”:
    - reasonable due diligence: search of the debtor’s records would have located the creditor;
    - the relationship between the creditor and debtor at the time of the proceedings; and
    - whether the claim was conceivable, conjectural, speculative or will arise in the future.

Notice to Creditors (cont'd)

- Unknown creditors: constructive notice by publication generally acceptable
  - Publication notice in a mix of national and local publications is often held to be constitutionally adequate in scope, absent case-specific considerations mandating publication in a specific region
- Environmental specific issues
  - Existence and scope of debtor's environmental liability may not be discoverable or fully known for several years after release of contaminants
  - Debtor susceptible to environmental liabilities should give notice to exhaustive list of potential environmental creditors to maximize the scope of the discharge and reduce future environmental liabilities
  - Publication of bankruptcy notices in environmental specific journals
  - Contractual environmental indemnification and hold-harmless obligations should be treated as known creditors and receive actual notice
  - Trend is before a creditor's CERCLA claim may be cut off by a bankruptcy discharge, creditor must have sufficient notice of the case and basis on which to foresee its claims against the debtor

Notice to Creditors (cont'd)

- Notice typically provides:
  - Date of the bankruptcy filing
  - Chapter under which the debtor filed, the case number, and whether the case was a voluntary or involuntary filing
  - The date, time and place for meeting of creditors
  - Applicable deadlines:
    - Bar Date — last date to file a proof of claim or they will be barred and discharged
    - Objection deadline to adequacy of disclosures in disclosure statement
    - Objection deadline to confirmation of plan and to object to the discharge of the debtor or dischargeability of a creditor's claim in the case

Proofs of Claims

- Importance: failure to timely file
  - Bars a creditor's claim/recovery against a debtor; voting rights and discharge
- Standard and Burdens
  - In the first instance, a claimant must allege facts sufficient to support the claim
  - Filing of claim is *prima facie* valid and the burden shifts to the debtor to object and refute at least one allegation that is essential to the claim.
  - If objector does the latter, the burden then reverts to the claimant to prove the validity of the claim by a preponderance of the evidence
- Governed by Bankruptcy Rules 3000
  - BR 3003(c)(1) *Who May File*? Any creditor or indenture trustee
  - BR 3003(c)(2) *Who Must File?* Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated
  - BR 3003(c)(3) *Time for Filing*. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed
    - Chapter 7 liquidation: timely if filed not later than 70 days after the order for relief
    - Chapter 11: typically debtor files a motion and court enters bar date order

Proofs of Claims (cont'd)

- Preparing
  - Must include a reasonable amount of supporting documentation, as appropriate, e.g.:
    - explanation of basis of the claim: contracts, invoices, statements of accounts, other documentation supporting the claim
  - If sufficient documentation is not attached, the court might disallow the claim outright
  - Should not file confidential or commercially sensitive information
  - Form B410; may have case specific form; Addendum and exhibits
- Amount of the claim
  - Liquidated amounts where possible
  - Contingent and unliquidated amounts: ensures creditors do not prejudice themselves and/or precludes potential claims or future damages
- Against which debtor to file
  - Creditors have a right to recover in full from each of the multiple entities that are jointly and severally liable for a debt, including guarantors
  - All debtors that are potentially liable

Proofs of Claims (cont'd)

- Consequences of filing a proof of claim
  - A proof of claim is a sworn and signed document attesting to the validity of a claim. Any misrepresentations in the proof of claim or the documents attached can provide a basis for disallowance, sanctions, or worse
  - Consent to Jurisdiction of the bankruptcy court to adjudicate both:
    - Matters pertaining to the claim itself; and
    - Related matters, including claims by the debtor against the creditor.
  - The disallowance/allowance of a proof of claim constitutes a final judgment on the merits, even if the creditor suffered damages (or additional damages) after the reorganization
  - Debtor can seek to estimate a contingent/unliquidated claim for allowance at low amount
  - Certain contingent claims (e.g., for reimbursement or contribution) may be disallowed in full under section 502(e)(1)(B) of the Bankruptcy Code

When Claims Arise for Bankruptcy Purposes

- Importance
  - Whether a debtor's obligation is a dischargeable claim subject to the bankruptcy process depends on when the claim arises
  - Chapter 7 — pre-petition claims receive distributions
  - Chapter 11 — pre-confirmation claims receive distributions and are dischargeable
  - A debtor remains fully liable for claims that arise post-confirmation in a Chapter 11 case
- "Claim" defined broadly: a right to payment, including contingent, unmatured
- Courts differ on standard for "when a claim arises" for environmental claims
- Right to Payment Approach
  - a debtor's CERCLA liability will be discharged only if all four CERCLA elements exist prior to bankruptcy.
    - 1) the defendant falls within one of the four categories of responsible parties; 2) hazardous substances are disposed at a facility; 3) there is a release or threatened release of hazardous substances; and 4) the release causes the incurrence of response costs
  - May encourage delay of cleanup and not incurring response costs until after case ends
  - CERCLA friendly as claims less likely dischargeable

When Claims Arise for Bankruptcy Purposes (cont'd)

