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INTRODUCTION

Courts have consistently struggled with the conflicting policy goals of environmental and bankruptcy law. Without Supreme Court guidance, lower courts have resorted to what has been deemed a case-by-case approach of balancing these competing interests. The cauldron of bankruptcy and environmental issues has been bubbling for some time and has now reached a boiling point. The response

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2 Id. at 80.
from Congress and the Supreme Court, however, has been virtually non-existent.  

Metaphors of Homeric proportions have been written about the state of environmental claims in bankruptcy, describing the competing interests as a veritable “clash of titans” of law and policy with conflicting priorities.  

A debtor cannot get a fresh start as well as pay for environmental obligations.  

A cleanup order cannot be treated comparably with other injunctive relief while receiving administrative priority.  

The Seventh Circuit recently commented on one of the many unresolved issues plaguing the intersection of environmental law and bankruptcy—the discharge of injunction orders under the Resource Conservation and Recovery Act (RCRA).  

This Note discusses the current circuit split representing the different ways that courts have defined rights to payment under section 101(5) of the Bankruptcy Code and the Seventh Circuit’s definitive holding in United States vs. Apex Oil Company, Inc.  

First, this Note argues that the Seventh Circuit’s holding, that the environmental obligation at issue in Apex...
was not a “right to payment” and hence not dischargeable in bankruptcy, is the correct interpretation of the bankruptcy provision as well as the environmental statute. This Note then discusses the implications of the Seventh Circuit’s holding and the several equitable concerns that remain in the wake of the court’s decision.

I. BACKGROUND

A. Environmental Law and Policy

State and federal environmental laws generally have as their purpose the regulation and elimination of dangerous pollution. To effectuate broad statutory mandates, environmental laws vest the President, and thus the EPA, with extensive power. Among its preventative and remedial functions, the EPA has a continuing duty to identify sites releasing hazardous substances. The sites, ranked in order of priority, comprise the National Priorities List (NPL). Environmental statutes also work retroactively, with expansive liability provisions that reach third parties, including parent companies, shareholders, corporate successors and lenders.

11 See, e.g. RCRA, 42 U.S.C. § 6902(b) (2006) (endeavoring to further the Congressional policy of minimizing the present and future threat to human health and the environment posed by solid and hazardous wastes).


13 Kelley, 15 F.3d at 1003.

14 Id. Through the end of the 2007 fiscal year, the EPA classified 1,569 sites as NPL sites, from a list of over 47,000 hazardous waste sites potentially requiring cleanup actions. U.S. GOV'T ACCOUNTABILITY OFFICE, supra note 3, at 4.

15 Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter CERCLA), 42 U.S.C. §§ 9601–9675, 9607(a) (2006); see United States v. Bestfoods, 524 U.S. 51, 67 (1998) (parent company may be charged with derivative CERCLA liability for its subsidiary’s actions); Browning-Ferris Indus. of Ill., Inc. v. Ter Maat, 195 F.3d 953, 955–56 (7th Cir. 1999) (shareholder not immunized from CERCLA liability where he personally operated polluting landfill);
remedies for environmental claims include—depending on the statute—clean-up orders, civil penalties, and criminal sanctions against responsible parties.\textsuperscript{16}

Generally, environmental laws authorize one or more of three courses of action. First, the government can undertake clean-up actions, including removal and remedial measures.\textsuperscript{17} Where the response is contingent with the National Contingency Plan, the costs of the cleanup actions are subsidized by the Hazardous Substances Fund.\textsuperscript{18} Second, the government can order abatement actions and assess penalties for non-compliance.\textsuperscript{19} Third, where the government or a private party undertakes the environmental cleanup or expends funds for it, a cost-recovery action may be brought against Potentially Responsible Parties (PRP).\textsuperscript{20}

Although there are many federal and state statutes, two are particularly relevant: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the RCRA.\textsuperscript{21}

CERCLA was enacted in 1980 to address the problem of remediating abandoned waste sites by establishing legal liability as

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\textsuperscript{16} See Control Data Corp. v. S.C.S.C. Corp., 53 F.3d 930, 936 (8th Cir. 1995) (defendant dry-cleaning supply business liable under CERCLA for cleanup costs under CERCLA for release of hazardous chemicals); U.S. v. Tex-Tow, 589 F.2d 1310, 1315 (7th Cir. 1978) (defendant owners of tank barge liable under Clean Water Act for civil penalties under absolute liability standard); U.S. v. Hamel, 551 F.2d 107, 109 (6th Cir. 1977) (defendant could properly be charged with criminal sanctions for willfully discharging gasoline into navigable waterway).

\textsuperscript{17} CERCLA, 42 U.S.C. § 9604 (2006).

\textsuperscript{18} Id.


\textsuperscript{20} Section 9607 defines four classes of PRP: (1) current owner and operator; (2) anyone who owned or operated the site at the time of the release of toxic substances; (3) any person who transported toxic substances to or from the site; and (4) any person who accepted transported toxic substances from the site. CERCLA, 42 U.S.C. § 9607(a) (2006).

well as a trust fund for environmental cleanup. CERCLA’s primary purpose is to effectuate cleanup of toxic waste sites or to compensate those who have attended to remediation of environmental hazards. CERCLA establishes a complicated scheme that enables the federal government to respond promptly and effectively to the pervasive problems inherent in hazardous waste disposal. Ultimately, CERCLA promotes the private allocation of responsibility for costs incurred in responding to threatened or actual releases, spills, or discharges of hazardous substances at existing or abandoned sites by laying liability at the feet of a broadly defined PRP.

RCRA is a comprehensive statute that governs the treatment, storage, and disposal of solid and hazardous waste. RCRA creates a “cradle to grave” regulatory framework for managing hazardous wastes by imposing compliance requirements on both generators and

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23 Hillinger & Hillinger, supra note 4, at 334–35.
24 A prima facie case for cost recovery under CERCLA is satisfied by establishing the following four elements: (1) the site is a facility as defined under CERCLA; (2) a release of hazardous substances has occurred or been threatened; (3) the release has caused the plaintiff to incur necessary costs of response; and (4) the defendant falls within one of the four categories of potentially responsible persons (PRPs). See CERCLA, 42 U.S.C. § 9607(a) (2006); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152–54 (9th Cir. 1989).
26 Hazardous waste is defined in § 6903 as: a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may (A) cause, or significantly contribute to an increase in mortality or an increase in serious, irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. RCRA, 42 U.S.C. § 6903 (2006).
transporters of hazardous wastes, as well as owners and operators of treatment, storage, and disposal facilities.\textsuperscript{27}

Unlike CERCLA, RCRA’s primary purpose is to reduce the generation of hazardous waste and to ensure proper treatment, storage, and disposal of waste that is nonetheless generated so as to minimize present and future threats to human health and environment.\textsuperscript{28} This difference in purpose is reflected in the remedial structures of the two statutes.\textsuperscript{29} RCRA claims are unique because they do not authorize any form of monetary relief and are purely injunctive.\textsuperscript{30}

