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William L. Norton, Jr.

Editor-in-Chief

United States Bankruptcy Judge (1971-1985)

Attorney at Law, Atlanta, Georgia

Chairman of the Board of Advisors

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CLASSIC CHAPTER 11 REORGANIZATIONS VERSUS SECTION 363 SALES AND THE EFFECTS ON ENVIRONMENTAL CLEANUP OBLIGATIONS: THE CHOICE AFTER *APEX OIL CO.* AND *GENERAL MOTORS*

*By Joel M. Gross and Christopher Anderson**

One of the most discussed trends in recent bankruptcy practice has been the increased reliance by Chapter 11 debtors on Section 363 sales as a substitute for major parts of the traditional Chapter 11 reorganization process. Some have suggested that in light of this trend, traditional reorganizations are a “thing of the past.”¹ A bankruptcy judge in the Southern District of New York, in confirming a traditional Chapter 11 plan in June 2009, noted that in his “experience during the past several years in this court, cases like this are increasingly the exception . . . This was not a case in which assets were being sold quickly, left behind with cash to later distribute and litigate avoidance actions. This is a classic, increasingly rare Chapter 11, a stand-alone reorganization.”²

In any given case, there are likely to be numerous distinctions and ramifications of the choice between the traditional Chapter 11 reorganization process and the use of a Section 363 sale. This article will focus on just one distinction, which in some cases may

*Joel M. Gross is a partner in the law firm of Arnold & Porter LLP in Washington, D.C. where he is a member of both the firm’s Environmental Practice Group and its Bankruptcy Group. From 1983–2000, he worked for the Environmental Enforcement Section of the U.S. Department of Justice. He served as Chief of that section from 1995–2000. Christopher Anderson was formerly an associate in the New York office of Arnold & Porter and a member of the firm’s Environmental and Litigation Practice Groups. He is now studying for an LLM in European Union law at University College London.

¹A panel at the American Bankruptcy Institute’s 2010 Annual Spring Conference is aptly entitled “Bankruptcy Transformed: Are Reorganizations a Thing of the Past? This panel will address the emergence of 363 sales as the new reorganization tool over traditional reorganizations.” See <http://www.abiworld.org/ASM10/schedule.html>.

²*In re Quebecor World (USA), Inc.*, No. 08-10152-jmp (Transcript of June 2009 hearing) (Remarks of Bankruptcy Judge James Peck). The authors’ law firm was counsel to the debtors in that case.

be reason enough for a debtor to go with the Section 363 sale: the ability to protect the emerging business from environmental remediation obligations resulting solely from the debtor's pre-bankruptcy activities.

One case decided in the Seventh Circuit during the past year, *United States v. Apex Oil*,³ suggests that if a traditional reorganization is used, the reorganized debtor could have substantial—potentially enormous—liabilities arising from the remediation of contaminated properties based solely on activities that predated—perhaps long predated—the Chapter 11 process. In *Apex Oil*, the Seventh Circuit held that a debtor's liability to the U.S. for injunctive relief under Section 7003 of the Resource Conservation and Recovery Act did not constitute a claim for bankruptcy purposes and thus was not discharged by confirmation of Apex Oil's plan of reorganization some years earlier, leaving the reorganized Apex Oil liable for injunctive relief valued at as much as \$150 million. Such liability could substantially undermine the fresh start that reorganized debtors have long sought and expected as part of the Chapter 11 process. On the other hand, the expansive use of a Section 363 sale in the General Motors bankruptcy (and many others) suggests that such a sale will do for General Motors what a confirmed Chapter 11 plan failed to do for Apex Oil: protect it from remediation liabilities arising from pre-bankruptcy activities.

This article will discuss *Apex Oil* and *General Motors*, the context in which they arise, and what those cases mean for the survivability of environmental remediation liabilities.

I. The Apex Oil Decision

A. Statutory Context

1. The Bankruptcy Context

For years, there has been uncertainty surrounding the issue of when obligations to clean up contaminated properties can be discharged in Chapter 11 cases.⁴ The key bankruptcy terms that

³*U.S. v. Apex Oil Co., Inc.*, 579 F.3d 734, 52 Bankr. Ct. Dec. (CRR) 2, 69 Env't. Rep. Cas. (BNA) 1658, Bankr. L. Rep. (CCH) P 81572 (7th Cir. 2009), cert. denied, 2010 WL 752322 (U.S. 2010).

⁴This was the subject of a previous article by one of the authors. 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*, 2003 Norton Annual Survey of Bankruptcy Law 1.

frame this analysis are “debt,” which is defined as “liability on a claim,”⁵ and “claim,” which is defined as a:

(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; or

(B) 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.⁶

Under Section 1141(d)(1) of the Bankruptcy Code, the confirmation of a plan of reorganization “discharges the debtor from any debt that arose before the date of such confirmation.” Thus, an obligation can be discharged if, and only if, it is characterized as a “claim.”

What if (i) years before it filed for bankruptcy, Company X owned and operated a facility that it then sold, and has had no involvement with since, (ii) that facility is now contaminated, partially as a result of the activities of Company X years ago, and (iii) substantive environmental law would allow the government (federal, state or local) to order Company X to clean up the contaminated property? Can that cleanup obligation be discharged in a Chapter 11 proceeding, *i.e.*, is it a “claim”?

From a policy perspective, Company X will argue that what the government wants it to do is to spend money to hire an environmental remediation contractor to clean up the property. Company X’s obligation to do so arises from its pre-petition activities and is essentially monetary in nature. If such an obligation cannot be addressed and discharged in a Chapter 11 proceeding, then the debtor’s fresh start may be materially—perhaps fatally—compromised, because it will emerge from bankruptcy with the overhang of its pre-petition (and perhaps very expensive) environmental remediation obligations.

Moreover, Company X would point out that if the cleanup obligation were not discharged, that obligation would have to be satisfied in full, which essentially transforms the obligation into a priority obligation, even though Congress has established no priority for environmental cleanup obligations. And the obligation would be even more difficult for the debtor to address than priority claims, which at least have to be liquidated during the

⁵11 U.S.C.A. § 101(12).

⁶11 U.S.C.A. § 101(5).

bankruptcy process, providing certainty as to the claim even if there is no discounting. By contrast, cleanup obligations would remain, to be satisfied in full at some undetermined point down the road and at some undetermined cost.

While there are strong policy arguments for allowing remediation claims to be discharged, the issue at its heart is not one of policy but of statutory construction: is the obligation a “claim?” And since it is clearly not a “right to payment” under the first prong of the definition of “claim,” the issue is whether it is a “right to an equitable remedy for breach of performance [that] gives rise to a right to payment.” That determination seems to require an analysis of the statute under which the obligation arose, and so we first turn to a review of the statute at issue in *Apex Oil*, the federal Resource Conservation and Recovery Act.

2. The Resource Conservation and Recovery Act

Although the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)⁷ is more frequently used by EPA to compel remediation of contaminated properties, the Resource Conservation and Recovery Act (“RCRA”), enacted in 1976, was actually the first federal statute to empower the government to require a responsible party⁸ to remediate a contaminated property. RCRA is the primary federal statute regulating the ongoing storage, treatment, and disposal of solid and hazardous wastes. The large majority of its provisions deal with the regulation of current activities, and only a few provisions are relevant to past disposal of waste, including two provisions that provide causes of action to require certain parties to address threats posed by waste, whether due to ongoing or past disposal. Section 7003 of RCRA empowers the EPA Administrator to bring suit in district court against “any person . . . who has contributed or who is contributing to [the] handling, storage, treatment, transportation, or disposal” of solid or hazardous waste that “may present an imminent and substantial endangerment to health or the environment” and to seek an injunction “to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.”⁹ Section 7003 also authorizes the Administrator to issue “such orders as may be necessary to

⁷42 U.S.C.A. § 9601–9675.

⁸For ease of discussion, we refer to all parties who may be liable to cleanup environmental contamination, regardless of the context in which that potential liability may arise, as “responsible parties.”

⁹42 U.S.C.A. § 6973.

protect public health and the environment.” Section 7002 of RCRA creates a citizen-suit right of action that is virtually identical in scope to the injunctive cause of action available to the Administrator under Section 7003.¹⁰

RCRA Sections 7002 and 7003 have been interpreted to allow citizens or the EPA Administrator, respectively, to sue for an injunction requiring the responsible party to remediate environmental contamination caused by past, as well as present, “handling, storage, treatment, transportation, or disposal” of waste. In fact, Congress amended Section 7003 in 1983 to make clear that the right of action is available regardless of when the waste handling occurred.¹¹ In addition, because they apply not just to “hazardous waste” but a much broader category called “solid waste,” which RCRA defines as any “discarded material,”¹² Sections 7002 and 7003 reach an extremely broad range of contaminants.¹³

The breadth of those provisions is limited somewhat by the requirement that the Administrator or the citizen suing demonstrate that the wastes at issue “may present an imminent and substantial endangerment to health or the environment.” Despite the seemingly strong language, however, this hurdle is not particularly high. Courts have uniformly interpreted the words “may present” to mean that the plaintiff need not show that there actually is an “imminent and substantial endangerment,” but only that one could exist.¹⁴ There is less agreement in the case

¹⁰42 U.S.C.A. § 6972; see also, e.g., *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 294 n.22, 52 Env’t. Rep. Cas. (BNA) 1908, 31 Env’t. L. Rep. 20767 (5th Cir. 2001) (noting the identical operative language of RCRA Sections 7002 and 7003 and holding that the two sections “are to be similarly interpreted”).