- Underlying Act Approach
  - A pre-bankruptcy "claim" subject to discharge exists so long as the underlying polluting act occurred prior to the debtor's bankruptcy
  - Even if EPA does not know of potential CERCLA claim against the debtor, debtor's liability is discharged if debtor's contamination conduct occurs prior to bankruptcy filing
  - Debtor/Bankruptcy Code friendly as more environmental claims dischargeable
  - Polluters could escape responsibility by filing after polluting, but before EPA knew
  - Undercuts CERCLA polluter accountability and large group of responsible parties goals
- Second Circuit's *In re Chateaugay Corp*/Debtor-Creditor Relationship Approach
  - Contingent claim arises at time of or threat of release of hazardous substance, regardless when government discovers or incurs recoverable costs, if the creditor and debtor began a relationship before the debtor filed for bankruptcy
  - Broadly construed "claim" to include environmental claims arising from yet unknown pre-petition releases of a hazardous substance
  - Generally not followed by other jurisdictions
  - Debtor/Bankruptcy Code friendly and similarly undercuts CERCLA

When Claims Arise for Bankruptcy Purposes (cont'd)

- Prevailing Approach: Fair Contemplation Standard
  - "Fair contemplation" or "foreseeability" standard posits that a contingent CERCLA claim arises pre-petition only if it is based upon prepetition conduct that can fairly be contemplated by the parties at the time of the debtor's bankruptcy
  - Limits the discharge of claims resulting from prepetition conduct to situations in which response costs had been "fairly contemplated" by the debtor and the creditor on or before the petition date
  - Thus, a claim accrues when the potential CERCLA claimant, at the time of bankruptcy, "could have ascertained through the exercise of reasonable diligence that it had a claim" against the debtor for a hazardous release
  - Attempts to balance competing goals of Bankruptcy Code (fresh start) and CERCLA/environmental statutes (protect public health and safety by facilitating an expeditious cleanup) perhaps with slight favor to environmental

What Constitutes a Claim?

Claims include:

- A right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;
- A right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. 11 U.S.C. § 101(5).

Examples of allowable environmental claims

- Civil penalties owed to the government
- Government or private claims for reimbursement of cleanup costs

Includes contingent and unliquidated claims

- Contingent Claim: “A claim that has not yet accrued and is dependent on some future event that may never happen.” *Claim*, Black's Law Dictionary (11th ed. 2019).
- Unliquidated Claim: “A claim in which the amount owed has not been determined.” *Id*.

Claims in Bankruptcy Proceedings

Claims are discharged and paid from the bankruptcy estate

- Note: what constitutes a claim is a separate inquiry from whether something is a “monetary judgment” subject to automatic stay

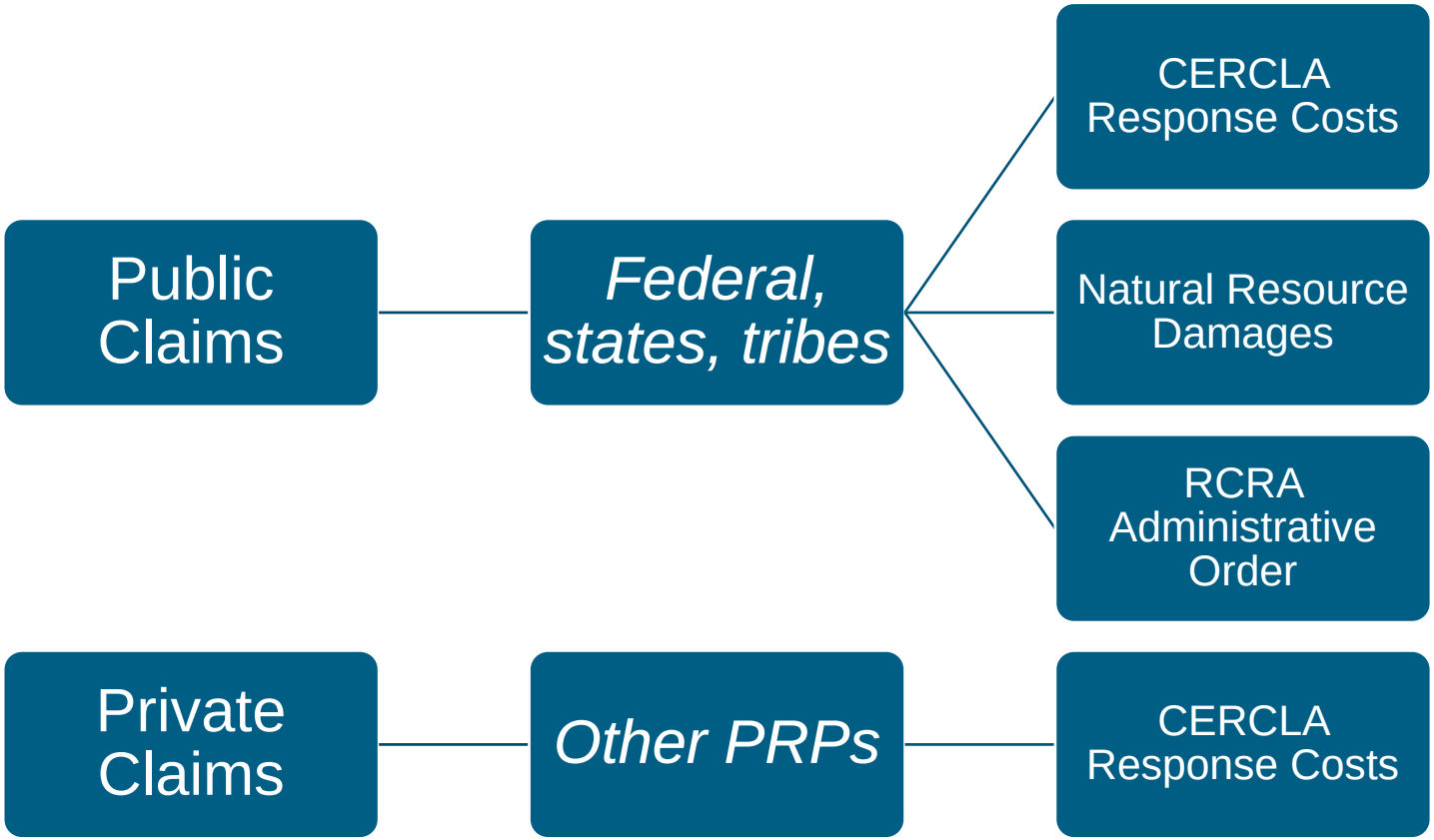
Bankruptcy does not affect ongoing regulatory obligations