\textbf{B. Bankruptcy Law and Policy}

The bankrupt debtor’s position has been likened to being stuck among a “circling flock of creditors who would otherwise feast merrily on the debtor’s carcass, with the swiftest among them realizing the choicest cuts.”\textsuperscript{31} To prevent a race to the courthouse, maximize the debtor’s assets, and preserve judicial order, there exist several procedural mechanisms by which debtors’ assets are liquidated or reorganized.\textsuperscript{32} The Bankruptcy Code aims to balance the dual goals of giving creditors what they are owed and providing debtors with a fresh economic start.\textsuperscript{33}

The “fresh start” principle is primarily achieved through two mechanisms: the automatic stay and the bankruptcy discharge.\textsuperscript{34} The

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\textsuperscript{28} Hillinger & Hillinger, \textit{supra} note 4, at 359.
\textsuperscript{29} See Meghrig v. KFC W., Inc., 516 U.S. 479 (1996).
\textsuperscript{32} Id.
\textsuperscript{34} Id.
\end{flushleft}
automatic stay stops creditors from being able to collect debts from the moment the bankruptcy is filed to the conclusion of the bankruptcy case. The automatic stay protects the debtor’s assets throughout the bankruptcy, guarantees that creditors will receive a fair share of the assets, and prevents the proverbial race to the courthouse to file creditor claims. In essence, because the costs of litigating judicial claims against the debtor often deplete the estate, the main purpose of the automatic stay provision is to preserve the estate.

The most important mechanism provided to debtors to achieve a fresh start is the bankruptcy discharge. Besides as otherwise provided in the Bankruptcy Code, a discharge in bankruptcy relieves the debtor from all debts that arose before bankruptcy. Individuals filing under Chapter 7 are discharged of all pre-petition debts, save for limited exceptions provided in the Bankruptcy Code. In a Chapter 11 bankruptcy, confirmation of a plan of reorganization discharges the debtor, usually a corporation, from all debts arising prior to the date of confirmation.

Section 1141(d)(1)(A) of the Bankruptcy Code provides that confirmation of a claim discharges “any debt that arose before the date of” confirmation of the bankruptcy. Debt is defined as liability on a claim. Section 1328 of the Bankruptcy Code expressly provides a discharge of all allowable debts: “the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title.” 11 U.S.C. § 1328(a) (2006) (emphasis added).

35 Losch, supra note 31, at 143.
38 Section 1328 of the Bankruptcy Code expressly provides a discharge of all allowable debts: “the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title.” 11 U.S.C. § 1328(a) (2006) (emphasis added).
39 Id.
40 See 11 U.S.C. § 523(a) (2006). Nondischargeable claims include child support, judgments for accidents involving drunk driving, certain taxes, and debts incurred illegally or by fraud.
42 Id.
43 Id. § 101(12). For purposes of identifying claims, federal bankruptcy, rather than state law, applies. See In re Jensen, 995 F.2d 925, 930 n.5 (9th Cir. 1993)
(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) [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.\textsuperscript{44}

Congress expressed its clear intention that the definition of claim be interpreted broadly, stating “the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.”\textsuperscript{45}

The usual interpretation of section 101(5)(B) is that if a holder of an equitable claim cannot obtain an equitable remedy but can obtain a money judgment instead, then the claim is dischargeable.\textsuperscript{46} The seemingly simple statutory interpretation has been complicated by the inconsistent judicial history of equitable claims in bankruptcy. A claim arises, for bankruptcy purposes, “when ‘the relationship between the debtor and creditor contain[s] all of the elements necessary to give rise to a legal obligation . . . under the relevant non-bankruptcy law.’”\textsuperscript{47}

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\textsuperscript{44} 11 U.S.C. § 101(5)(A)–(B).
\textsuperscript{46} United States v. Apex Oil Co., Inc., 579 F.3d 734, 736 (7th Cir. 2009).
\textsuperscript{47} In re Duplan Corp., 212 F.3d 144 (2d Cir. 2000) (quoting In re Chateaugay Corp., 53 F.3d 478, 497 (2d Cir. 1995)).
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The relevant non-bankruptcy legal obligation must arise prior to the filing of the bankruptcy petition.48

The bankruptcy discharge is primarily associated with Chapter 7 debtors who liquidate their assets in exchange for relief from the burden of their debts, but is an equally important principle for debtors attempting reorganization under Chapter 11.49 Reorganization under Chapter 11 is most often used by debtors who wish to continue doing business but cannot meet obligations to their creditors.50 Chapter 11 reorganization provides payments to the debtor’s creditors in accordance with a reorganization plan submitted to the creditors for vote and approved by the bankruptcy court.51 In a Chapter 11 reorganization, debtors plan the repayment of their debts with the expectation that their debts will be discharged.52 Consequently, the guarantee of dischargeability is important for debtors who are trying to determine how best to dispose of bad debt and restructure the rest of their obligations for future financial health.53

Outside of the bankruptcy discharge, the bankruptcy courts have general equitable powers under section 105 of the Bankruptcy Code, which states: “the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the title.”54 The court may thus enjoin any action where it is appropriate.55

As a general rule, when Congress empowers the federal courts to grant equitable remedies, the courts are presumed to be authorized to exercise their full equitable authority unless Congress clearly

50 Id.
51 Id.
53 Id. at 877.
55 Heidt, supra note 37, at 80.
indicates otherwise.\textsuperscript{56} This equitable authority includes the power to order prohibitory and mandatory injunctions, writs of mandamus, and restitutionary damages.\textsuperscript{57} Courts are limited in their broad discretion from awarding compensatory or punitive damages.\textsuperscript{58}

Claims for contribution to environmental cleanup costs clearly fall within the scope of section 105(A) of the Bankruptcy Code.\textsuperscript{59} Such claims are, by their very nature, rights to payment.\textsuperscript{60} Environmental injunctions, on the other hand, are a form of equitable remedy that fall within the scope of section 105(B).\textsuperscript{61} In contrast to claims under section 105(A), which are rights to payment by definition, not all injunctions are rights to payment.\textsuperscript{62}

Although environmental injunctions may differ significantly in both form and cost from other equitable relief, public policy supporting environmental cleanup does not require that environmental claims be treated differently from other claims in bankruptcy, in absence of clear legislative intent.\textsuperscript{63}

\section*{C. Conflicts}

The tension between bankruptcy and environmental principles is evident in the goals and obligations of the respective parties.\textsuperscript{64} The Bankruptcy Code aims to repay creditors while providing debtors with a fresh economic start.\textsuperscript{65} In contrast, environmental regulations

\textsuperscript{58} Id. at 737.
\textsuperscript{60} See Bos. & Me. Corp. v. Mass. Bay Transp. Auth., 587 F. 3d 89, 100 (1st Cir. 2009).
\textsuperscript{62} See Matter of Udell, 18 F.3d 403, 410 (7th Cir. 1994) (employer’s right to an injunction preventing a former employee from violating a covenant not to compete was not a claim under section 105(a)).
\textsuperscript{64} Losch, supra note 31, at 144.
\textsuperscript{65} See Porter & Thorne, supra note 33, at 68.
generally seek to protect public safety and the environment regardless of the particular interests of debtors and creditors. While this admittedly oversimplifies the conflict between bankruptcy and environmental laws, it is at precisely this crossroads that courts must determine whether the bankruptcy discharge applies to environmental injunctions.