¹¹H.R. Rep. No. 98-198, Part I, at 48 (1983), as reprinted in 1984 U.S.C.-C.A.N. 5576, 5607.

¹²42 U.S.C.A. § 6903(27).

¹³Sections 7002 and 7003 refer to “solid waste or hazardous waste,” but that formulation is redundant, as RCRA defines “hazardous waste” as a subset of “solid waste.” 42 U.S.C.A. § 6903(5).

¹⁴E.g., *Crandall v. City and County of Denver, Colo.*, 594 F.3d 1231, 1236, 70 Env’t. Rep. Cas. (BNA) 1193 (10th Cir. 2010), cert. denied, 2010 WL 2786722 (U.S. 2010); *Dague v. City of Burlington*, 935 F.2d 1343, 1355, 33 Env’t. Rep. Cas. (BNA) 1559, 21 Env’t. L. Rep. 21133 (2d Cir. 1991), judgment rev’d in part on other grounds, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449, 34 Env’t. Rep. Cas. (BNA) 1857, 60 Fair Empl. Prac. Cas. (BNA) 11, 22 Env’t. L. Rep. 21099 (1992).

law on what the terms “imminent” and “substantial” mean,¹⁵ but courts have consistently held that the use of Sections 7002 and 7003 is not limited to emergency situations.¹⁶ If a court finds that the solid waste at issue “may present an imminent and substantial endangerment,” it is authorized to order broad injunctive relief to address that endangerment, including complete cleanups or “final remedies” of contaminated sites, not just interim measures to forestall an endangerment.¹⁷

The breadth of the language and interpretation of Section 7003 means that in the majority of contaminated site situations, EPA will have the option of addressing the site through CERCLA or RCRA. Indeed, because the definition of “solid waste” is considerably broader than the definition of “hazardous substance,” the operative trigger for CERCLA liability, there are situations in which EPA can only proceed through RCRA. *Apex Oil* was one such case because CERCLA excludes “petroleum, including crude oil or any fraction thereof” from its definition of hazardous substance.¹⁸ EPA has historically preferred to use its authority under CERCLA to address contaminated sites, in part because of its greater flexibility to take administrative action, but in most cases nothing prevents it from resorting to its authority under RCRA.

To a debtor in bankruptcy, however, the most relevant difference between CERCLA and RCRA is that, whereas CERCLA gives EPA the option of either ordering responsible parties to undertake site cleanup or conducting the cleanup itself and then recovering the cost from the responsible parties, RCRA allows only for injunctions (or administrative orders) requiring the responsible party to take action.¹⁹ As discussed below, that limitation was the crux of the Seventh Circuit’s analysis in *Apex Oil*.

¹⁵E.g., *Maine People’s Alliance And Natural Resources Defense Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 288, 63 Env’t. Rep. Cas. (BNA) 1737 (1st Cir. 2006) (“Imminence generally has been read to require only that the harm is of a kind that poses a near-term threat; there is no corollary requirement that the harm necessarily will occur or that the actual damage will manifest itself immediately.”); *Interfaith Community Organization v. Honeywell Intern., Inc.*, 399 F.3d 248, 259, 59 Env’t. Rep. Cas. (BNA) 2116, 35 Env’t. L. Rep. 20043 (3d Cir. 2005) (holding that “substantial” means “not imaginary”).

¹⁶E.g., *Davis v. Sun Oil Co.*, 148 F.3d 606, 610, 46 Env’t. Rep. Cas. (BNA) 1910, 28 Env’t. L. Rep. 21358, 1998 FED App. 0192P (6th Cir. 1998); Dague, 935 F.2d at 1355–56.

¹⁷E.g., *Interfaith Community Organization*, 399 F.3d at 267.

¹⁸42 U.S.C.A. § 9601(14).

¹⁹*Meghrig*, 516 U.S. at 484.

3. CERCLA

CERCLA is the principal federal statute concerning the cleanup or remediation of historical environmental contamination. The statute provides EPA with numerous administrative and judicial tools to address unacceptable risks posed by historical contamination.

Section 104 of CERCLA authorizes EPA to respond to releases and threatened releases of hazardous substances using monies from the Hazardous Substances Superfund.²⁰ The terms “release” and “hazardous substance” are both broadly defined.²¹ EPA may take a range of response actions under Section 104, including “removal actions,” which are typically shorter-term actions designed to ameliorate immediate threats, and “remedial actions,” which are longer-term responses designed to address contaminated sites in a permanent manner.²² Although size and cost vary widely, remedial actions can take decades to implement and cost tens, or even hundreds, of millions of dollars.²³

In addition to providing EPA with the authority to undertake response actions, CERCLA creates broad liability, based on the “polluter pays” principal. There are two main types of CERCLA liability. First, if EPA, or any other party, cleans up a site following the National Contingency Plan, that party can recover its response costs under Section 107 of CERCLA from four categories of responsible parties: the present owner and operator of the facility from which the hazardous substances were released, the past owners and operators of those facilities at the time the release occurred, generators of hazardous substances who ar-

²⁰42 U.S.C.A. § 9604.

²¹A “release” is “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection, escaping, leaching, dumping or disposing into the environment.” 42 U.S.C.A. § 9601(22). “Hazardous substance” is defined to include substances identified under several other federal environmental laws, including “hazardous wastes” under RCRA. “Petroleum, including crude oil or any fraction thereof,” is excluded from the definition of hazardous substance, however. 42 U.S.C.A. § 9601(14).

²²“Removal” is defined at 42 U.S.C.A. § 9601(23), and “remedial” is defined at 42 U.S.C.A. § 9601(24). Regardless of type, all of EPA’s response actions must be consistent with the National Contingency Plan, codified at 40 C.F.R. pt. 300, which sets forth detailed criteria for the evaluation of risks posed by contaminated sites and the selection of response actions to address those risks.

²³For example, at one Superfund site in California, the Iron Mountain Mine Site, EPA has estimated that future cleanup costs could approach a billion dollars and the first phase of cleanup will take 30 years. See <http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/3dec8ba3252368428825742600743733/b32731488ba88e8788257007005e943d!OpenDocument>.

ranged for disposal of their wastes at the site, and certain transporters who took wastes to the site.²⁴ Liability under CERCLA is strict; it makes no difference that no laws or regulations were violated or that the responsible party took care to avoid the release.²⁵

The second type of CERCLA liability is EPA's authority under Section 106 to require responsible parties to perform cleanup actions themselves. Enforcement under Section 106 has the advantage to EPA of not requiring the agency to undertake a cleanup first and then recover costs. EPA can either issue an administrative order or sue in federal district court for an injunction requiring responsible parties to undertake a cleanup whenever the agency finds that, as a result of releases at a site, "there may be an imminent and substantial endangerment to the public health or welfare or the environment."²⁶ As with the "imminent and substantial endangerment" standard for liability under RCRA, that standard for liability under CERCLA Section 106 has been interpreted broadly, by both EPA and the courts, and the agency typically finds that such an endangerment exists whenever a site requires extensive response actions under the National Contingency Plan.²⁷ The relatively low standard for liability under Section 106 means that in most cases EPA will have the option of either remediating the site itself and then

²⁴42 U.S.C.A. § 9607(a). In addition to response costs, responsible parties under CERCLA are also liable for injury to natural resources. *Id.* Inasmuch as parties are only liable for money damages with respect to injury to natural resources, there is little debate that such liability is dischargeable in bankruptcy.

²⁵CERCLA itself does not use the word "strict," but rather incorporates the standard of liability under a provision of the Clean Water Act that has been interpreted to impose strict liability. See 42 U.S.C.A. § 9601(32). Courts have uniformly interpreted CERCLA as imposing strict liability. See Allan Topol and Rebecca Snow, *Superfund Law and Practice* § 4.2; Michael Gerrard and Joel Gross, *Amending CERCLA, The Post-SARA Amendments to the Comprehensive Environmental Response, Compensation and Liability Act 2*; *U.S. v. Monsanto Co.*, 858 F.2d 160, 167, 28 Env't. Rep. Cas. (BNA) 1177, 19 Env'tl. L. Rep. 20085 (4th Cir. 1988). CERCLA provides three narrowly construed defenses for acts of God, acts of war, or acts of contractually unrelated third parties. 42 U.S.C.A. § 9607(b).

²⁶42 U.S.C.A. § 9606(a).

²⁷See EPA OSWER Directive No. 9833.0-1a, *Guidance on CERCLA Section 106 Unilateral Administrative Orders for Remedial Design and Remedial Action* (Mar. 13, 1990), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf>.

recovering response costs from responsible parties or ordering the responsible party to perform the cleanup in the first instance.²⁸

4. State Cleanup Laws

In addition to federal law, virtually every state has enacted a “little CERCLA.” Many of these statutes are modeled on CERCLA, but they vary widely in their specifics. Liability under state law may be broader or narrower than under CERCLA. State statutes also vary in the types of relief available to state agencies and the mechanisms for seeking that relief. Beyond state CERCLA equivalents, many states also have more specialized statutes that may provide avenues for addressing contaminated sites. Finally, state common law can also be used in many instances by both government and private parties to compel cleanups, recover remediation costs, or both.

B. Background: *United States v. Apex Oil, Inc.*

1. Factual Background

The village of Hartford, Illinois (population 1,545) is located on the banks of the Mississippi River, approximately twelve miles northeast of St. Louis, Missouri. In 1940, Wood River Oil & Refining Co. built a petroleum refinery in Hartford (the “Hartford Refinery”). At its peak, the Hartford Refinery had the capacity to process 60,000 barrels of crude oil per day, and its average through-put from January 1984 until March 1986 was 47,946 barrels per day.²⁹

In addition to building the Hartford Refinery, Wood River built a dock on the Mississippi River west of Hartford and installed three product pipelines running beneath portions of the village to transport its products to the dock for shipping. In 1952, two additional pipelines were laid beneath the village to move oil from the Refinery to a terminal north of Hartford.³⁰ These buried lines, and leaks from those lines, were the source of much of the contamination that was the subject of the district court litigation described below.