- A debtor has ongoing responsibility to maintain property of the estate (owned or operated by the debtor) in compliance with law. *See* 28 U.S.C. § 959(b).
- Compliance with emissions limits, pollution prevention, obligations to remediate contamination, etc.

Generally, debtors wish to have as many liabilities as possible defined as claims and discharged

- In Chapter 7, where discharge is irrelevant, parties seeking a cleanup may not have an alternative to filing a claim
- In Chapter 11, a party seeking a cleanup may want to exclude such obligation from the bankruptcy to avoid discharge and seek performance from the reorganized entity
- But debtor would generally seek those classified as claims so that the liabilities cannot be asserted against the reorganized debtor

Cleanup Claims Under Federal Law



Dischargeable Cleanup Obligations

Cleanup obligations run with the land

- So a debtor who retains ownership of a contaminated property after reorganization still has the cleanup obligation

Less clear whether a cleanup order to remediate property owned by third party constitutes a dischargeable claim

- The issue is whether such an injunction (under CERCLA or similar law) would constitute an “equitable remedy for breach of performance if such breach gives rise to a right to payment,” so that it would be a “claim” subject to discharge

Case law is divided

- Some courts have focused on the distinction between property owned by the debtor, where the cleanup obligation would not be a claim, and property not owned by the debtor where there could be a claim
- Other courts have focused on whether the government would even have the ability to accept money in lieu of cleanup, and if the government did not have such an ability, the courts have found that the government did not have a claim

Case Law on Cleanup Obligations

- In *Ohio v. Kovacs,* the Supreme Court addressed the issue of whether a cleanup order was a “claim,” concluding that where the debtor no longer controlled the property to be cleaned up, the government was in essence seeking money, and therefore, had a claim. 469 U.S. 274, 285 (1985).
- “Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a "claim.” But an order to clean up a site, . . . is a ‘claim’ if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.” *United States v. LTV Corp. (In re Chateaugay Corp.)*, 944 F.2d 997, 1008 (2d Cir. 1991).

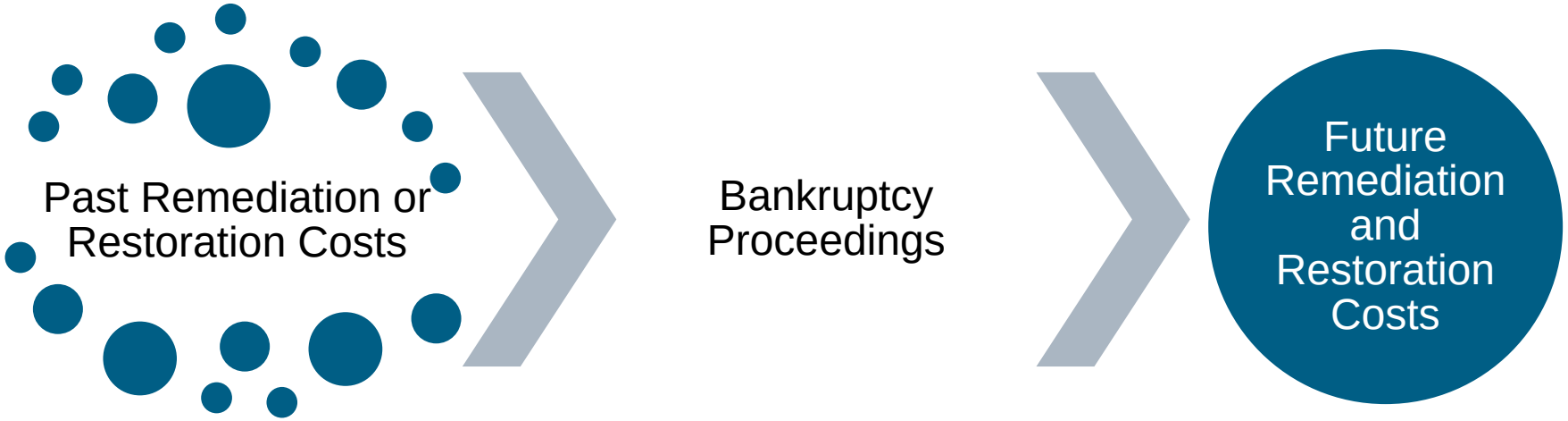
Case Law on Cleanup Obligations (cont'd)

- In *In re Torwico Electronics, Inc.,* the Third Circuit found that where a manufacturer had previously operated at a site, but never owned the property and had ceased operations, a cleanup order from the State of New Jersey was not a claim because the state was not seeking payment. 8 F.3d 146 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994).
  - The state statute did not authorize the state to accept money in lieu of cleanup.
- "[D]ischarge must indeed be limited to cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed, rather than merely imposing a cost on the defendant, as virtually all equitable decrees do." *United States v. Apex Oil Co.,* 579 F.3d 734, 738 (7th Cir. 2009).
  - Dealt with RCRA § 7003 claim, where government had no alternative right to payment
- Some parties have resolved issues by settling potential claims with the government in exchange for certainty of discharge.