When the bankrupt debtor is also a polluter under CERCLA or another environmental statute, the policy considerations of environmental and bankruptcy laws collide. A debtor with limited assets must, in a bankruptcy, distribute his assets according to priority of claim against him. An ideally positioned unsecured creditor would benefit from administrative expense status. However, because many environmental obligations are enormous financial burdens, giving those claims administrative priority effectively dwarfs all other unsecured claims. Such priority status helps the environmental enforcement agencies, but it may ruin a debtor’s attempts at reorganization. Where the environmental claims are given a larger share of the debtor’s assets, this inevitably leaves less to repay other creditors who receive a diminished share.

On the contrary, when environmental obligations are pooled with other general, unsecured claims, they are often discharged for pennies on the dollar. Discharging unpaid liability undermines the goals of environmental laws to force parties responsible for contamination to clean up the polluted sites.

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66 Losch, supra note 31, at 144–45.
67 Hillinger & Hillinger, supra note 4, at 371.
68 Id.; 11 U.S.C. § 507(a) (2006). Priority claims are ordered as follows: (1) domestic support obligations; (2) administrative expenses; (3) “claims” as defined in section 502; (4) payment of wages to corporate debtors’ employees; (5) contributions to employee benefit plans; (6) claims related to grain storage and fishing; (7) certain deposits for real and personal property; and (8) certain taxes.
69 Hillinger & Hillinger, supra note 4, at 390.
70 Id.
71 Id.
72 August, supra note 1, at 74.
73 Hillinger & Hillinger, supra note 4, at 390.
74 Id.
Bankruptcy issues that prevent or delay enforcement of environmental statutes can greatly increase the expenditures related to cleanup for those sites.\textsuperscript{75} Litigation and negotiation costs are largely site-specific, and the small number of sites with bankrupt PRPs can astronomically raise the overall level of spending on litigation.\textsuperscript{76}

Further issues arise in situations where there are multiple responsible parties at a given cleanup site. Bankrupt parties who cannot contribute to cleanup costs complicate negotiations between the remaining parties.\textsuperscript{77} It can be more difficult to settle claims in cases where some of the responsible parties are facing bankruptcy because other responsible parties do not want to pay for the insolvent party’s share of the cleanup costs.\textsuperscript{78}

The lower courts weigh the competing interests of the laws inconsistently, with conflicting results for debtors. Some courts give certain deference to environmental laws, while others favor bankruptcy provisions.\textsuperscript{79} There is also a complex middle ground that further confuses the issue.\textsuperscript{80}

\textit{D. Judicial History}

1. Supreme Court

\textit{Ohio v. Kovacs} was the first case in which the Supreme Court tackled the bankruptcy discharge as it relates to environmental

\textsuperscript{75} U.S. GOVERNMENT ACCOUNTABILITY OFFICE, \textit{supra} note 3, at 14.

\textsuperscript{76} In the last 10 years, litigation-related expenses have comprised up to 23\% of total EPA expenditures. \textit{Id.} at 12–14.

\textsuperscript{77} U.S. GOVERNMENT ACCOUNTABILITY OFFICE, \textit{LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS} 34 (2009), \textit{available at} http://www.gao.gov/new.items/d09656.pdf (citing reports where the EPA rejected settlement proposals from minimally responsible parties where bankrupt owners were largely responsible for site contamination but were unable to pay).

\textsuperscript{78} \textit{Id.} at 6.

\textsuperscript{79} August, \textit{supra} note 1, at 73.

\textsuperscript{80} \textit{Id.}
injunctions. When this landmark case was decided, it was interpreted as a blanket edict that polluting debtors could discharge environmental obligations in bankruptcy. Over time, however, *Kovacs* has raised more questions than it has answered.

In *Kovacs*, the State of Ohio sought a declaration from the bankruptcy court that the debtor’s obligation to clean up a contaminated site was not dischargeable in bankruptcy. The debtor, the principal shareholder of the polluting corporation, had previously signed a stipulation and judgment requiring him to remove specified wastes from the property. When the debtor failed to comply with the injunction, the State appointed a receiver to take possession of the site. Prior to completion of the cleanup, the debtor filed for personal bankruptcy under Chapter 7, precluding the State from enforcing its environmental laws against him. The Supreme Court held that because the debtor’s cleanup duty had been reduced to a monetary obligation, it was a liability on a claim that was dischargeable under the Bankruptcy Code.

The *Kovacs* decision most importantly stands for the proposition that a debtor cannot maintain an ongoing nuisance in direct violation of state environmental laws. The state can exercise its regulatory powers and force compliance with its laws, even if the debtor must expend money to comply. Under *Kovacs*, what the state cannot do is force the debtor to pay money to the state; at that point,
the state is no longer acting in its role as regulator, and it is instead acting as a creditor.90

The Kovacs Court expressly limited its holding in several ways,91 making it difficult to consider as precedent for future cases. Several issues were not decided: whether a monetary obligation imposed prior to bankruptcy was dischargeable; whether the consequences would be different had a receiver not been appointed to facilitate the injunction; or whether any environmental claims at all are dischargeable.92 The Kovacs Court noted that even if an injunction does not facially require payment of money, it still may present a “claim.”93 In particular, the Court did not address the issue of whether an injunction against further pollution is dischargeable.94

Kovacs fails to address the situations in which an injunction is not automatically dischargeable. The Supreme Court has since never addressed the specific issues on which it declined to comment in Kovacs. The limited holding in Kovacs has befuddled courts struggling to use any shred of guiding light from the Supreme Court in their respective analyses.95

Courts have struggled to identify a uniform legacy for Kovacs. In Midlantic National Bank v. New Jersey Department of Environmental Protection, the Supreme Court interpreted dicta in Kovacs to mean that the abandonment of property in bankruptcy is

90 Id.
91 Kovacs, 469 U.S. at 284.
92 Id. at 284–85 (“[W]e do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee . . . . [W]e do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State’s waters is dischargeable in bankruptcy; we here address . . . only the affirmative duty to clean up the site and the duty to pay money to that end.”).
93 Id. at 274.
95 Kovacs, 469 U.S. at 284–85; see In re Alongi, 272 B.R. 148, 156 (Bankr. D. Md. 2001) (citing Kovacs, 469 U.S. at 284); see also Goodwyn, supra note 94, at 776–77 (discussing Kovacs and how the Supreme Court limited its holding to the facts of the particular case, rather than disposing of potential issues).
subject to environmental laws.\textsuperscript{96} The subject property in \textit{Midlantic} was uncontestedly burdensome and not of value to the bankrupt estate.\textsuperscript{97} The bankruptcy court allowed the trustee in bankruptcy to abandon the contaminated site, even though the debtor had done nothing to remediate the facility.\textsuperscript{98} The Third Circuit reversed, and the Supreme Court affirmed.\textsuperscript{99} 