Like many petroleum refineries in the U.S., the Hartford

²⁸EPA generally prefers to use cleanup orders under Section 106, as part of what it calls “enforcement first,” because it allows the Agency to avoid having to utilize scarce Superfund resources in the first instance.

²⁹*U.S. v. Apex Oil Co., Inc.*, 68 Env’t. Rep. Cas. (BNA) 1056, 2008 WL 2945402, at *1-*4 (S.D. Ill. 2008), aff’d, 579 F.3d 734, 52 Bankr. Ct. Dec. (CRR) 2, 69 Env’t. Rep. Cas. (BNA) 1658, Bankr. L. Rep. (CCH) P 81572 (7th Cir. 2009), cert. denied, 2010 WL 752322 (U.S. 2010) (“Apex II”).

³⁰Apex II, at *2-*3.

Refinery has had a number of owners. In 1950, Wood River sold the Hartford Refinery to Sinclair Refining Company. In 1967, Sinclair sold the refinery to Clark Oil and Refining Corp. Clark Oil became a subsidiary of a partnership called Apex Oil Company in 1981. In 1987, Apex Oil Company and most of its subsidiaries, including Clark Oil, filed for reorganization under chapter 11 in the Eastern District of Missouri. In 1988, while still in bankruptcy, Clark Oil sold the Hartford Refinery to Premcor Refining Group Inc., which still owns the refinery today. In 1989, Apex Oil, Inc. was incorporated and Clark Oil was subsequently merged into it.³¹ On August 16, 1990, the Bankruptcy Court confirmed the Apex Oil debtors' plan of reorganization and "discharg[ed] the consolidated debtors and their estates from any and all claims, debts, and liens arising before the confirmation date."³²

Over the course of its history, there were numerous leaks and spills at the Hartford Refinery, as well as leaks from the product lines beneath the village. A report prepared in 1986 indicated that 1.7 percent of the crude oil supplied to the refinery was lost that year, largely through spills and leaks,³³ and one of the North Terminal lines may have been leaking as much as 360 barrels³⁴ of petroleum products per week.³⁵ The leaked and spilled petroleum products created a "hydrocarbon plume" extending beneath much of the village. In many areas, this plume includes layers of light non-aqueous phase liquids, or LNAPL, floating on top of the water table. LNAPL essentially consists of undissolved petroleum products migrating through the soil along the top of the groundwater table. Subsequent environmental investigations measured the layer of free-phase petroleum products floating on the groundwater beneath the refinery at as much as twenty-four feet thick.³⁶

Environmental investigations detected high levels of benzene and other volatile hydrocarbons in the soil vapor beneath

³¹Id. at *1-*2.

³²*U.S. v. Apex Oil Co., Inc.*, 438 F. Supp. 2d 948, 949 (S.D. Ill. 2006) ("Apex I").

³³Apex II at *17.

³⁴A barrel equals forty-two gallons. 360 barrels is a sufficient volume to fill a moderate-sized backyard swimming pool.

³⁵Apex II at *12.

³⁶Id. at *15.

Hartford, including in residential areas.³⁷ Soil vapor can enter buildings through cracks in foundations and other openings, contaminating indoor air. Indoor vapor concentrations have been so high in Hartford that literally hundreds of odor complaints have been made to government agencies over the years. Some of the individuals making the complaints have also complained of headaches, nausea, and burning of the eyes. There have even been fires and explosions in Hartford caused by the ignition of soil vapor that migrated into homes.³⁸

In August 2003, EPA met with representatives of five oil companies with current or past operations in the vicinity of Hartford and asked them to enter into an Administrative Order on Consent (“AOC”) to perform a removal action. Three companies, Premcor, Shell, and BP, agreed to the AOC, and Sinclair later joined the AOC. Because it believed its liability for the Hartford Refinery had been discharged by its bankruptcy, Apex declined to join the order.³⁹

C. District Court Proceedings

The U.S. sued Apex in 2005 under Section 7003 of RCRA, seeking an order requiring Apex to complete the remaining investigation of environmental conditions in the Hartford area and to take the necessary remedial action. Because the Hartford contamination consists almost entirely of petroleum and petroleum products, EPA did not have the option of taking action under CERCLA, which, as discussed above, excludes petroleum from its reaches.

Early on, the government sought a declaratory judgment that EPA’s RCRA claim had not been discharged in Apex’s earlier bankruptcy proceeding, and the district court granted the U.S. summary judgment on its declaratory judgment claim in 2006.⁴⁰ The crux of EPA’s argument, which the district court accepted, was that EPA did not have the right under RCRA to seek money from Apex instead of an injunction. Because EPA had no alternative right to payment, the court held that EPA’s right of action under Section 7003 was not a “claim” for bankruptcy purposes

³⁷Id. at *27.

³⁸Id. at *31-*32.

³⁹Id. at *40-*41.

⁴⁰Apex I, at 954.

and hence was not discharged by the confirmation of Apex's plan or reorganization in 1990.⁴¹

The district court held a seventeen day bench trial in early 2008 and found the facts as recounted above. Given the scope and severity of the contamination, the district court had little trouble concluding that conditions associated with spilled and leaked petroleum products from the Hartford Refinery "may present an imminent and substantial environment" as required for liability under RCRA Section 7003,⁴² and that Apex Oil is a "person" who contributed to the "handling" and "disposal" of solid waste (i.e., the leaks and spill of petroleum products).⁴³ The court further held that liability under Section 7003 of RCRA is joint and several, that the harm was not divisible, and that it was therefore appropriate to hold Apex Oil liable for remediation of the entirety of the harm.⁴⁴

The district court entered an injunction requiring Apex Oil to undertake several actions under EPA's oversight, including: maintaining the existing interim remedies, completing the investigation of contaminated groundwater beneath the Hartford Refinery and the village, and implementing a remedy to remove the LNAPL.⁴⁵ In addition, the district court ordered Apex Oil to "coordinate and cooperate with the parties to the existing Administrative Order on Consent in performing activities required under this injunction."⁴⁶

D. The Seventh Circuit's Opinion

The Seventh Circuit affirmed.⁴⁷ Writing for the court, Judge Posner noted at the outset that Apex Oil's challenges to the substance of the district court's order had "no possible merit."⁴⁸ Instead, the court of appeals focused its analysis exclusively on

⁴¹Id. at 952–54.

⁴²Apex II, at *79.

⁴³Id. at *82.

⁴⁴Id. at *83.

⁴⁵Order and Terms of Injunction, *United States v. Apex Oil Co.*, No. 05-cv-242 (S.D. Ill. Jul. 28, 2008).

⁴⁶Id. As will be discussed below, that seemingly minor component of a sweeping cleanup injunction may have important implications for the treatment of other environmental bankruptcy claims.

⁴⁷*U.S. v. Apex Oil Co., Inc.*, 579 F.3d 734, 52 Bankr. Ct. Dec. (CRR) 2, 69 Env't. Rep. Cas. (BNA) 1658, Bankr. L. Rep. (CCH) P 81572 (7th Cir. 2009), cert. denied, 2010 WL 752322 (U.S. 2010).

⁴⁸Id. at 735.

the question whether EPA's claim for injunctive relief had been discharged in Apex Oil's chapter 11 reorganization.

Judge Posner began his analysis by observing that because only "debts" are discharged in a chapter 11 proceeding, and because a "debt" is a "liability on a claim," the "critical question" was whether EPA's right to seek an injunction constituted a claim, and—more specifically—whether the injunctive relief that EPA may seek under RCRA "gives rise to a right to payment."⁴⁹

In the court's view, the "natural reading" of the definition of a "claim" covers those circumstances in which the holder of a right to equitable relief has the right to obtain payment if for some reason the equitable remedy is unobtainable.⁵⁰ Judge Posner offered the example of a decree awarding specific performance of a property sale that cannot be enforced because the defendant no longer has the ability to convey the property (for example, because the property was already sold to someone else). In that case, the plaintiff would be entitled to money damages for breach of the sales contract as an alternative. Such rights to equitable relief are "claims" under the bankruptcy code, and hence a person's liability thereon is a dischargeable "debt" in a reorganization proceeding. He then went on to note that other types of equitable relief, such as back pay orders, that take the form of an order to pay money are also "claims" within the meaning of the code.⁵¹

Judge Posner then examined whether EPA had an alternative right to payment on its equitable claim and determined that Section 7003 of RCRA "does not authorize *any* form of monetary relief," relying principally on the Supreme Court's decision in *Meghrig v. KFC Western, Inc.*, which held that the nearly identical citizen suit provision of RCRA, Section 7002, did not authorize equitable restitution as a remedy.⁵² The lack of an available monetary remedy was conclusive for the court, which thus held

⁴⁹Id. at 736 (quoting 11 U.S.C.A. § 101(5)).

⁵⁰Id. at 736.

⁵¹Id. at 736 (noting additionally that orders of restitution are frequently equitable orders to pay money).