Case Law on Cleanup Obligations (cont'd)

- In *In re Peabody Energy Corporation,* three California municipalities sued the reorganized Peabody based on climate change-related claims under various tort theories, including public nuisance. No. 18-3242, 2020 WL 2176028, at *1 (8th Cir. May 6, 2020). The Eighth Circuit rejected the municipalities' arguments that their claims for pre-bankruptcy conduct survived the reorganization and agreed with the bankruptcy court that the claims were discharged.
  - The bankruptcy plan at issue had a carve-out that governmental claims under "Environmental Law" would not be discharged, but the court ruled that the municipalities claims were based on tort law or common law, rather than the environmental laws contemplated by the plan.

Types of Cleanup Costs



Cleanup Costs in Bankruptcy

- Past costs are known, but claims for future remediation costs may be contingent and unliquidated — and disallowed by the court.
- The Bankruptcy Code disallows contingent claims for reimbursement or contribution where the claimant is co-liable with the bankrupt debtor. 11 U.S.C. § 502(e)(1)(B).
  - Various courts have consistently interpreted this provision broadly and disallowed contingent claims for reimbursement of *future* remediation costs. E.g., *Route 21 Associates of Belleville, Inc. v. MHC, Inc.*, 486 B.R. 75, 98 (S.D.N.Y. 2012)
  - A court can allow a claim that becomes fixed prior to the end of the bankruptcy case (e.g., if costs are known or incurred). 11 U.S.C. § 502(e)(2)
- A direct, contingent claim for response costs under CERCLA § 107 can be allowed because it is not a claim for contribution and the parties are not co-liable.
  - *In re Allegheny Intern., Inc.*, 126 B.R. 919, 923 (W.D. Pa. 1991); "C" *Glidden Co. v. FV Steel & Wire Co.*, 350 B.R. 96, 102 (E.D. Wis. 2006)

Abandonment of Contaminated Property

- Section 554 of the Bankruptcy Code generally allows a trustee to "abandon" property that is either "burdensome" or "of inconsequential value and benefit" to the estate.
  - Typically, when a Chapter 7 trustee abandons contaminated property, the property reverts to the debtor.
- The Supreme Court created an exemption to the abandonment power, ruling 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." *Midlantic Nat. Bank v. N.J. Dept. of Envtl. Prot.*, 474 U.S. 494, (1986)
- Subsequent cases have generally found that the more immediate and serious the harm, and the more funds are available in the estate to address that harm, the more likely the court is to deny abandonment.
  - Abandonment has been allowed in some cases where a contaminated property has not been shown to present imminent harm. *E.g., In re L.F. Jennings Oil Co., 4 F.3d 887 (10th Cir. 1993)*

Use of Trusts to Settle Environmental Claims in Bankruptcy

- Why might a debtor need to set up a trust as part of a bankruptcy proceeding?
  - Debtor owns one or more contaminated properties it is no longer using
  - Those properties have significant associated environmental liabilities — typically, they require expensive cleanups
  - The liabilities are significant enough that the debtor wants to/needs to be free of them after the bankruptcy
  - Because of the liabilities, the properties have negative net value — their liabilities exceed their worth
- In this situation, debtors have limited options
  - Can't continue to own the properties; the debtor will get a bankruptcy discharge but a new post-bankruptcy liability will spring up and attach to the owner post-bankruptcy
  - Section 363 "free and clear" sale won't solve that problem
  - Can't give away the property — probably no one wants it
  - Can't abandon the property
- If the liability is significant enough, the debtor may not be able to reorganize successfully

How To Deal With These Problems?

- Need to separate debtor/reorganized company from ownership of the properties
  - Don’t want to have a post-CERCLA liability created for the new owner
- But how to separate the properties from the debtor, given that no one wants them?
  - No one wants to assume liability for the properties
  - Reorganized debtor doesn’t want to give an indemnification — would defeat purpose
- United States and states don’t want to own the property
- Individual would not want ownership. Not a corporation/LLC. Maybe a trust!
- But a trustee would require assurance he/she/they would not be held liable. Maybe the governments will agree that the trustee and trust will not be liable?
- Why would the governments agree to such a thing?
  - They may want the reorganization to succeed
  - They may get something out of the arrangement — Property access, and debtor may pay the Trustee some money for remediation
  - Make the governments the beneficiaries of the trust

How To Deal With These Problems? (cont'd)

- Who would be the trustee? The job requirements:
  - Independence from the debtor
  - Some legal background helps
  - Experience with trusts like these
  - Responsible/trustworthy
  - Acceptable to the governments/amenable to carry out the governments' instructions for the property
  - Willing to assume role *without* indemnification
    - Debtor doesn't want to indemnify
    - Government won't/can't indemnify
- How to document such an agreement?
  - For certainty, the agreement needs to be part of a judicially approved settlement — a court order
  - Attachment to a consent decree
  - Under the agreement, the Trustee to take and hold title to the property