\textit{Midlantic} seems to advocate a case-by-case approach in which courts must balance the environmental violation’s threat to public health against the estate’s ability to comply with environmental laws.\textsuperscript{100} Although the \textit{Midlantic} Court dealt with abandonment of debtor property in the bankruptcy estate, and not the discharge of a claim for liability post-bankruptcy as in \textit{Kovacs}, the underlying question was the same: who will pay the cleanup costs for the contaminated property?\textsuperscript{101}

2. The Circuit Split

The Supreme Court did not, in either \textit{Kovacs} or \textit{Midlantic}, address the discrete issue of when a claim arises for the purposes of bankruptcy. In \textit{In re Chateaugay Corp.}, the Second Circuit considered what constituted a claim in the context of a bankrupt debtor who

\textsuperscript{96} 474 U.S. 494, 500–01 (1986) (quoting \textit{Kovacs}, 469 U.S. at 285) (anyone in possession of polluted property “must comply with the environmental laws of the [s]tate”).
\textsuperscript{97} \textit{Midlantic}, 494 U.S. at 502.
\textsuperscript{98} \textit{Id.} at 498 n.3.
\textsuperscript{99} \textit{Id.} at 498.
\textsuperscript{100} Hillinger & Hillinger, \textit{supra} note 4, at 362–69. Lower courts are divided on how to treat the outcome of \textit{Midlantic}. Some hold that \textit{Midlantic} requires the trustee to bring contaminated property into complete compliance with all environmental laws before abandonment. \textit{See In re Peerless Plating Co.}, 70 Bankr. 943, 946–47 n.1 (Bankr. W. D. Mich. 1987). Others interpret limiting language in \textit{Midlantic} to mean that the exception applies only where there is an imminent danger to public health and safety. \textit{In re Smith-Douglass, Inc.}, 856 F.2d 12, 15 (1988); \textit{see also In re Purco, Inc.}, 76 Bankr. 523, 533 (Bankr. W.D. Pa. 1987); \textit{In re Franklin Signal Corp.}, 65 Bankr. 268, 271–72 (Bankr. D. Minn. 1986).
\textsuperscript{101} Hillinger & Hillinger, \textit{supra} note 4, at 369.
owned and operated literally dozens of hazardous waste sites. The Second Circuit held that the EPA’s costs of responding to the hazardous waste situations, even those not yet addressed at the time of the bankruptcy, involved claims. As such, the EPA was required to file a proof of claim for each of the sites and stand in line with the other creditors in the bankruptcy. With respect to injunctions requiring the debtor to clean up the waste sites, the Second Circuit made the distinction between seeking reimbursement for cleanup and accepting payment as an alternative to continued pollution. The Second Circuit held:

[A] cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim. It is true that, if in lieu of such an order, EPA had undertaken the removal itself and sued for the response costs, its action would have both removed the accumulated waste and prevented continued pollution . . . But an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, 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.

Finding the logic of the Second Circuit persuasive, the Third Circuit held in In re Torwico Electronics, Inc. that a cleanup order entered after the bankruptcy bar date is not dischargeable. In Torwico, the Chapter 11 debtor had owned, but no longer possessed, the polluted property. The Third Circuit held that the debtor’s

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102 944 F.2d 997, 1006 (2d Cir. 1991).
103 Id.
104 Id. at 1004.
105 Id. at 1008.
106 Id.
107 8 F.3d 146, 149 (3d Cir. 1993), cert. denied, 511 U.S. 1046 (1994).
obligations under the state’s administrative order requiring the debtor to clean up hazardous waste on the polluted property was not a claim under the Bankruptcy Code. The debtor claimed that because it no longer had possession of the cleanup site, it was no longer maintaining a nuisance or participating in or responsible for the ongoing release of hazardous chemicals at the site. The Third Circuit held that although the state did not have a right to payment, it had the right to force the debtor to comply with existing environmental laws, even if the debtor expended money to comply.

The Third Circuit centered its analysis on the State of New Jersey’s regulatory role. The court found that if the State could force the debtor to pay money to the State, it would cease to be merely a regulator and would take on the role of creditor. So while forcing compliance is within the power of the State as regulator, including forcing the debtor to expend money to comply with court orders, the State cannot force the debtor to pay money directly to the state. Interestingly, the Court held that the cleanup obligation was not a right to payment, even though that option was available to the State. The State could have, under the Act, cleaned up the hazardous waste and then sought reimbursement, which would be a judicial right to payment.

The Third Circuit rejected the debtor’s contention that Kovacs applied to the cleanup obligation, agreeing with the state that Kovacs was not applicable because the state was not seeking a money judgment, but only seeking to remedy the ongoing pollution by forcing

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108 Id. at 148.
109 Id. at 151.
110 Id. at 150.
111 Id.
112 Id. at 150.
113 Id. at 151 n.6 (“The parties dispute[d] whether, if the state has an ‘alternate payment remedy’ the order becomes a ‘claim.’”); see In re Chateaugay Corp., 944 F.2d 997, 1008 (“[T]o the extent that [an order] imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, [it] is a ‘claim’ if the creditor obtaining the order had the option . . . to do the cleanup work itself and sue for response costs”).
114 Torwico, 8 F.3d at 151.
the debtor to clean up the site. Under New Jersey law, the environmental obligations of the polluting company ran with the waste and not the land. Thus, the debtor company was responsible for the cleanup even though it was no longer in possession of the land.

The Sixth Circuit has held oppositely. In United States v. Whizco, Inc., the government sought to enjoin the defendant, a coal company, to obey orders of the Secretary of the Interior requiring the defendants to satisfy their statutory obligation to reclaim their abandoned coal mine. The court held that the former operator of the coal mine was required to reclaim the abandoned site, even though the mine had been liquidated, but made the point of distinguishing enforcement obligations that required performance from those that were monetary obligations: “to the extent that fulfilling his obligation to reclaim the site would force the defendant to spend money, the obligation [i]s a liability on a claim as defined by the Bankruptcy Code.”

Whizco suggests that all claims in which the defendant must spend money are rights to payment as defined in section 101(5). The Whizco position favors debtors in bankruptcy, because it follows “fresh start” principles. As such, Whizco has been argued many times by bankrupt debtors trying to resolve environmental claims in court. However, most courts have declined to follow the Sixth Circuit’s distinction between money claims and injunctive relief.