⁵²Id. at 736–37. *Meghrig* specifically held that the citizen suit provision of RCRA could not be used to get "compensation for past cleanup efforts." *Meghrig*, 516 U.S. at 584. Whether Judge Posner was correct to say that RCRA does not allow for *any* form of monetary relief, is potentially an open question the implications of which are discussed below.

that EPA's RCRA cause of action was not a "claim" for purposes of the bankruptcy discharge.⁵³

Judge Posner addressed and distinguished the lead Supreme Court case in this area, *Ohio v. Kovacs*.⁵⁴ In *Kovacs*, an individual, William Kovacs, had been ordered by the State of Ohio to clean up a site that was filled with thousands of drums of hazardous waste. After Kovacs went into bankruptcy, the State tried to enforce its order, and the Supreme Court said it could not because the order could be satisfied only by Kovacs' payment of money to perform the cleanup, and accordingly had been discharged. Judge Posner distinguished *Kovacs*, because in that case the State had taken the step of appointing a receiver to collect Kovacs' money and perform the cleanup itself; the state was therefore no longer attempting to force Kovacs to perform any cleanup.⁵⁵

Judge Posner went on to refute several counterarguments made by Apex Oil. First, pointing to a long string of cases, he brushed aside the argument that a RCRA injunction is actually a claim because it requires the responsible party to spend money.⁵⁶ He noted that virtually all injunction require the enjoined party to spend some resources, so that a rule classifying all injunctions that require the expenditure of money "claims" would sweep far too broadly. Importantly, Judge Posner dismissed as "arbitrary" all of the various distinctions offered by Apex Oil to limit the reach of a rule that would treat an injunction that required the expenditure of money as a "right to payment."⁵⁷

In particular, the court did not find tractable the idea that

⁵³*Apex Oil*, 579 F.3d at 737.

⁵⁴*Ohio v. Kovacs*, 469 U.S. 274, 105 S. Ct. 705, 83 L. Ed. 2d 649, 12 Bankr. Ct. Dec. (CRR) 541, 11 Collier Bankr. Cas. 2d (MB) 1067, 21 Env't. Rep. Cas. (BNA) 2169, Bankr. L. Rep. (CCH) P 70163, 15 Env'tl. L. Rep. 20121 (1985).

⁵⁵*Apex Oil*, 579 F.3d at 737.

⁵⁶*Id.* at 737 (citing, among others, *AM Intern., Inc. v. Datacard Corp.*, 106 F.3d 1342, 1348, 30 Bankr. Ct. Dec. (CRR) 434, 44 Env't. Rep. Cas. (BNA) 1001, Bankr. L. Rep. (CCH) P 77260, 27 Env'tl. L. Rep. 20503 (7th Cir. 1997); *In re Torwico Electronics, Inc.*, 8 F.3d 146, 150, 24 Bankr. Ct. Dec. (CRR) 1394, 30 Collier Bankr. Cas. 2d (MB) 86, 37 Env't. Rep. Cas. (BNA) 1809, Bankr. L. Rep. (CCH) P 75487, 24 Env'tl. L. Rep. 20016 (3d Cir. 1993); *Matter of CMC Heartland Partners*, 966 F.2d 1143, 1145-47, 23 Bankr. Ct. Dec. (CRR) 206, 35 Env't. Rep. Cas. (BNA) 1001, Bankr. L. Rep. (CCH) P 74739, 22 Env'tl. L. Rep. 21313 (7th Cir. 1992), and *In re Chateaugay Corp.*, 112 B.R. 513, 523-24, 31 Env't. Rep. Cas. (BNA) 1427, Bankr. L. Rep. (CCH) P 73295, 20 Env'tl. L. Rep. 21269 (S.D. N.Y. 1990), judgment aff'd, 944 F.2d 997, 22 Bankr. Ct. Dec. (CRR) 74, 25 Collier Bankr. Cas. 2d (MB) 620, 34 Env't. Rep. Cas. (BNA) 1233, 21 Env'tl. L. Rep. 21466 (2d Cir. 1991)).

⁵⁷*Apex Oil*, 579 F.3d at 738.

cleanup injunctions are really “rights to payment” because they typically require the responsible party to hire specialist consulting and service firms rather than to undertake any work itself.⁵⁸ That distinction, said Judge Posner, “has no relevance to the policy of either the Bankruptcy Code or the Resource Conservation and Recovery Act.”⁵⁹ And, in any event, the court could find no meaningful difference between “a check written to an employee [and] a check written to an independent contractor.” In summing up, Judge Posner remarked that “the near consensus of the cases” suggests that the discharge of rights to equitable relief must be limited to “cases in which the claim gives rise to a right to payment because the equitable decree cannot be executed.”⁶⁰

Judge Posner, in conclusion, foreshadowed the issue of whether Apex Oil would it have been better off had it sold its remaining assets while it was in bankruptcy through a Section 363 sale rather than propose a plan of reorganization. He pointed out that the policy argument relied on by Apex Oil—that not allowing the discharge of environmental cleanup obligations will make it difficult, or perhaps impossible, for some debtors to reorganize and that in the long run the government might actually have fewer resources—could be true or false, and indeed likely would be true in some cases and false in others, and so ultimately weighed in favor of neither Apex Oil’s nor the government’s position.⁶¹

Of course, as discussed below, had Apex sold its operating assets to another company, perhaps even a company owned by the same group of people who wound up owning the reorganized Apex, the result of the government’s efforts to impose liability upon it would likely have been very different.

On February 23, 2010, Apex filed a petition for certiorari in the

⁵⁸With respect to this argument, Judge Posner acknowledged the Sixth Circuit’s opinion in *U.S. v. Whizco, Inc.*, 841 F.2d 147, 17 Bankr. Ct. Dec. (CRR) 497, 27 Env’t. Rep. Cas. (BNA) 1373, Bankr. L. Rep. (CCH) P 72214, 18 Env’tl. L. Rep. 20571 (6th Cir. 1988), in which that court held that a claim for injunctive relief requiring an individual debtor who had received a discharge in bankruptcy, to reclaim a mine site was a “claim” because the individual, who did not own the equipment necessary for doing the cleanup, could only comply with the order through the expenditure of money. *Apex Oil*, 579 F.3d at 738 (citing *Whizco*, 841 F.2d at 150–51). In Judge Posner’s view, the Sixth Circuit’s reasoning was unpersuasive because it set forth no limiting principle. As companies can only act through their employees, they can only ever implement an injunction by paying someone. *Id.* (“Why distinguish a check written to an employee from a check written to an independent contractor?”).

⁵⁹*Id.* at 738.

⁶⁰*Id.* at 738.

⁶¹*Id.* at 738–39.

U.S. Supreme Court. Because the Supreme Court had not taken up a case involving the intersection of bankruptcy and environmental law in a quarter century, there was some reason to think that the Court might agree to hear this case.⁶² However, it was not to be: on October 4, 2010, the Supreme Court denied cert.

E. The Scope of the *Apex Oil* Decision

Apex Oil appears to have answered generically the question whether a responsible party's liability to undertake cleanup under orders issued under Section 7003 of RCRA is a claim, and that answer is an unqualified "no," at least in cases in which CERCLA is inapplicable. The *Apex Oil* holding is susceptible of broad application because the Seventh Circuit reached its conclusion almost entirely through a textual analysis of the relevant statutes, rather than a functional analysis of the relief sought, thus rendering the factual context largely irrelevant. Presumably, this holding also applies to injunctive relief in citizen suits brought under Section 7002, as well as other environmental statutes that provide for injunctive relief without an alternative monetary remedy.⁶³ If the *Apex Oil* becomes the law in other circuits, it would appear that a responsible party's potential liability under the imminent and substantial endangerment provisions of RCRA can never be discharged in bankruptcy, and the reorganized debtor will remain fully liable even if all of the conduct that gave rise to the liability occurred prepetition and even if the reorganized debtor no longer owns the property in question.

How significant *Apex Oil* will prove to be will largely depend on three issues not addressed by the case.

1. *Private Party Litigation.* The first issue left undecided by *Apex Oil* is its ramifications for private party litigation and whether it has the potential to change drastically private party environmental claims in bankruptcy. Due to the broad nature of liability under CERCLA, at many sites there are multiple, often dozens of, responsible parties. A classic example is a landfill site to which multiple parties sent wastes generated elsewhere. In

⁶²See Joel M. Gross, The Effect of Bankruptcy on Obligations to Clean Up Contaminated Properties: Recent Developments and Open Issues Two Decades After Kovacs and Midtantic, 2003 Norton Annual Survey of Bankruptcy Law 1.

⁶³Many federal environmental statutes include "imminent hazard" provisions that allow EPA to sue responsible parties for injunctive relief to abate the hazard. The operative language of these statutes tends to be very similar. E.g., Clean Air Act Section 303, 42 U.S.C.A. § 7603; Clean Water Act Section 504, 13 U.S.C.A. § 1364.

such cases, the current owner of the site, the owners of the site when it was receiving waste, the generators of the waste deposited there, and in some cases the transporters of the waste are all liable for the cost of remediating the landfill. At a typical multiparty site, EPA or the equivalent state agency notifies the responsible parties of their potential liability for the site. Those parties that decide to settle with the agency often form an unincorporated organization known as a PRP (“potentially responsible party”) group, and the group distributes liability for the cleanup among its members based on a negotiated (and usually confidential) allocation structure. Members of a PRP group usually enter into contractual commitments with one another to fund the cleanup in proportion to each member’s allocated share. Members may also agree to share other costs, such as common counsel and consultants to negotiate with the agency and undertake the required work.