National Gypsum Case: The Very First Environmental Bankruptcy Trust

Photo Credit: EPA.gov

- Debtor owned a former waste disposal site — closed, no longer in use, listed on NPL
- Created Trust under judicially-approved settlement with government
- Transferred property title to the Trust
- As part of settlement, National Gypsum paid a fixed sum to the Trust that could be drawn upon:
  - To pay expenses of the Trust (Trustee's fees, administrative expenses, maintenance)
  - To reimburse the United States for some response costs
- Settlement agreement provided:
  - "Neither the United States nor the debtors shall be or shall be deemed to be an owner, operator, trustee, partner, agent, shareholder, officer, or director of the . . . Trust"
- Trust Agreement provided:
  - "Neither this Trust nor the Trustee shall be liable except in accordance with the terms of this Trust Agreement and the Settlement . . . for relief arising out of conditions at or relating to the Trust Real Property caused by any action or inaction of any former owner, tenant or licensee of the Trust Real Property"

When will Environmental Trusts *NOT* be Helpful?

- The Reorganized Debtor will still need to use the property — i.e., it will remain in active use
  - If reorganized debtor owns the property, there's no need for a trust
  - Leasing the property won't shield the operator from liability
- The liabilities at issue are for regulatory violations and not for cleanup costs
  - Trustee will still need to comply with regulatory requirements; Trust structure will not protect the ongoing owner or operator from regulatory violations
  - Past regulatory violations probably would not be attributed to the new owner (reorganized debtor), as long as the violations don't continue after the title transfers
- The issue and the environmental liabilities are not important enough to the debtor to warrant negotiating and establishing the Trust, and the costs to fund it
- The debtor is unable or unwilling to chip in *anything* for remediation costs
  - The government needs a reason to consent to the establishment of the trust

Examples of Cases in which Environmental Trusts have been Used Since *National Gypsum*

- *Fruit of the Loom*
- *Tex Tin*
- *Lyondell*
- *Delphi*
- *Asarco*
- *Tronox*
- *General Motors*

Perspectives of an Environmental Remediation Trustee

- Establish a corporation as Trustee
  - Minimize risk of personal liability for the individual
  - Ensure that all actions are taken solely by the corporate trustee, and that the trustee is not acting on its own behalf, but only as trustee
    - Sign all documents “not individually, but solely as President of [corporate trustee], not individually but solely as Custodial Trustee”
  - My parent corporate entity is named Le Petomane, Inc.
    Le Petomane establishes separate subsidiaries to serve as trustee for each trust
    - My first environmental remediation trusts were for the Fruit of the Loom bankruptcy. Those trusts were Le Petomane I, Inc., Le Petomane II, Inc., Le Petomane III, Inc., and ad Le Petomane IV, Inc. (Different properties).
    - Many more followed. The next will be Le Petomane XXXI, Inc.

Perspectives of an Environmental Remediation Trustee (cont'd)

- Drafting the Trust Documents
  - Basic terms of trust agreement generally stay the same from agreement to agreement
    - Trust is set up under some judicially approved settlement (e.g., consent decree)
    - Trust provides for transfer of contaminated property to Trust
    - Everyone agrees that the Trustee will have no liability for pre-existing environmental conditions, or beyond the Trust corpus
- Beneficiaries
  - Two beneficiaries — the U.S. and the State where the site is located
  - One beneficiary is the "lead" agency and the other is the non-lead

Perspectives of an Environmental Remediation Trustee (cont'd)

- Budgets
  - Trustee meets with the beneficiaries to develop environmental and administrative budgets
  - Once budgets are established, the Trust can use the funds per the budget provisions
  - Reports are filed as per the trust agreement
  - Meetings are held on a monthly or more frequent basis, depending on the nature of the site and activities going on there

Perspectives of an Environmental Remediation Trustee (cont'd)

- Environmental Activities Undertaken by Trust
  - Trustee hires environmental consultants, who will submit work plans to the Trust
    - Some trustees do the environmental work in-house. I believe that is not appropriate as it creates a conflict of interest. Trustees should not be attempting to monitor their own work
    - The Trust hires one or two working consultants and another oversight consultant to monitor the work being done and to make recommendations as to the procedures being followed by the working consultants
  - Trustee will confer with the lead agency for approval of projects
  - In addition to the beneficiaries, there are usually "interested parties" that are advised of the actions to be taken and given an opportunity to comment

Perspectives of an Environmental Remediation Trustee (cont'd)

- Investment of Trust Assets
  - Governments are usually very cautious as to how Trust funds are invested
  - In larger cases of long duration, I have convinced the beneficiaries to place part of the Trust assets in equities. Making the case for doing so took a very long time and involved convincing the parties of the necessity of equities for long-term trusts
  - Key issues are what percentage of the assets should be invested in equities and what types of equities
  - Investments must be closely monitored and actions of the investment manager are reviewed by a financial consultant.