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115 Id. at 149.
116 Id.
117 Id.
118 841 F.2d 147, 147 (6th Cir. 1988).
119 Id. at 151.
120 Id.; see 11 U.S.C. § 101(5).
122 United States v. Hubler, 117 B.R. 160 (W.D. Pa. 1990), aff’d, 928 F.2d 1131 (3d Cir. 1991) (cessation order demanded performance, not payment, and thus, the obligations were not “claims” within meaning of Bankruptcy Code); In re Chateaugay Corp., 112 B.R. 513 (S.D.N.Y. 1990), aff’d, 944 F.2d 997 (2d Cir. 1991) (“claims for injunctive relief for which creditors had option of converting injunction
3. The Seventh Circuit

The Seventh Circuit has previously considered environmental claims in bankruptcy, with varying results. In *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Chicago I)* \(^{123}\) and *In re Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Chicago II)*, the Seventh Circuit affirmed the discharge of CERCLA claims.\(^{124}\) The court held that a claim arises for bankruptcy purposes when the claimant can “tie the bankruptcy debtor to a known release of a hazardous substance which this potential claimant knows will lead to CERCLA response costs.”\(^{125}\) Thus, in *Chicago I*, because the relevant authority waited to file a claim until four years after the bankruptcy approval date, the claim was discharged in bankruptcy.\(^{126}\) The discharge was affirmed in *Chicago II*, where the court found that sufficient information existed, had the plaintiff sought it out, to give at least constructive knowledge that it possessed a CERCLA claim prior to and during the bankruptcy.\(^{127}\)

The Seventh Circuit held broadly that cost incurred to comply with an equitable cleanup order is not equivalent to the right to payment.\(^{128}\) In *AM International, Inc. v. Datacard Corp*, the Seventh Circuit considered whether a cleanup order under RCRA was converted to a monetary obligation.\(^{129}\) Because only “rights to

\(^{123}\) 974 F.2d 775 (7th Cir. 1992).

\(^{124}\) 3 F.3d 200 (7th Cir. 1993).

\(^{125}\) *Chicago I*, 974 F.2d at 786.

\(^{126}\) *Chicago II*, 3 F.3d at 203, 207. Prior to the confirmation of the bankruptcy, the EPA launched a massive investigation of the site, and a state-commissioned study detailing the site's problems was published.

\(^{127}\) *Id.* at 1348.

\(^{128}\) *AM Int'l, Inc. v. Datacard Corp*, 106 F.3d 1342 (7th Cir. 1997).
payment” are dischargeable “claims” for bankruptcy purposes, the RCRA injunction was not a claim.\(^{130}\)

In *In re CMC Heartland Partners*, the Seventh Circuit found in favor of the EPA because the CERCLA provision involved created a claim “running with the land.”\(^{131}\) The court found that a “statutory obligation attached to current ownership of the land survives bankruptcy.”\(^{132}\) The court distinguished “claims” in bankruptcy, noting that “[t]o the extent [the relevant federal statutory sections] require a person to pay money today because of acts before or during the reorganization proceedings, CERCLA creates a ‘claim’ in bankruptcy.”\(^{133}\) Thus, the court avoided the possibility that a cleanup order would be a response to an ongoing threat, and not just a repackaged claim for damages.\(^{134}\)

## II. *UNITED STATES V. APEX OIL CO., INC.*

In *U.S. v. Apex Oil Company, Inc.*, the United States, seeking injunctive relief under the endangerment provision of RCRA, brought an action against Apex Oil Company, Inc. (“Apex”).\(^{135}\) Apex was a successor company to Clark Oil and Refining Corporation.\(^{136}\) Fifteen

\(^{130}\) *Id.; see* Meghrig v. KFC W., Inc., 516 U.S. 479 (1996) (RCRA does not allow a party to clean up site and sue for response costs in lieu of seeking an injunction).

\(^{131}\) 966 F.2d 1143, 1147 (7th Cir. 1992). *CMC* is the successor case to *Chicago I*, 974 F.2d 775.

\(^{132}\) *CMC*, 966 F.2d at 1147.

\(^{133}\) *Id.* at 1146.

\(^{134}\) *Id.* at 1147.

\(^{135}\) RCRA, 42 U.S.C. §§ 6901–6987, 6973 (2010); *U.S. v. Apex Oil Co., Inc.*, 579 F.3d 734, 734 (7th Cir. 2009).

\(^{136}\) Clark Oil Refining Corporation (“Clark Oil”) bought the Hartford Refinery in 1967. Apex Oil Company (“Apex Oil”) was a general partnership formed in 1979. In 1981, Clark Oil was merged into Apex Acquisition, Inc. and subsequently changed its name to Clark Oil and Refining Corporation (“Clark/Apex”). In 1987, Apex Oil and most of its subsidiaries, including Clark/Apex, filed for protection under Chapter 11 of the Bankruptcy Code. In 1988, Clark/Apex sold the Hartford Refinery to yet another incarnation of Clark Oil and Refining Corporation. Apex Oil Company, Inc. was incorporated in 1989 and merged into Apex Oil (“Apex”). Apex
years after the company’s successful Chapter 11 reorganization, the
government brought an action against the successor company for
groundwater contamination at the site of a previously owned oil
refinery in Hartford, Illinois. After a seventeen-day bench trial, the
district judge found that millions of gallons of oil constituting a
“hydrocarbon plume” were trapped underground at the site. The
pollution contaminated the groundwater and emitted fumes into the
surrounding area, creating hazards to health and to the environment.
The district judge found that the evidence presented established
Apex’s liability and that the injunction was appropriate.

The question brought before the Seventh Circuit was whether
the claim had been discharged in Apex’s previous bankruptcy and
therefore could not serve as the basis for the lawsuit. The principal
issue addressed by the Seventh Circuit was whether the government’s
claim to an injunction was discharged in bankruptcy, precluding the
claim from being brought in another lawsuit. At the time the
Government instituted the cause of action, Apex no longer owned the
property, engaged in refining, or had the in-house capability to clean
up the contaminated site. Apex argued that because it would be
unable to fulfill its environmental obligations without payment of
approximately $150 million dollars to an outside contractor, and
therefore the equitable remedy had been reduced to payment, it was a
dischargeable claim.

is a successor-by-merger to both Clark Oil and Clark/Apex, who collectively owned
Co., Inc., No. 05-CV-242-DRH, 2008 WL 2945402, at *1–2 (S.D. Ill. July 28,
2008).

137 United States v. Apex Oil Co., Inc., 579 F.3d 734, 735 (7th Cir. 2009).
138 Id.
139 Id.
140 United States v. Apex Oil Co., Inc., No. 05-CV-242-DRH, 2008 WL
141 Apex, 579 F.3d at 735.
142 Id.
143 Id. at 736.
144 Notably, the government had initially asked for injunctions under either the
Clean Water Act or CERCLA but changed positions when confronted with Apex’s
bankruptcy discharge defense. Id. at 737.
Judge Posner, writing for the court, explained that the definition of a “claim” in section 101(5)(B) of the Bankruptcy Code includes “a right to an equitable remedy for breach of performance” only if the breach “gives rise to a right to payment.” The critical inquiry for the statutory interpretation is the meaning of “gives rise to a right to payment.” The Seventh Circuit read the plain language of the statute to mean that if the equitable remedy was unobtainable and the holder of an equitable claim could obtain a money judgment instead, the claim would give rise to a right to payment and would hence be dischargeable.