When a member of a PRP group files for bankruptcy, it typically stops paying its share of the allocated costs and often withdraws or is ejected from the group. If the member in bankruptcy undergoes a reorganization, it also usually receives a discharge from its contractual liabilities to the group to fund cleanup costs, as well as from any claims the group’s members might have under CERCLA or other laws to bring actions against the bankrupt member for its share. The group and its members can file claims in the bankruptcy, but even if those claims are allowed,⁶⁴ they very often are paid out at pennies on the dollar. In such situations, the group members must reallocate the share of costs formerly paid by the member in bankruptcy among the remaining solvent members, thereby increasing their costs. Because the total cost of an environmental cleanup is frequently in the tens of millions of dollars, even small increases in a party’s share of liability can result in greatly increased costs.

A bankruptcy discharge generally cuts off the possibility of other responsible parties recovering response costs from the reorganized debtor. Under *Apex Oil*, however, there remains the possibility for other responsible parties to seek injunctive relief against the reorganized debtor to bear a portion of the cleanup burden. Section 7002 of RCRA, the private citizen-suit counterpart to Section 7003, allows “any person” to sue a responsible party to cleanup waste that may present an imminent and

⁶⁴Private party claims for environmental cleanup costs are frequently objected to and sought to be disallowed as contingent claims for contribution under Section 502(e)(1)(B) of the Code.

substantial endangerment.⁶⁵ That provision has been interpreted to mean what it says, and to allow any person, not just plaintiffs motivated by environmental or health concerns, to sue.⁶⁶ The district court in *Apex Oil*, along with the large majority of other courts to have considered the issue, held that liability under RCRA is joint and several absent proof of divisibility and that a party that is liable under the statute can properly be enjoined to address the entirety of the endangerment.⁶⁷ Although there is little precedent for such an action, it is at least theoretically possible for responsible parties to sue other responsible parties to implement a cleanup as an alternative to seeking contribution from them.⁶⁸

Although citizen suits against reorganized debtors may potentially provide a means to resurrect previously discharged contribution claims, there are several reasons why such suits might be unattractive. First, litigating a RCRA claim is often a complicated, expert-intensive process that can be both expensive and time-consuming.⁶⁹ There must therefore be enough at stake for the game to be worth the candle, and there must be time enough to litigate the case so that the defendant can be enjoined to help while the cleanup is still going on and costs are still being incurred. Second, litigating a case requires the plaintiff to allege

⁶⁵42 U.S.C.A. § 6972(a)(1)(B).

⁶⁶E.g., *AM Intern., Inc. v. Datacard Corp.*, 106 F.3d 1342, 1349, 30 Bankr. Ct. Dec. (CRR) 434, 44 Env't. Rep. Cas. (BNA) 1001, Bankr. L. Rep. (CCH) P 77260, 27 Env't. L. Rep. 20503 (7th Cir. 1997).

⁶⁷*Apex II* at *83.

⁶⁸There are several important limitations on a responsible party's ability to sue other responsible parties under RCRA. Most importantly, Section 7002(b)(1) of RCRA prohibits private parties from bringing suit if the EPA Administrator or a state has already taken certain actions to address the site, including filing its own suit under RCRA, engaging in a removal action under CERCLA, or initiating a Remedial Investigation and Feasibility Study under CERCLA. 42 U.S.C.A. § 6972(b)(1)(B), (C). That provision means, as a practical matter, that a private party will not be able to sue at sites that are being cleaned up under CERCLA authorities. However, the bars to citizen suits that refer to CERCLA have been interpreted not to apply to actions taken by states under state law. Because the large majority of contaminated sites today are remediated under state law rather than CERCLA, the citizen suit bars will be inapplicable in many situations.

⁶⁹Section 7002 of RCRA does provide for fee awards to prevailing parties, 42 U.S.C.A. § 6972(e), but there is no guarantee that a court will allow the entirety of the fees expended in prosecuting the case. See *id.* (allowing an award of fees "whenever the court determines such an award is appropriate"). Additionally, if the claim is ultimately unsuccessful, there is a risk that the plaintiff will end up liable for the defendant's litigation costs.

that a site may pose an imminent and substantial endangerment and to put on evidence demonstrating that endangerment. Although the “imminent and substantial endangerment” bar is not a high one, responsible parties who initiate a citizen suit may be estopped from denying an endangerment exists in subsequent litigation and they may be forced to take positions in litigation that will restrict their ability to negotiate with the government in the future. Third, RCRA allows any person “who claims an interest relating to the subject of the action” and who “is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest” to intervene as of right. Initiating a RCRA citizen suit may prompt citizen groups who are dissatisfied with the progress of the cleanup to intervene and ask the court to impose greater burdens on both the defendant and the plaintiff responsible parties. For these reasons and others, a RCRA citizen suit against a reorganized debtor may not make sense in many, perhaps most, cases. At high stakes sites, however, for which the cleanup costs can run into the hundreds of millions of dollars, and at which there may not be a large number of responsible parties to share the burden,⁷⁰ the possibility of citizen suits against reorganized debtors—left open by the seemingly categorical holding in *Apex Oil*—may be an attractive option.

2. CERCLA Orders. A second issue not addressed by *Apex Oil* is whether the same result obtains under CERCLA, under which EPA clearly has the option of doing the cleanup itself and then suing to recover its costs. EPA has taken the position in a number of CERCLA cases that even under CERCLA, its cleanup orders are not claims, and thus non-dischargeable, because the recipient of an order does not have the right to simply write EPA a check. It must do the cleanup itself, and can be ordered to do so. This position is subject to attack for placing form so far over substance, they no longer can see one another. It is one thing to say that when the government does not have the ability to perform the cleanup itself, the obligation is not a monetary one. But if the government could perform the cleanup, but elects to issue an order to circumvent the discharge of the Bankruptcy Code, it is hard to see why such a circumvention of the Bankruptcy Code should be allowed.

3. RCRA Orders When CERCLA Could be Used. The third

⁷⁰The Hartford Refinery situation is a perfect example: the Seventh Circuit noted that the costs of the cleanup could be \$150 million or more and so far as it appears from the opinions there are only a handful of responsible parties to potentially share in those costs.

open issue raised by *Apex* is whether assuming that CERCLA orders are different than those under RCRA and are claims because EPA could accept money if it so chose, EPA could choose to use RCRA exclusively to avoid the result that would obtain under CERCLA. In other words, can EPA say “We prefer CERCLA to RCRA generally because it has more flexibility and was the statute intended by Congress as the primary tool for cleaning up contaminated sites, but when we are dealing with bankruptcy, we prefer RCRA because it is our ticket to the land of the nondischargeable obligation”? If the answer is that when EPA could use CERCLA, but chooses to use RCRA, the obligation is nonetheless dischargeable, then *Apex Oil* may be limited to those few cases, such as those involving petroleum (which is not covered by CERCLA), that only have RCRA remedies. But if EPA can choose to use RCRA whenever bankruptcy is involved, then *Apex Oil* may be a gaping hole in the protection afforded by plans of reorganizations.⁷¹ And it may increasingly cause debtors with material contaminated site liabilities to take the road General Motors drove down, successfully, last year: Route 363.

As to the *Apex Oil* decision itself, it appears that the linguistic analysis is winning, and that may well be as it should, given the courts’ obligation to apply statutes as written. Nonetheless, there

⁷¹The only court of appeals to previously tackle this question head-on was the Third Circuit in *In re Torwico Electronics, Inc.*, 8 F.3d 146, 24 Bankr. Ct. Dec. (CRR) 1394, 30 Collier Bankr. Cas. 2d (MB) 86, 37 Env’t. Rep. Cas. (BNA) 1809, Bankr. L. Rep. (CCH) P 75487, 24 Env’t. L. Rep. 20016 (3d Cir. 1993), and it did so only in a footnote. In *Torwico* the court held that an obligation imposed under New Jersey state law to clean up a property that the debtor had previously operated was not dischargeable. The Third Circuit noted that *Torwico* had argued that, although the specific statute under which it had been sued did not give the state a right to money damages, New Jersey had other statutory authorities that would allow the state to perform the cleanup and recover its costs. The Third Circuit dismissed *Torwico*’s argument as “irrelevant,” given the limitations of the statute under which *Torwico* was sued.

Torwico notwithstanding, a textual analysis of the definition of “claim” suggests that environmental cleanup obligations should be dischargeable if there is an available monetary remedy, regardless of the law that provides that remedy. The Code defines a “claim” as a “right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.” Thus, the Code determines whether a right is a claim, based on the remedies that are available to remedy the breach of performance, not in terms of the remedies available under any particular legal provision. That interpretation would further the Bankruptcy Code’s policy of providing debtors with a fresh start. It would also promote the policy of equal treatment of creditors by preventing some creditors whose rights may arise under multiple legal provisions from avoiding discharge of their claims simply by picking and choosing their remedies.

is no reason to believe that Congress was thinking about environmental cleanup injunctions when it drafted the definition of “claim” in the Code, and little reason to assume that the result in *Apex Oil*—which, despite Judge Posner’s analysis, is in tension with many fundamental policies of the federal bankruptcy law—is what Congress would have intended had it addressed that issue directly.