Perspectives of an Environmental Remediation Trustee (cont'd)

- Trust and its Operations are Constantly Evolving
  - Few sites remain static.
    - Conditions change
    - Objectives of the beneficiaries and other interested parties change
  - Therefore, the Trust must constantly evolve to meet the requirements of the site, the beneficiaries, and the interested parties

Section 363 Sales

- Section 363 of the Bankruptcy Code (11 U.S.C. § 363) permits a company in bankruptcy (i.e., the "debtor") to sell its assets outside of the ordinary course of its business "**free and clear**" of most liabilities (subject to certain exceptions).
- The debtor must seek and obtain the bankruptcy court's approval of the sale.
- The bankruptcy court normally requires an auction or proof of an open and notorious process to ensure that debtor receives the "**highest or otherwise best**" offer for the assets.
  - "Highest" offer is not necessarily the "best," though failure to take the highest offer leaves the debtor subject to its sale being challenged by creditors or non-winning parties.
  - An offer for lower consideration might be considered better (e.g., quicker closing, fewer "outs," assumption of additional assets or liabilities, etc.).
- Section 363 sales typically move quite quickly from the commencement of the bankruptcy case to completion.

Section 363 Sales - Stages of the Process

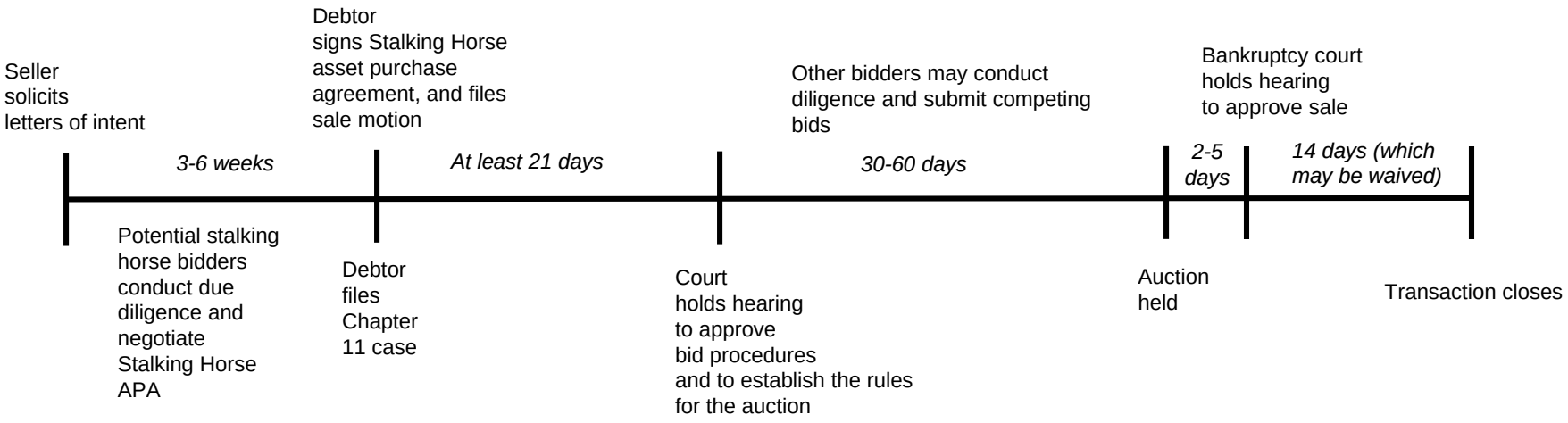
Prepetition or Postpetition

- Bankers/company solicit indications of interest and letters of intent.
- Negotiate purchase agreement with "*Stalking Horse*" bidder (if there is a Stalking Horse bidder).
  - If negotiated prior to a bankruptcy filing, the Stalking Horse agreement is typically executed concurrently with the bankruptcy filing by the debtor.

Postpetition

- Filing of bankruptcy case (if the debtor has not already filed).
- Court approves bid procedures, and any bid protections for the Stalking Horse bidder.
- Further marketing and submission of competing bids.
- Auction
- Sale hearing
- Closing

Sample 363 Sale Timeline



Section 363 Sale vs. Traditional M&A

- PROS:
  - Buyer obtains a court order authorizing the sale of assets "*free and clear*" of interests in those assets.
  - Overrides anti-assignment clauses in contracts (including leases).
  - Ability to “cherry-pick” assets and liabilities to be acquired.
- CONS:
  - More limited opportunity to conduct due diligence, including title and environmental diligence.
  - Diligence must be conducted on an accelerated timeline.
  - Acquisitions are often on an “as is, where is” basis (with limited or no post-closing indemnification).
  - More limited seller representations and warranties.

Environmental Considerations in Section 363 Sales

- "Free and Clear" sale of debtor's real estate will not shield new owner from its own liability arising when it acquires title.
  - Party acquiring contaminated land from a bankruptcy estate potentially liable under CERCLA and similar state laws as the "owner" or "operator" of the property.
    - Leading Early Case – *In re CMC Heartland Partners*, 966 F.2d 1143 (7th Cir. 1992): CMC Heartland Partners was the successor to a reorganized railroad. USEPA had been aware of the existence of contamination on the subject property, but did not file a bankruptcy claim. While the Seventh Circuit recognized that the liability for the contamination which existed prior to the reorganization was discharged, the reorganized debtor was the current owner or operator of contaminated property.
  - Buyer is also responsible for on-going compliance with environmental laws.
    - *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009): Sale "free and clear of liens" meant the new owner of contaminated property would not have successor liability for the debtor's prior environmental liability. New owner, though, was not shielded from responsibility for compliance with environmental law applicable after it acquired title, including remedial obligations. See also Transcript of Hearing, *In re Magnesium Corp. of America*, No. 01-14312 (Bankr. S.D.N.Y. June 4, 2002) (ECF #290).