The Seventh Circuit compared the cleanup injunction to other equitable remedies that give rise to rights to payment because the claimant would be entitled to a money judgment, and it noted that certain equitable remedies like backpay orders and orders of equitable restitution would be dischargeable if not for explicit statutory authority to the contrary. Accordingly, only two types of injunctions give rise to an alternate right to payment: (1) injunctions that are no longer capable of performance, such as an injunction to do something that is no longer possible and (2) injunctions that actually call for the payment of money. The Court specifically rejected the notion that equitable remedies are orders to act and are never orders to pay.

In contrast to equitable remedies that may be reduced to money judgments, the government’s RCRA claim does not entitle the plaintiff to demand payment of cleanup costs in lieu of the defendant cleaning up the site, either by doing the cleanup itself or by paying a third party. Because RCRA does not authorize any form of monetary

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145 11 U.S.C. § 101(5)(B); Apex, 579 F.3d at 735.
146 Apex, 579 F.3d at 736.
147 Id.
148 Id.; see In re Davis, 3 F.3d 113, 116 (5th Cir. 1993) (a money judgment to the value of the equitable remedy or claim is a right to receive payment and is dischargeable in bankruptcy); UFG, LLC v. Sw. Corp., 848 N.E.2d 353, 363, 365 (Ind. App. 2006) (decree for specific performance that could not be performed and thus entitled the plaintiff to a money judgment was dischargeable).
149 Apex, 579 F.3d at 736.
150 Id.
151 Id.
relief, the Seventh Circuit concluded that that the cleanup order at issue could not be deemed a right to payment.\footnote{152 Id. at 736–37.}

The RCRA provision that was the basis of the government’s equitable claim did not entitle the government to a demand for any monetary relief, although it did entitle the plaintiff to equitable relief in the form of money.\footnote{153 Id. at 737.} As such, the government’s equitable claim entitled the government to require Apex to clean up the site at Apex’s expense.\footnote{154 Id.}

The Seventh Circuit relied on the Supreme Court’s decision in \textit{Meghrig v. KFC Western, Inc.} to support its interpretation that section 6973(a) did not authorize monetary relief.\footnote{155 RCRA, 42 U.S.C. § 6972(a)(2) (2006); Meghrig v. KFC W., Inc., 516 U.S. 479, 483–87 (1996); \textit{Apex}, 579 F.3d at 737.} \textit{Meghrig} interpreted RCRA’s companion provision authorizing private suits as not authorizing monetary relief.\footnote{156 Id.} The relevant language from the two statutes is identical.\footnote{157 Id.} The Seventh Circuit concluded on this basis that the government’s equitable claim allowed the court to compel the defendant to clean up the contaminated site, and nothing more.\footnote{158 Id.}

The court also rejected Apex’s second argument, that all equitable decrees requiring payment for compliance are money claims and are therefore dischargeable.\footnote{159 Id.} The court found the position to be inconsistent with the Bankruptcy Code that creates only the limited right to the discharge of equitable claims.\footnote{160 11 U.S.C. § 101(5)(B); \textit{Apex}, 579 F.3d at 737.} As such, the cost to the defendant is not equivalent to a right to payment for the plaintiff.\footnote{161 Apex, 579 F.3d at 737; see AM Int’l, Inc. v. Datacard Corp., 106 F.3d 1342, 1348 (7th Cir. 1997); \textit{In re Torwico Elecs.}, Inc., 8 F.3d 146, 150 (3d Cir. 1993), \textit{cert. denied}, 511 U.S. 1046 (1994); \textit{In re CMC Heartland Partners}, 966 F.2d 1143, 1145–47 (7th Cir. 1992); \textit{In re Commonwealth Oil Refining Co.}, 805 F.2d 1175, 1186–87 (5th Cir. 1986); Penn Terra, Ltd. v. Dep’t of Envtl. Res., 733 F.2d 267, 278–79 (3d Cir. 1984); U.S. v. Hubler, 117 B.R. 160, 164 and n.1 (W.D. Pa. 1990), aff’d, 928
The Court explained, “[a]lmost every equitable decree imposes a cost on the defendant, whether the decree requires him to do something, as in this case, or, as is more common, to refrain from doing something.”162

The Seventh Circuit distinguished Ohio v. Kovacs, in which the receiver that had been appointed was seeking money for the injunction instead of an order for cleanup.163 The claim was a right to payment.164 Here, the government was not seeking money, and the injunction therefore did not entitle a right to payment that would be dischargeable in bankruptcy.165 In Apex, the EPA merely sought cleanup of the contaminated site, whereas the receiver in Kovacs sought money for cleanup.166 The court dismissed the notion that the two were synonymous.167

III. ANALYSIS

Apex’s argument failed because it attempted to distinguish the environmental injunction under RCRA from all other equitable claims.168 Under the current statutory makeup of the Bankruptcy Code, however, distinguishing between equitable claims is simply not possible.169 The Seventh Circuit found definitively:

F.2d 1131 (3d Cir. 1991); In re Chateaugay Corp., 112 B.R. 513, 523–24 (S.D.N.Y. 1990), aff’d, 944 F. 2d 997 (2d Cir. 1991).  
162 Apex, 579 F.3d at 737.  
163 Id.  
164 Id.  
165 Id.  
166 Id.  
167 Id. The Seventh Circuit also rejected Apex’s alternative argument that the injunction itself is vague and violates Rule 65(d) of the civil rules requiring that an injunction “state its terms specifically” and “describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” Apex, 579 F.3d at 739. The issue is not addressed in this Note.  
168 Id. at 736.  
The distinctions that Apex suggests to limit the scope of a position that it realizes is untenable (that all equitable claims are dischargeable in bankruptcy in the absence of a specific exception in the Code)—between injunctions to do and injunctions not to do, between injunctions that require major expenditures and those that require minor ones, between injunctions that the defendant can comply with internally and injunctions that it has to hire an independent contractor in order to achieve compliance with—are arbitrary.  

The root arbitrariness of Apex’s position is that neither the Bankruptcy Code nor RCRA make any legal distinction for the manner in which the cleanup occurs. The Seventh Circuit underscored that adopting Apex’s position would encourage polluters to remain without internal cleanup capacity. The cleanup costs exist whether they are paid for by the polluter or someone else. As the polluter most responsible for the environmental damage, Apex’s cleanup obligation withstands bankruptcy. Were the court to adopt Apex’s position, it is unlikely that the state could effectively enforce its laws. The argument that any order requiring the debtor to expend money creates a dischargeable claim is untenable, because virtually all enforcement actions impose some cost on the violator.  

The Seventh Circuit reasoned that all equitable decrees impose costs on the defendants, and that discharge generally must be limited to cases where the claim gives rise to a right to payment. This position is consistent with the Seventh Circuit’s previous decisions regarding the dischargeability of environmental claims in bankruptcy. The court clearly followed its own precedent in In re CMC Heartland.