II. *General Motors* and the Section 363 Sale Option

A. Introduction

The circumstances that led two of the three U.S. automakers—General Motors and Chrysler—to file Chapter 11 petitions during 2009 and to sell their operating businesses through Section 363 sales are well known, and will not be elaborated upon here.⁷² Those bankruptcy proceedings raised a myriad of difficult and controversial issues: the role of the U.S. government as lender of last resort and prime mover in the bankruptcy proceedings, the treatment of the companies’ dealers, the participation of the unions, etc. Those issues too will not be addressed here, except for one: how the transactions were structured, with the active support and participation of the U.S. government, to protect the surviving, operating business from cleanup liabilities for properties that the automakers had involvement with only during the pre-bankruptcy period. As will be seen, the companies proposed, the U.S. supported and the courts approved provisions that

⁷²To reset the timeline, Chrysler filed for bankruptcy on April 30, 2009. It proposed a Section 363 sale of its operating assets to a newly created company. Ownership of New Chrysler was to be distributed by membership interests, 55% of which go to an employee benefit entity, 8% to the U.S. Treasury, 2% to Export Development Canada, and 20% to Fiat, which was also given rights to acquire more (up to 51%), contingent on payment in full of the debts owed to the U.S. Treasury and Export Development Canada. The sale was approved by Bankruptcy Judge Gonzalez on June 1, 2009. *In re Chrysler LLC*, 405 B.R. 84, 51 Bankr. Ct. Dec. (CRR) 181 (Bankr. S.D. N.Y. 2009), leave to appeal granted, 2009 WL 1532960 (2d Cir. 2009) and aff’d, 576 F.3d 108, 51 Bankr. Ct. Dec. (CRR) 254, 62 Collier Bankr. Cas. 2d (MB) 183, 47 Employee Benefits Cas. (BNA) 1513 (2d Cir. 2009), cert. dismissed, 130 S. Ct. 41, 174 L. Ed. 2d 626 (2009) and cert. granted, judgment vacated, 130 S. Ct. 1015, 175 L. Ed. 2d 614, 48 Employee Benefits Cas. (BNA) 2952 (2009) and judgment vacated, 592 F.3d 370 (2d Cir. 2010) and appeal dismissed, 592 F.3d 370 (2d Cir. 2010) (“Chrysler”). The decision was first affirmed by the Second Circuit on substantially the reasons stated in the opinions below on June 5, 2009. On August 5, 2009, after the Supreme Court had denied a stay and after the transaction had closed on June 10, 2009, the Second Circuit issued its opinion. 576 F.3d 108 (2d Cir. 2009). The General Motors Section 363 sale, discussed below, was approved by Bankruptcy Judge Gerber on July 5, 2009—in the period between the Second Circuit’s order and the issuance of its opinion. 407 B.R. 463.

protect the new General Motors and the new Chrysler from precisely the sort of liabilities that the U.S. successfully imposed on reorganized Apex.

Although one could also focus on Chrysler, this section focuses on General Motors because the treatment of environmental claims is prominently featured in the order approving the sale. In addition, unlike the Chrysler case, which was in part a merger with Fiat, the General Motors Section 363 sale—to a Newco owned by creditors of the debtor—more closely resembles the sort of restructuring that in the past would have been done through a Chapter 11 reorganization.

B. The General Motors Section 363 Sale and the Protection Sought for the Purchaser from Environmental Claims

Shortly after it filed for bankruptcy, and in acute financial distress, General Motors sought to sell its operating business—the largest auto manufacturing business in the U.S.—to a new company that would be formed to operate the business free from bankruptcy entanglement. The concept behind the proposed sale was as follows:

Under this game plan, the Purchaser would acquire the purchased assets; create a New GM; and operate New GM free of any entanglement with the bankruptcy cases. If the sale could be accomplished quickly enough, before GM's value dissipated as a result of continuing losses and consumer uncertainty, the 363 sale would thereby preserve the going concern value; avoid systemic failure; provide continuing employment; protect the many communities dependent upon the continuation of GM's business, and restore consumer confidence.⁷³

The key provisions of the proposed sale, as relevant to the focus here, were as follows:

1. New GM would acquire all of Old GM's assets, with the exception of certain Excluded Assets, including certain cash and cash equivalents, certain real and personal property, and certain other assets.

2. Old GM would retain all liabilities except certain Assumed Liabilities, including certain product liability claims, the warranty and recall obligations of both Old GM and New GM, and certain employment-related obligations and liabilities. Among the obligations specifically retained by Old GM and not assumed by new GM were all liabilities to third parties for claims based upon "[c]ontract, tort or any other basis".

⁷³407 B.R. at 480.

3. The consideration to Old GM for the sale was estimated to be worth approximately \$45 billion, plus the value of equity interests that it will receive in New GM. It included a credit bid by the U.S. Treasury of the majority of the indebtedness outstanding owed to the Treasury, the assumption by New GM of certain other existing indebtedness and liabilities, and 10% of the post-closing outstanding shares of New GM, plus an additional 2% under certain conditions, and warrants to acquire additional shares.

4. Apart from the 10% of New GM to be owned by Old GM, the other shares of new GM would be owned by the U.S. Treasury (60.8%), Export Development Canada (11.7%) and a New Employees Beneficiary Association Trust (17.5%).

5. Most relevant to the focus of this article, GM submitted a Proposed Sale Order that contained a number of provisions directed at cutting off any potential successor liability of New GM (except for the limited successor liability that was contractually assumed). One way to look at this is that the U.S., which was going to own the majority stake in New GM, wanted to ensure that its ownership interest would not be undermined by the sorts of environmental cleanup obligations arising from pre-bankruptcy activities that the U.S. itself successfully imposed on reorganized Apex Oil. Thus, the Proposed Sale Order contained a finding that the Debtors may sell the Purchased Assets free and clear of all liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability. And the Proposed Sale Order sought to enjoin all persons holding liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability, from asserting them against New GM or the Purchased Assets.

Thus, paragraph 8 of the Proposed Sales Order broadly provided as follows:

Except as expressly permitted or otherwise specifically provided by the [Master Sale and Purchase Agreement] or this Order, all persons and entities, including, but not limited to, all debt security holders, equity security holders, governmental, tax, and regulatory authorities, lenders, trade creditors, dealers, employees, litigation claimants, and other creditors, holding liens, claims, encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferee liability, against or in a Seller or the Purchased Assets (whether legal or equitable, secured or unsecured, matured or unmatured, contingent or noncontingent, senior or subordinated), arising under or out of, in connection with, or in any way relating to, the Sellers, the Purchased Assets, the operation of the Purchased Assets prior to the Closing, or the 363 Transaction, are forever barred, estopped,

and permanently enjoined (with respect to future claims or demands based on exposure to asbestos, to the fullest extent constitutionally permissible) from asserting against the Purchaser, its successors or assigns, its property, or the Purchased Assets, such persons' or entities' liens, claims, encumbrances, and other interests, including rights or claims based on any successor or transferee liability.

One aspects of this provision is especially noteworthy: the protection against successor liability is not limited to “claims” but bars successor liability arguments based on “other interests” and “rights.”

Moreover, just in case there was any doubt about the belt of paragraph 8, the Proposed Sales Order added the suspenders of paragraph 46, which provided:

Except for the Assumed Liabilities expressly set forth in the MPA, none of the Purchaser, its present or contemplated members or shareholders, its successors or assigns, or any of their respective affiliates or any of their respective agents, officials, personnel, representatives, or advisors shall have any liability for any claim that arose prior to the Closing Date, relates to the production of vehicles prior to the Closing Date, or otherwise is assertable against the Debtors or is related to the Purchased Assets prior to the Closing Date. The Purchaser shall not be deemed, as a result of any action taken in connection with the MPA or any of the transactions or documents ancillary thereto or contemplated thereby or in connection with the acquisition of the Purchased Assets, to: (i) be a legal successor, or otherwise be deemed a successor to the Debtors (other than with respect to any obligations arising under the Purchased Assets from and after the Closing); (ii) have, de facto or otherwise, merged with or into the Debtors; or (iii) be a mere continuation or substantial continuation of the Debtors or the enterprise of the Debtors. Without limiting the foregoing, the Purchaser shall not have any successor, transferee, derivative, or vicarious liabilities of any kind or character for any claims, including, but not limited to, under any theory of successor or transferee liability, de facto merger or continuity, *environmental*, labor and employment, and products or antitrust liability whether known or unknown as of the Closing, now existing or hereafter arising, asserted, or unasserted, fixed or contingent, liquidated or unliquidated.

(Emphasis added.) Note that this provision explicitly includes “environmental” liability and the protection being afforded is not limited to claims for money.⁷⁴ The purchaser—New GM—is protected from non-monetary obligations from which reorganized

⁷⁴The term “Liabilities” was defined in the Proposed Sales Order without any reference to whether the claim was monetary. It “means any and all liabilities and obligations of every kind and description whatsoever, whether such liabilities or obligations are known or unknown, disclosed or undisclosed, matured or unmatured, accrued, fixed, absolute, contingent, determined or

Apex was not protected.

The Proposed Sales Order does make clear that New GM is liable for contamination on property it purchased. Paragraph 61 provides that “Nothing in this Order or the MPA releases, nullifies, or enjoins the enforcement of any Liability to a governmental unit under Environmental Laws or regulations (or any associated Liabilities for penalties, damages, cost recovery, or injunctive relief) that any entity would be subject to as the owner, lessor, or operator of property after the date of entry of this Order.” This provision limiting the protection received by GM is critically limited to New GM’s status “as the owner, lessor, or operator of property after the date of entry of this Order.”

C. The Bankruptcy Court’s Decision

On July 5, 2009, Bankruptcy Judge Gerber approved the Section 363 sale and entered the Proposed Sales Order, and set forth his reasoning in a detailed 87-page opinion.

1. Use of Section 363

Judge Gerber first dealt with the argument that, because so many of GM’s assets were being disposed of in this transaction, this was an appropriate use of Section 363. The court reviewed the Second Circuit law on the use of Section 363 sales, and emphasized the longstanding Circuit rule from the *Lionel* case: “The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing *a good business reason* to grant such an application.”⁷⁵ Under that rule, and other precedent, “even the entirety of a debtor’s business may be sold without waiting for confirmation when there is a good business reason for doing so.”⁷⁶

The Bankruptcy Court found that the proposed Section 363 sale had a good business reason justifying it. “In fact, it is hard to imagine circumstances that could more strongly justify an immediate 363 sale. As the Court’s Findings of Fact set forth at length, GM, with no liquidity of its own and the need to quickly

undeterminable, on or off-balance sheet or otherwise, or due or to become due, including

Indebtedness and those arising under any Law, Claim, Order, Contract or otherwise.”