Environmental Considerations in Section 363 Sales (cont'd)

- Asset purchase in traditional M&A context typically does not involve assumption of the seller's pre-existing environmental liabilities.
- In a Section 363 sale, the debtor may seek to include a broad assumption of environmental liabilities in the sale agreement.
- Common misconception that purchase of the assets "free and clear" results in discharge of all pre-existing environmental liabilities.
- If the buyer expressly assumes those liabilities in the sale agreement, then those liabilities will transfer to the buyer as a result of the sale.
- Buyers should consider pushing back on broad assumptions of liability in Section 363 sale agreement.
- Also consider express language in the 363 sale order cutting off successor liability for pre-petition environmental conditions.

Environmental Considerations in Section 363 Sales (cont'd)

- Federal and state environmental agencies may be interested in the transaction.
  - In *In re Oldco M Corp*., 438 B.R. 775 (Bankr. S.D.N.Y. 2010), the court noted: "[A] state may well have valid grounds to object to a property sale to a party that will not, or financially cannot, offer adequate assurance that it will meet its environmental compliance obligations." *Id.* at 785.
- Agencies typically insist on language in the 363 sale order that provides assurance that environmental liabilities will be addressed.
  - "Nothing in this Order or the Asset Purchase Agreement releases or nullifies any liability to a government entity under police and regulatory statutes or regulations that any entity would be subject to as the owner or operator of property after the date of entry of this Order."

Environmental Considerations in Section 363 Sales (cont'd)

- Reasonable purchase price may be best protection.
  - Work with experienced consultant to estimate costs.
  - Mine online diligence resources.
- To the extent possible, follow steps to qualify for purchaser defenses, such as bona fide prospective purchaser defense under CERCLA.
- Consider participating in Brownfield or Voluntary Cleanup Program.
- Consider obtaining environmental insurance or assignment of debtor's existing insurance policies.

Q&A

COVID-19 WEBINAR SERIES

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Laurence Kirsch

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Practices

- Environmental

Admissions & Certifications

- U.S. Supreme Court
- U.S. Court of Appeals, 3rd Circuit
- U.S. Court of Appeals, 5th Circuit
- U.S. Court of Appeals, 9th Circuit
- U.S. Court of Appeals, D.C. Circuit
- U.S. District Court, District of Columbia
- District of Columbia

Education

- Harvard Law School, J.D., 1982
- University of Pennsylvania, M.S., 1979
- University of Pennsylvania, B.A.S., 1979 (*summa cum laude*, Phi Beta Kappa)

LAURENCE S. KIRSCH is a partner in the Environmental practice group who focuses on environmental negotiation and litigation, emphasizing large contaminated sites, sediment sites and complex environmental enforcement proceedings. Mr. Kirsch brings his combined background in science and law to his practice which includes matters that have involved air, surface water, groundwater, hazardous waste, sediments, toxic substances regulation and indoor air quality, among other issues.

Mr. Kirsch has litigated and counseled clients on matters involving the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), SARA Title III (TRI), Resource Conservation and Recovery Act, Clean Air Act, Clean Water Act, Safe Drinking Water Act, Toxic Substances Control Act, Occupational Safety and Health Act and related state statutes.

In addition, Mr. Kirsch has considerable experience on matters involving the interface between environmental laws and bankruptcy. Among other things, prior to joining Sidley, he litigated the first estimation proceeding ever conducted of a federal CERCLA claim in a bankruptcy proceeding, resulting in a no liability ruling for the debtor on an US$80 million claim by the United States. As part of that same bankruptcy proceeding, he also participated in the creation of the first environmental remediation trust used in a Chapter 11 proceeding to take and hold title to contaminated property, allowing debtors to reorganize successfully. As part of his work on environmental bankruptcies, he has litigated and negotiated a number of key issues concerning how environmental obligations are addressed in bankruptcy proceedings.

Mr. Kirsch has been selected for inclusion in *Chambers USA*: America's Leading Lawyers for Business and Best Lawyers. While attending law school, he served as Managing Editor of the *Harvard Environmental Law Review*. Mr. Kirsch has been elected to the Environmental Law Institute's Leadership Council, the Institute's group of the most prominent environment, energy and natural resource leaders in the nation.

Heather Palmer

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Practices

- Energy
- Environmental
- M&A

Admissions & Certifications

- Texas

Education

- Vanderbilt University Law School, J.D., 1994
- Rhodes College, B.A., 1991 (*cum laude*)

HEATHER PALMER has extensive experience in energy-related environmental issues. She advises energy, petrochemical and pipeline companies and clients in the power and utility sector on environmental compliance and the allocation of environmental liabilities in mergers and acquisitions.

Heather's practice focuses on environmental law, advising clients on regulatory requirements, assisting them in the evaluation and negotiation of corporate and real estate transactions and representing them in environmental enforcement matters. Her industry experience includes onshore and offshore oil and gas regulation, solid and hazardous waste, oil and gas waste, coal combustion residuals (coal ash), environmental remediation, water quality, water rights, wetlands, endangered species, Superfund litigation and compliance with the National Environmental Policy Act. She plays a major role in advising clients on the environmental issues surrounding shale play development, hydraulic fracturing and the permitting, construction and operation of liquefied natural gas (LNG) import/export facilities in the U.S.