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170 Apex, 579 F.3d at 738.
171 Id.
172 Id.
173 Id. at 737.
174 Id.
176 Apex, 579 F.3d at 738.
Partners, which held that the statutory cleanup obligation that attached to current ownership of the land survived bankruptcy,\textsuperscript{177} and \textit{AM International, Inc. v. Datacard Corp.}, where that cost incurred to comply with a RCRA injunction was not equivalent to the right to payment.\textsuperscript{178}

The Seventh Circuit’s reliance on its own precedent is indicative of the lack of guidance from higher authority, namely the Supreme Court or Congress. While the Seventh Circuit correctly interpreted the statutory language, other Circuits are still relying on the spotty lineage of cases following \textit{Kovacs} to make conflicting decisions about the dischargeability of environmental claims.

The Seventh Circuit’s reliance on its own precedent, and similar lines of cases in other circuits, indicates that there is no unified approach to environmental claims in bankruptcy. The Seventh Circuit’s analysis is supported by some of the circuits, but starkly contrasted by the Sixth. Beginning with the latter, the Seventh Circuit explicitly rejected Apex’s attempt to support its position with \textit{United States v. Whizco, Inc.}\textsuperscript{179}

\textit{Whizco} suggests that all claims where the defendant must spend money in order to comply with the court’s orders are rights to payment.\textsuperscript{180} The question presented in \textit{Whizco}—whether the discharge provisions of the Bankruptcy Code apply to mandatory injunctive relief that cannot be performed personally and would require a debtor in a chapter 7 liquidation bankruptcy to spend money—is comparable to that in \textit{Apex}.\textsuperscript{181} The facts of \textit{Whizco} are also similar to those in \textit{Apex}, as the debtor in \textit{Whizco} had surrendered the property in question, as well as all the mining equipment, in his bankruptcy.\textsuperscript{182} The debtor no longer had the physical ability to perform the reclamation nor the right to enter the polluted site.\textsuperscript{183} Further, the

\textsuperscript{177} 966 F.2d 1143, 1147 (7th Cir. 1992).
\textsuperscript{178} 106 F.3d 1342, 1348–49 (7th Cir. 1997).
\textsuperscript{179} 841 F.2d 147, 147 (6th Cir. 1988).
\textsuperscript{180} \textit{Id.} at 151.
\textsuperscript{181} \textit{Id.} at 147; see \textit{Apex}, 579 F.3d at 735.
\textsuperscript{182} \textit{Whizco}, 841 F.2d at 149; see generally \textit{Apex}, 579 F.3d 735.
\textsuperscript{183} \textit{Whizco}, 841 F.2d at 149.
debtor lacked the financial ability to post bond or to hire a third party to perform the cleanup work.\footnote{id}

The Sixth Circuit relied on \textit{Kovacs} in holding that the debtor’s obligation to comply with the injunction was discharged in bankruptcy.\footnote{id} According to the court, the petitioner in \textit{Whizco} essentially sought from the respondent debtor only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the Bankruptcy Code.\footnote{Ohio v. Kovacs, 469 U.S. 274, 284 (1986); Whizco, 841 F.2d at 149.} Like \textit{Kovacs}, where the State of Ohio was essentially trying to obtain a money payment from the debtor, the debtor in \textit{Whizco} could not personally clean up the waste he wrongfully released into the environment.\footnote{Kovacs, 469 U.S. at 287–88; Whizco, 841 F.2d at 149.} As such, the Sixth Circuit determined that the redress sought by the government was actually a money claim and dischargeable in bankruptcy.\footnote{Whizco, 841 F.2d at 150.}

The Sixth Circuit rejected \textit{Whizco}, Inc.’s argument that an injunctive order should be discharged only when the government has an alternative right to payment of money in lieu of compelling the operator or his agent to perform his reclamation duties.\footnote{id} The Sixth Circuit held:

\begin{quote}
Although the terms of the injunction would not require the payment of money, to the extent that the injunction were to be effective, it would. . . . Thus, when we look at the substance of what the plaintiff seeks, rather than the form of the relief sought, we see that the plaintiff is really seeking payment.\footnote{id}
\end{quote}

The \textit{Whizco} court determined that money payment was a claim, regardless of the form of the court order demanding cleanup.\footnote{id} The

\begin{footnotesize}
\begin{itemize}
\item\footnote{id} Id.
\item\footnote{id} Id.
\item\footnote{Ohio v. Kovacs, 469 U.S. 274, 284 (1986); Whizco, 841 F.2d at 149.} Id.
\item\footnote{Kovacs, 469 U.S. at 287–88; Whizco, 841 F.2d at 149.} Id.
\item\footnote{Whizco, 841 F.2d at 150.} Id.
\item\footnote{id} Id.
\item\footnote{id} Id. at 151.
\end{itemize}
\end{footnotesize}
distinction between form and substance makes practical sense. An interpretation of the Bankruptcy Code that turns on the debtor’s financial reality is preferable for debtors who are legally liable but practically unable to pay for the environmental cleanup that would inevitably be performed by government agencies.

The Sixth Circuit applied *Kovacs* more literally than the Seventh Circuit, finding that the substance of the claim—namely, the money expense—governs over the form of the court order. While most courts begin inquiry into environmental matters in bankruptcy with a discussion of *Kovacs*, the Seventh Circuit stepped away from that approach. Instead, the Seventh Circuit turned to the statutory language of RCRA and the Bankruptcy Code.

The key difference between the Sixth and Seventh Circuits’ study of *Kovacs* is that the Sixth Circuit interpreted the case without respect to the appointment of the receiver, while the Seventh Circuit in *Apex* found that the appointment of a receiver transferred the power to make money claims out of the hands of the debtor, and therefore was inapplicable to the present case. Had the *Whizco* court considered the receiver’s role as intermediary seeking payment for the environmental cleanup, the court may have come to the same conclusion as the Seventh Circuit.

The Seventh Circuit’s analysis mirrors that of the Third Circuit in *In re Torwico Electronics, Inc.* In *Torwico*, the court applied an environmental law similar to the RCRA provision that limits claims to injunctive relief. The Third Circuit reasoned that because the New Jersey Department of Environmental Protection and Energy (NJDEPE) could not force the debtor to pay money to the State, the cleanup costs were not a claim in bankruptcy. NJDEPE had no right

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192 United States v. Whizco, Inc., 841 F.2d 147, 150 (6th Cir. 1988).
193 United States v. Apex Oil Co., Inc., 579 F.3d 735, 736 (7th Cir. 2009).
194 *Id.*
195 *Whizco*, 841 F.2d at 149.
196 *Apex*, 579 F.3d at 737.
197 8 F.3d 146 (3d Cir. 1993).
198 *Id.*
199 *Torwico*, 8 F.3d at 150.
to payment, because its authority was limited to enforcement of the laws requiring the debtor to clean up the hazardous wastes for which it was responsible under state law.200 The court in Torwico stated that much like the remedy at issue in Apex, “it is clear that the state demanded not that Torwico pay money over to the state, but rather that it take action to ameliorate ongoing hazard.”201

Both the Sixth Circuit’s substance/form distinction and the Seventh Circuit’s determination that an injunction is not a universal right to payment have significant policy implications. If a debtor’s environmental obligations are dischargeable, as advocated by the Sixth Circuit, the entire burden of reclaiming and cleaning up the polluted sites falls on the government.202 Such policy decisions are the responsibility of Congress, which could easily modify the Bankruptcy Code with a specific provision stating that a debtor may not discharge his cleanup obligations. While a statutory mandate requiring compliance with environmental acts would further the aims of environmental policy, it would be devastating to both debtors and other creditors in bankruptcy. Environmental injunctions and cleanup orders often amount to exponential costs203 that, if allowed to take administrative priority, would mean that fewer debtors would be able to reorganize and more would be forced to liquidate.204 Further, in liquidation, the high costs of environmental obligations would leave little if anything for the debtor’s unsecured creditors.205

The relatively simple legal issue in Apex implicates complicated equitable principles in bankruptcy and environmental law. Although the Seventh Circuit was correct in affirming the injunction against Apex, the case highlights several of the issues that continuously plague polluters entering bankruptcy or those who have already gone through bankruptcy.