⁷⁵*In re Lionel Corp.*, 722 F.2d 1063, 1071, 11 Bankr. Ct. Dec. (CRR) 553, 9 Collier Bankr. Cas. 2d (MB) 941, Bankr. L. Rep. (CCH) P 69510 (2d Cir. 1983).

⁷⁶407 B.R. at 489.

address consumer and fleet owner doubt, does not have the luxury of selling its business under a plan.”⁷⁷

2. *Sub Rosa* Plan

The Bankruptcy Court also rejected the argument that the Section 363 sale was in reality a prohibited *sub rosa* plan of reorganization, to be effectuated without going through the plan process. The proposed sale “does not dictate the terms of a plan of reorganization, as it does not attempt to dictate or restructure the rights of the creditors of this estate. It merely brings in value. Creditors will thereafter share in that value pursuant to a chapter 11 plan subject to confirmation by the Court. A transaction contemplating that does not amount to a *sub rosa* plan.”⁷⁸

3. Successor Liability Protection

With those issues out of the way, the Bankruptcy Court then turned to objections filed by various creditors to the broad protections afforded New GM from successor liability. In approving those protections, the court noted that Section 363 itself, which allows for a sale “free and clear of any interest in such property of an entity other than the estate,” does not make clear whether interests can include claims based on successor liability. The court noted that neither “interest” nor “interest in property” is defined, and its textual analysis proved inconclusive.

The court then turned to case law and noted that nationally the courts were split on this issue.⁷⁹ “Some courts have held that Section 363(f) provides a basis for selling free and clear of successor liability claims,⁸⁰ and others have held that it does not.”⁸¹ But in the Second Circuit the case law was not split. Judge Gerber focused on the Bankruptcy Court decision in *Chrysler*, which at

⁷⁷407 B.R. at 491.

⁷⁸407 B.R. at 495–96.

⁷⁹407 B.R. at 503.

⁸⁰Judge Gerber provided the following citations here: “*See, e.g., Chrysler*, 405 B.R. at 111; *In re Trans World Airlines, Inc.*, 322 F.3d 283, 288–90 (3d Cir.2003) (“TWA”); *United Mine Workers of Am.1992 Benefit Plan v. Leckie Smokeless Coal Co.* (In re Leckie Smokeless Coal Co.), 99 F.3d 573, 581–82 (4th Cir.1996).”

⁸¹Judge Gerber provided the following citations here: “*See, e.g., Michigan Empl. Sec. Comm. v. Wolverine Radio Co., Inc.* (In re Wolverine Radio Co.), 930 F.2d 1132, 1147–48 (6th Cir. 1991); *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC* (In re Qualitech Steel Corp.), 327 F.3d 537, 545–46 (7th Cir. 2003); *Fairchild Aircraft Corp. v. Cambell* (In re Fairchild Aircraft Corp.), 184 B.R. 910, 918 (Bankr. W.D. Tex. 1995), *vacated as moot on equitable grounds*, 220 B.R. 909 (Bkrcty. W.D. Tex. 1998).”

that point had been affirmed by the Second Circuit, although the court of appeals' opinion had not yet been issued.⁸² In fact, the opinion later issued makes clear that Section 363 orders can foreclose successor liability claims. The Second Circuit stated: "The possibility of transferring assets free and clear of existing tort liability was a critical inducement to the Sale It is the transfer of Old Chrysler's tangible and intellectual property to New Chrysler that could lead to successor liability (where applicable under state law) in the absence of the Sale Order's liability provisions. Because appellants' claims arose from Old Chrysler's property, § 363(f) permitted the bankruptcy court to authorize the Sale free and clear of appellants' interest in the property."⁸³

Back in GM, Judge Gerber rejected the argument that the Chrysler sale was "distinguishable because the purchaser there, Fiat, was a commercial entity, and . . . the purchaser here is an entity formed by the U.S. and Canadian Governments. We are talking about an issue of statutory interpretation here, and the Code makes no distinction in that regard."⁸⁴

Finally, the court acknowledged that successor liability protections would foreclose possible avenues of recovery for tort victims, but that was just a consequence of the needs of the sale. "This Court fully understands the circumstances of tort victims, and the fact that if they prevail in litigation and cannot look to New GM as an additional source of recovery, they may recover only modest amounts on any allowed claims—if, as is possible, they do not have other defendants who can also pay. But the law in this Circuit and District is clear; the Court will permit GM's assets to pass to the purchaser free and clear of successor liability claims, and in that connection, will issue the requested findings and associated injunction."⁸⁵

4. Environmental Obligations

After addressing the issue of successor liability in general, the Bankruptcy Court addressed specifically the effect of the Sales Order on environmental claims and objection filed by a number of parties, including the New York Attorney General and the St.

⁸²The Supreme Court later vacated the Second Circuit's judgment in *Chrysler* on the ground that substantial consummation of the plan had mooted the appeal. *Indiana State Police Pension Trust v. Chrysler LLC*, 130 S. Ct. 1015, 175 L. Ed. 2d 614, 48 Employee Benefits Cas. (BNA) 2952 (2009).

⁸³576 F.3d at 126.

⁸⁴507 B.R. at 505 n.108.

⁸⁵507 B.R. at 505–06.

Regis Mohawk Tribe who had argued that the proposed order would too broadly release either Old GM or New GM from their duties to comply with environmental laws and cleanup obligations.⁸⁶ In rejecting these objections the court made two main points.

First, it noted that “[o]bjections of this character were a matter of concern to this Court as well, but they were addressed—very well, in this Court’s view—by amendments to the proposed order that were made after objections were due.” The Court referenced those provisions, parts of which are quoted above, which, the Court found, “make it quite clear that neither Old GM nor New GM will be relieved of its duty to comply with environmental laws.”⁸⁷

Second, the Bankruptcy Court overruled the objections to the application of the successor liability protection to environmental cleanup claims. It noted that the objectors “understandably would like New GM to satisfy cleanup obligations that were the responsibility of Old GM, on theories of successor liability. For reasons articulated in the Court’s ‘Successor Liability Issues’ discussion . . . , however, the property may be sold free and clear of such claims Any Old GM properties to be transferred will be transferred free and clear of successor liability, but New GM will be liable from the day it gets any such properties for its environmental responsibilities going forward.”⁸⁸

5. The GM Decision in Context

How much effect the decisions in *GM and Chrysler* will have will have on bankruptcy practice outside the Second Circuit will largely depend on whether other courts accept their holding that assets can be sold free and clear of successor liability claims pursuant to Section 363, and whether any limits on that ability are developed in subsequent case law. As Judge Gerber noted, there is a split of authority as to whether successor liability claims are “interests in property” that can be cut off via a 363 sale. And it remains to be seen whether the views expressed in *GM* and *Chrysler* will ultimately prevail.

Judge Gerber—and the Second Circuit in *In re Chrysler*—relied heavily on the Third Circuit’s decision in *In re Trans World*

⁸⁶ 407 B.R. at 507.

⁸⁷ 407 B.R. at 508.

⁸⁸ 407 B.R. at 508.

*Airlines, Inc.*⁸⁹ In that case, TWA, while struggling financially (but before filing its Chapter 11 petition), arranged to sell substantially all of its assets to American Airlines, subject to TWA's agreement to file for bankruptcy and to have the sale to American approved by the bankruptcy court free and clear of all interests, including successor liability interests.⁹⁰ TWA subsequently filed for bankruptcy under Chapter 11, and the bankruptcy court approved the sale under Section 363. The Equal Employment Opportunity Commission and a group of former employee plaintiffs, who had previously settled certain discrimination claims against TWA, appealed on the ground that successor liability interests are not "interests in property" and that, accordingly, the bankruptcy court did not have the power to cut off those interests in its order approving the sale. The court of appeals sided with the debtor, holding that "interests in property" are not limited to "in rem interests," but instead refer to all "obligations that are connected to, or arise from the property being sold," including successor liability claims.⁹¹ In reaching this conclusion, the court of appeals relied on the Fourth Circuit's holding in *In re Leckie Smokeless Coal Co.*,⁹² which had also affirmed similar orders approving 363 sales free and clear of successor liability claims.⁹³

The holdings in *TWA* and *Leckie Smokeless* contrast with *In re Wolverine Radio Co.*,⁹⁴ in which the Sixth Circuit held that the debtor's assets could not be sold free and clear of successor liability with regard to the debtor's unemployment tax rating under state law.⁹⁵ The Michigan tax statute at issue in that case determined an employer's contribution rate to the state unemploy-

⁸⁹*In re Trans World Airlines, Inc.*, 322 F.3d 283, 40 Bankr. Ct. Dec. (CRR) 284, 91 Fair Empl. Prac. Cas. (BNA) 385, Bankr. L. Rep. (CCH) P 78815, 84 Empl. Prac. Dec. (CCH) P 41362, 22 A.L.R. Fed. 2d 809 (3d Cir. 2003).

⁹⁰*Id.* at 286.

⁹¹*Id.* at 289–90.

⁹²*In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 36 Collier Bankr. Cas. 2d (MB) 1693, 20 Employee Benefits Cas. (BNA) 2103, 78 A.F.T.R.2d 96-7021 (4th Cir. 1996).