Heather has been acknowledged in numerous industry publications. She was featured in Chambers USA for Texas Environment (2006–2012, 2016–2020). The Legal 500 United States recognized her for Energy: Transactional (2015–2016) and Environment: Litigation (2014) and in Best Lawyers for Environmental Law (2009–2018). She was featured in Texas Super Lawyers (2010–2015) and named a Rising Star (2006–2008). Heather was recognized as a leading lawyer by Lawdragon 3000 Leading Lawyers in the United States (2010–2011). She was named a Houston Top Lawyer by H Texas in 2007.

Alex Rovira

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Practices

- Restructuring

Admissions & Certifications

- U.S. Court of Appeals, 2nd Circuit
- U.S. District Court, E.D. of New York
- U.S. District Court, S.D. of New York
- New York

Education

- University College London, LL.M., 2006 (Corporate Insolvency LL.M. Full Year Course)
- Georgetown University Law Center, J.D., 2003
- Harvard University, A.B., 1999

ALEX R. ROVIRA is a partner in the firm's Restructuring practice group in New York and has spent close to three years in each of Sidley's London and Hong Kong offices. As such, Alex has a broad range of experience in representing clients on various aspects of corporate restructuring and workouts, creditors' rights, bankruptcy and insolvency matters in the U.S., UK, Asia Pacific and Cayman Islands. His work has included representing both debtors' and creditors' rights in complex U.S. Chapter 11 and Chapter 15 cases (recognition of foreign proceedings), solvent and insolvent schemes of arrangements proceedings in England, Hong Kong and the Cayman Islands and cross-border reorganizations with a broad range of experience, including, among other things, negotiating DIP financing, cash collateral and exit financing packages; drafting, negotiating and implementing plans of reorganization and schemes of arrangement; advising provisional liquidators and "light-touch" provisional liquidators; negotiating debt and equity documents for reorganized companies; drafting and negotiating sale documents and pleadings in connection with distressed asset sales; strategic planning for debt restructuring alternatives both in- and out- of court proceedings; preparing debtors for restructuring filings in numerous jurisdictions and cross-border proceedings; and structuring exit strategies for debtors and creditors in complex distressed and restructuring situations and related proceedings. He also has significant experience advising and representing clients on broker dealer and bank liquidation proceedings. Alex also advises on the structuring of financing transactions such as real estate financing, securitizations, repurchase agreements, security lending arrangements, swaps, forwards and other derivative agreements, sale-lease back transactions with a focus on insolvency risks, enforcement and remedies.

Alex was noted in The Legal 500 as a key contact for Sidley's Restructuring and Insolvency practice in Hong Kong. He was also selected as "Rising Stars" by Super Lawyers in 2013–2014 and was also noted as "top rated creditor and debtor rights attorney in New York." In 2011, Alex was selected for the National Conference of Bankruptcy Judges Next Generation program.

Jay Steinberg

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Admissions & Certifications

- U.S. Supreme Court
- U.S. District Court, Northern District of Illinois

Education

- DePaul University College of Law, J. D. 1971

JAY A. STEINBERG is of counsel at Foley & Lardner. Mr. Steinberg was appointed to the original United States Trustee's Private Panel of Trustees and has served as past chairman of the panel. As a panel trustee, Mr. Steinberg was Trustee for hundreds of debtors including the Grabill Corporation, the Congress Hotel in Chicago and Ben Franklin Retail Stores.

Mr. Steinberg also served as the Trustee for Energy Cooperative, Inc. During the Administration of the trust, the refinery previously owned by ARCO was demolished and the site remediated. In addition, parts of the refinery were sold and shipped to a Chinese company. Mr. Steinberg also served as trustee for several methane gas co-generation facilities that produced electricity.

In 2002, LePetomane II, III and IV were appointed as trustees for the Fruit of the Loom Environmental Trust that was established to remediate and sell, if possible, the trust assets. This trust was one of the first Environmental Response Trusts. Various Le Petomane entities are serving as trustees for Environmental Trusts established during the Chapter 11 Bankruptcies of ASARCO, Lyondell, Tronox, Delphi and Vertellus. A Le Petomane entity is also serving as trustee in the U. S. Four Corners Uranium Mine Sites Trust.

In addition, as President of various trustees, he has recovered in excess of 1.3 billion dollars as a result of fraudulent conveyance actions and environmental insurance claims.

Marshall Morales

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Practices

- Environmental

Admissions & Certifications

- District of Columbia
- Washington

Education

- New York University School of Law, J.D., 2015
- Swarthmore College, B.A. in Environmental Science, 2008

MARSHALL R. MORALES is a member of the Environmental practice group in Washington, D.C. His practice focuses on complex environmental litigation, enforcement and regulatory compliance. His experience includes matters involving the Clean Air Act, the Toxic Substances Control Act (TSCA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Endangered Species Act (ESA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

As a litigator, Marshall handles matters in federal and state courts involving challenges to agency actions, citizen suits, and multiparty cost allocations. He also has represented clients in enforcement matters before the Environmental Protection Agency. He counsels clients with respect to chemical regulatory approvals, industrial permitting, consumer and commercial product restrictions, environmental marketing claims and industrial health and safety matters. With an undergraduate degree in Environmental Science, Marshall draws on his extensive technical background to address the scientific and engineering issues in environmental matters.

Within the firm, Marshall serves on the Diversity Committee's Recruitment and Retention Subcommittee for the D.C. office. Prior to Sidley, Marshall previously served an Assistant Attorney General in the Honors Program of the Washington State Attorney General's Office. In that position, he gained substantial administrative and appellate litigation experience in energy and occupational safety matters. Additionally, he served as a junior Indian law advisor to various state government programs.

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