200 Id. at 148.
201 Id. at 150.
203 Porter & Thorne, supra note 33, at 68.
204 Id.
205 Id.
First, the *Apex* holding puts the post-bankruptcy debtor in the position where they can be blindsided by astronomical cleanup costs.\textsuperscript{206} Bankruptcy courts confirm only those bankruptcy plans that feasibly pay all preferred creditors and claims, and then discharge the remaining debt.\textsuperscript{207} A debtor must be aware of all claims, potential liabilities, and debts that exist or potentially exist prior to the bankruptcy in order to plan reorganization.\textsuperscript{208} Debtors cannot anticipate a complete discharge if they do not know the status of their potential environmental liability.\textsuperscript{209} Without an accurate forecast of potential liabilities, debtors may end up grossly miscalculating their assets.

Thus, even the best-intentioned debtor can fall prey to a huge claim under the expectation of a complete discharge. Apex argued that had it known in 1986 that it would be liable for $150 million in cleanup costs, it would have had to undergo a Chapter 7 liquidation rather than a Chapter 11 reorganization, because it could not have successfully reorganized with the additional, non-dischargeable debt.\textsuperscript{210} Without a successor or surviving entity to take over liability for the cleanup, the full expense of the operation would fall on the government.

Of course, environmental statutes such as CERCLA and RCRA hold parties accountable regardless of financial status.\textsuperscript{211} The concept of the PRP mandates joint and several liability for all responsible parties without reference to business organization.\textsuperscript{212}

More troubling for the debtor, *Apex* provides little hope that debtors may ever be able to discharge liability for RCRA claims. By simply structuring the cause of action as a RCRA injunctive suit rather than attempting to obtain a money judgment under CERCLA or a different statute, government agencies can ensure debtor compliance,

\begin{itemize}
  \item \textsuperscript{206} United States v. Apex Oil Co., Inc., 579 F.3d 735, 736 (7th Cir. 2009).
  \item \textsuperscript{207} Heidt, *supra* note 37, at 122.
  \item \textsuperscript{208} *Id.*
  \item \textsuperscript{209} *Id.*
  \item \textsuperscript{210} *Apex*, 579 F.3d at 736.
  \item \textsuperscript{211} Heidt, *supra* note 37, at 72.
  \item \textsuperscript{212} *Id.* at 89.
\end{itemize}
even where it may not be the most equitable outcome for the parties involved. In *Apex*, the government originally filed its claim under CERCLA and the Clean Water Act, but repledged when confronted with Apex’s bankruptcy defense. A claim under the relevant CERCLA provision could be converted to a money judgment, which is a claim for bankruptcy purposes. The corresponding RCRA claim does not have a money judgment as an available remedy. Filing the cleanup action under RCRA essentially guaranteed that Apex would not be discharged of liability.

Based on statutory purpose alone, CERCLA is a more appropriate statute under which to file than RCRA because its purposes are cleanup and remediation instead of prevention of future pollution. RCRA’s limited remedial structure can be somewhat explained by the correspondingly broad citizen suit provisions. Further, unlike CERCLA, which imposes broad liability on both the current owner of the polluted land as well as the responsible parties, RCRA aims to reduce environmental damages by regulating potential polluters. Because it failed to overcome the issue in litigation, Apex’s attempt to avoid liability for the cleanup was doomed from the start.

The Seventh Circuit’s holding in *Apex* is an unpleasant precedent for polluters. Although the government may file RCRA

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213 *Apex*, 579 F.3d at 737.
215 Furrer v. Brown, 62 F.3d 1092, 1094 (8th Cir. 1995) (RCRA “does not give the district courts express authority in citizen suits to award money judgments for costs incurred in cleaning up contaminated sites. Thus, if such a remedy is to be available, we must find either that Congress, by authorizing the district court ‘to order … such other action as may be necessary,’ … implicitly created such a remedy, or that the ‘cause of action … may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct’” (quoting Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 90 (1981))).
217 *Id.*
218 *Id.*
claims, Congress intended that RCRA enforcement be a partnership between state and federal governments, with the state taking primary responsibility for implementation. The government selectively filed a claim under RCRA when confronted with Apex’s bankruptcy defense. The resulting Seventh Circuit decision gives the government carte blanche to shoehorn responsive claims into what is meant to be a preventative statute, for the purpose of avoiding bankruptcy defenses.

Although it will not resolve the conflicting principles between bankruptcy and environmental law, decreasing the number of bankrupt parties saddled with environmental liability would serve to partially ameliorate the problem. The EPA reported in 2005 that implementing a 1980 statutory mandate under CERCLA requiring businesses handling hazardous substances to provide assurance of their financial responsibility could help reduce the risk overall that companies entering bankruptcy would be responsible for costly environmental cleanup. This would also reduce the risk that the general public would have to assume the financial responsibility of the cleanup costs.

CONCLUSION

Although denying that a $150 million cleanup order is a “right to payment”—as the Seventh Circuit did in Apex—may seem initially adverse to the traditional prospect of a dischargeable claim, the Seventh Circuit was correct to affirm the district’s decision for at least two reasons. First, the Bankruptcy Code and relevant RCRA

221 Hillinger & Hillinger, supra note 4, at 359 (RCRA’s “cradle to grave” regulatory scheme is intended to prevent the types of untreated releases that CERCLA is designed to clean up).
223 Id.
provisions are blind to the financial status of a debtor in what is a purely equitable claim. Second, the Supreme Court’s decision in Kovacs does not provide a blueprint for this type of environmental injunction in a bankruptcy case.

While the Seventh Circuit’s decision was legally correct, there are equitable concerns that span beyond the simple statutory analysis of the Bankruptcy Code. The injunction against Apex forces the company to spend vastly outside of its fiscal bankruptcy plan. As such, the debtor did not receive a “fresh start” in this case. In a cross section of law where one party gets the short end of the stick, the debtor company in this case certainly received just that. Apex highlights the tension between the competing purposes of bankruptcy and environmental law. Until the issue is further treated by either the Supreme Court or by Congress, the status of environmental claims in bankruptcy will remain uncertain.