⁹³*Id.* at 582 ("Because there is . . . a relationship between [the objectors' claims against the debtors] and . . . the use to which [debtors] put their assets, we find that the [objectors] have interests in those assets within the meaning of Section 363(f).").

⁹⁴*In re Wolverine Radio Co.*, 930 F.2d 1132, 21 Bankr. Ct. Dec. (CRR) 932, 24 Collier Bankr. Cas. 2d (MB) 1702, Bankr. L. Rep. (CCH) P 73898, Unempl. Ins. Rep. (CCH) P 21952 (6th Cir. 1991).

⁹⁵*Id.* at 1147.

ment insurance fund based on various factors, including the employer's employment history.⁹⁶ The statute also provided that the transfer of assets of a business to another employer also transfers all or part of the seller's unemployment insurance contribution rate to the new owner.⁹⁷ In *In re Wolverine*, the new owner argued that it could not be assigned the debtor's contribution rate because of the order approving the sale free and clear of liens, claims, and interests. The Sixth Circuit, however, rejected the argument, holding that the debtor's contribution rating was not an "interest" within the meaning of Section 363(f).⁹⁸ Although the Sixth Circuit did not adopt a specific definition of "interest," it did suggest that the term encompasses only those interests that "attach[] to property ownership so as to cloud its title," and specifically rejected that the term could include all general unsecured claims.⁹⁹

In light of the split in circuit authority, it remains to be seen whether the view that successor liability claims can ultimately be cut off via a Section 363 sale will prevail. For the time being, however, the majority of appellate courts (including the Second and Third Circuits where so many major Chapter 11 cases are filed) have held that they can, and there seems to be a similar trend in the lower courts.¹⁰⁰

Assuming the *GM* court's view that successor liability claims can be cut off by a Section 363 sale does carry the day, there still remains the question of what limits may exist on a bankruptcy court's ability to approve such a sale. One potentially important limitation, which appears not to have been addressed by any court to date, is Section 363(e)'s requirement that all sales approved under Section 363 provide adequate protection for the interest of any entity in the property sold. In a typical Section 363 sale, holders of interests in the assets sold receive adequate protection through a lien on the proceeds of the sale. But such a result in the case of successor liability interests (at least with respect to claims that would be general unsecured claims if asserted against the debtor) would be to accord those claims preferential treatment, a result which the Third Circuit specifically

⁹⁶Id. at 1136 n.4.

⁹⁷Id. at 1145.

⁹⁸Id. at 1147.

⁹⁹Id. at 1147 & n.23.

¹⁰⁰See Michael H. Reed, Successor Liability and Bankruptcy Sales Revisited—A New Paradigm, 61 BUS. LAW. 179, 208–211 (2005) (surveying the lower courts' application of *TWA*).

rejected in *TWA*¹⁰¹ and which would defeat the whole purpose of the sale free of successor liability interests.¹⁰² If a lien is unavailable, however, it is difficult to see what other form of security could be provided to adequately protect successor liability claims. And in *GM* and *Chrysler* no such security was provided.

One possible answer to the Section 363(e) problem is that, although successor liability claimants have an interest in the assets sold in that it would be possible to obtain a judgment lien in the assets, that interest is contingent until a judgment is obtained and thus has no value as of the time of the sale.¹⁰³ Another way of looking at the problem is that if the underlying claim on which the successor liability claim is based would be discharged by confirmation of the plan, then it hardly makes sense to allow the claim to survive merely because assets were sold to a new entity rather than being retained by the reorganized debtor.

There could be another approach for obtaining relief from successor liability claims without implicating Section 363(e). Under Section 105 of the Code, the bankruptcy court has the authority to “issue any order . . . necessary or appropriate to carry out the provisions of [the Code].” If, as the Second Circuit found in *Chrysler*,¹⁰⁴ the ability to sell assets free and clear of successor liability claims is in some circumstances essential to maximizing the value of the sale, then it would seem that the bankruptcy courts have ample authority under Section 105 to determine whether an asset purchaser will succeed to the liabilities of the debtor. The general rule is that purchasers of a corporation’s assets do not succeed to the corporation’s liabilities.¹⁰⁵ Given that, and the exigencies of the bankruptcy process, a bankruptcy court could decide that it had the authority to determine under Section 105 that no successor liability attaches.

Given the adequate protection puzzle and other complexities of extinguishing successor liability claims in orders under Section

¹⁰¹*In re TWA*, 322 F.3d at 291–92.

¹⁰²Of course, to the extent that the sale at issue involves substantially all the debtor’s assets, as was the case in *GM* and *Chrysler*, providing a security interest in proceeds to claimants with successor liability claims would prioritize the claims of those claimants who could establish such a claim, under applicable substantive law, vis-a-vis those who could not.

¹⁰³One commentator has endorsed this view. Reed, *supra* note 101, at 195–97.

¹⁰⁴*In re Chrysler*, 576 F.3d at 126.

¹⁰⁵William M. Fletcher, *Fletcher Cyclopaedia Of The Law Of Private Corporations* § 7122.

363, there may continue to be some doubt as to whether the vehicle of a 363 sale will safely transport debtors to the land of released injunctive cleanup options. Nonetheless, given the certainty following *Apex Oil* that at least some injunctive claims will survive a traditional chapter 11 reorganization, it can be expected that debtors with significant environmental exposure will prefer to follow the roadmap laid out in *GM*.

III. *Apex and General Motors—Analysis and Lessons*

One way to look at *General Motors* and *Apex* together is this: for many years General Motors built cars at facilities around the U.S. that millions of American bought and drove; Apex operated refineries that produced some of the gasoline that fueled those cars. As markets changed, and for various other reasons, both General Motors and Apex fell on hard times and utilized bankruptcy protection, and in the process divested their ongoing business from certain formerly owned properties, some of which were contaminated. Similar stories, but with different endings. Apex used the traditional Chapter 11 reorganization process and wound up still being stuck with liabilities for those divested assets. General Motors used a Section 363 sale and its surviving business is now free of any obligations for its formerly owned contaminated properties. Creditors can file claims in the bankruptcy and perhaps get small distributions, but that is all. What should we make of this? Several points present themselves:

First, from a policy perspective, it is hard to see any difference between the two situations. Reorganized debtors want and need a fresh start, and so do Section 363 purchasers. If anything, the incentives should be crafted to encourage more debtors to utilize the full Chapter 11 process, with its heightened procedural safeguards, than the more expeditious, less process-encumbered Section 363 process.

Second, from a statutory construction perspective, both decisions could well be correct as they construe different statutory terms: “claim” in one case and “interest in property” in the other. One critical difference is that “claim” is a defined term, and that definition constrained Judge Posner’s ability to construe the term to achieve statutory objectives. “Interest in property” is not defined, and that allowed Judge Gerber, and the Second Circuit in *Chrysler*, to take a more expansive reading to achieve policy objectives.

Third, to the extent there is inconsistency here, it is mostly in the position of the U.S. government, which should be more focused on the policy ramifications of the positions it takes. That it sought successfully to get around Apex’s bankruptcy protec-

tion, while pushing for even broader protection for its subsidiary General Motors, is troubling, and in the big picture not a constructive development.¹⁰⁶

Fourth, unless the law in this area changes, any debtor seeking to provide maximum protection to its surviving business from broad cleanup liabilities for divested properties would be best advised to utilize a Section 363 sale.¹⁰⁷ The protection from successor liability that can be achieved through such a sale will very likely exceed the more narrow discharge from monetary claims that can be obtained if the property is transferred under a plan of reorganization.

It might be argued that Section 363 sales of most of a company's assets should be limited to the sort of emergency situations presented in *Chrysler* and *GM*. But while the urgency in those cases could justify the need for extremely expeditious timing, why does it justify the different treatment of claims for contaminated sites? And given that use of a Section 363 sale can be justified by compelling business reasons, would not the need to protect the business from legacy cleanup claims be precisely such a reason? A strong case can be made that it should be.

¹⁰⁶The U.S. did not directly address the successor liability issue in its brief in the Bankruptcy Court supporting the sale. The U.S. did, however, join the Debtors' reply "completely." *In re General Motors Corp.*, No. 09-50026, U.S. Br. in Support of Debtors' Motion to Approve the Sale, 2009 WL 1868012, at 1 (Bankr. S.D.N.Y. June 26, 2009).

¹⁰⁷A Chapter 11 debtor could potentially achieve the same result as in *GM* through a traditional plan of reorganization. Section 1123(b)(4) of the Code allows for a plan of reorganization to "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." Additionally, Section 1123(b)(6) provides that the plan may "include any other appropriate provision not inconsistent with the applicable provisions of [the Code]." Subclause (6) would appear to allow for a plan provision that any sale of assets would be free and clear of successor liability because—assuming the *GM* analysis is correct—such a provision would be allowed by Section 363, and thus would be consistent with the Code. Indeed, it appears that the sale addressed in *In re Wolverine Co.* occurred as part of a plan of reorganization. See *In re Wolverine Co.*, 930 F.2d at 1136.

Such an approach would be more cumbersome, as the sale would be subject to the greater procedural safeguards of plan confirmation. It also would not allow for another benefit of a Section 363 sale: the ability of the operating business to escape bankruptcy court supervision early, while the process of addressing claims against the estate is ongoing. (In *GM*, for example, only thirty-five days elapsed between the filing of the petition and the court's approval of the Section 363 sale, whereas the process of addressing claims is still very much ongoing.) Nonetheless, there may be circumstances in which the sale of assets through a plan of reorganization would be preferable. The authors thank Richard Lieb for this insight.