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In re Reading Co.: Cutting Off Environmental Claims That Never Existed During Bankruptcy

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IN RE READING CO.: CUTTING OFF ENVIRONMENTAL CLAIMS THAT NEVER EXISTED DURING BANKRUPTCY

I. INTRODUCTION

Three million gallons of sludge poured into the Schuylkill River on November 13, 1970, after heavy rains washed out the containment walls at two storage lagoons near Douglassville, Pennsylvania. The thick, black crankcase oil formed a twenty mile long slick that flowed unchecked into the Delaware River, damaging the surrounding environment. Less than two years later, in the wake of Hurricane Agnes, six million more gallons of oil washed over the containment walls at Douglassville. The “rivers of

1. See Alan L. Phillips, Spilled Sludge Floats Down The Schuylkill, PHILA. INQUIRER, Nov. 14, 1970, at 1 (reporting that sludge escaped from Berks Associates, Inc., a reprocessing plant that had been listed as “one of the 10 most chronic water polluters in the state”); Dominic Sama & Cliff Linedecker, Oil and Sludge Flow Down the Delaware as Barrier Breaks, PHILA. INQUIRER, Nov. 15, 1970, §1, at 1 (noting that further damages resulted from three knot current in river which complicated cleanup effort); see also Thomas J. Madden & Mike Clark, Schuylkill Polluter Cited For 8 Violations Since ’59, PHILA. INQUIRER, Nov. 16, 1970, at 1 (discussing previous spills at Berks Associates’ reprocessing plant). A spokesperson for Berks Associates, Inc., said the company had been taking steps to strengthen the lagoon walls. See Phillips, supra, at 5 (noting that heavy sludge which escaped into environment contained high concentrations of lead). One health department official who responded to the spill remarked, “the earth is soaked with oil.” Id.

2. See Madden & Clark, supra note 1, at 1 (finding that Douglassville might be named national disaster area); Patricia McBroom, Effects Feared If Sludge Sinks in Schuylkill, PHILA. INQUIRER, Nov. 17, 1970, at 6 (discussing possibility that “black goo” from spill may sink in river and complicate cleanup efforts); Phillips, supra note 1, at 1 (noting that United States Coast Guard attempted to prevent oil slick from entering Delaware Bay by putting boom across Schuylkill River); Sama & Linedecker, supra note 1, §1, at 1 (noting that oil slick flowed unchecked as far south as Claymont, Delaware after boom broke under strong currents); see also Dennis Kirkland, Oil Baths Peril 100 Canada Geese on Schuylkill, PHILA. INQUIRER, Nov. 15, 1970, §1, at 4 (stating that spill covered entire flock of Canadian Geese with reprocessed crankcase oil).

3. See Richard Casey, Flooding Caused Biggest Inland Oil Spill in U.S., PHILA. INQUIRER, July 7, 1972, at 4 (reporting that size of spill may have been as great as eighteen million gallons); Bill Collins, Schuylkill Sludge Spill Spreads; U.S. Vows Aid, PHILA. INQUIRER, July 1, 1972, at 1 (noting that sludge coated river banks at boat-house row); Jeremy Heymsfeld, 3,000 Tons of Flood Debris Retrieved, PHILA. INQUIRER, July 6, 1972, at 13 (reporting that rain postponed plans to burn sludge and debris at Douglassville); Dominic Sama, Bucket Brigade Works to Clean Schuylkill Oil Spill, PHILA. INQUIRER, July 9, 1972, at B1 (discussing cleanup efforts following spill); Joel N. Shurkin, The Schuylkill ‘Oil Swamp’: Ecology Gone Haywire, PHILA. INQUIRER, July 10, 1972, at 21 (“It turned the miles of riverbank between here and Pottstown into a reeking petroleum swamp that may take 15 years to return to normal.”). Like the 1970 oil spill at Douglassville, the 1972 spill threatened Philadelphia’s water supply—half of which came from the body of water into which the oily waste had been released: the Schuylkill River. See Collins, supra, at 1 (discussing boiling water instructions Environmental Protection Agency (EPA) gave to many);
On December 11, 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to protect public health and the environment from hazardous spills like the nine million gallon disaster at Douglassville. One of the stated goals of CERCLA is to hold responsible parties liable for environmental cleanup costs. In practice, however, many responsible parties end up in bankruptcy, where the goals of CERCLA often take a backseat to the bankruptcy court’s interest in giving debtors a “fresh start” by absolving them of liability. This conflict between the nation’s bankruptcy and environmental

Shurkin, supra, at 21 (noting that sludge contained “heavy amounts of lead, steel, zinc, cadmium and other metals . . . so heavy it sinks, complicating the cleanup”); see also Phillips, supra note 1, at 1 (finding that sludge originally had lead concentration of 10,000 parts per million, but that officials did not know what concentration of lead was in Schuylkill River).

4. Shurkin, supra note 3, at B1 (stating that one Coast Guard worker almost drowned in thick oil that seemed to “rain” everywhere); see Collins, supra note 3, at 1 (“The worst inland oil spill in U.S. history is threatening water supplies, forests and greenery along a 35-mile stretch of the Schuylkill.”); see also Casey, supra note 3, at 4 (reporting that sludge and mud covered foliage and buildings as high as 20 feet above normal river level); McBroom, supra note 2, at 6 (discussing complications of cleanup); Sama, supra note 3, at B1 (noting that EPA was coordinating river cleanup).


7. See H.R. Rep. No. 96-1016, pt. 1, at 17 (stating that CERCLA permits rapid recovery of cleanup costs from liable parties); see also In re Hemingway Transp., Inc., 993 F.2d 915, 921 (1st Cir. 1993) (finding that CERCLA aims for “equitable allocation of cleanup costs among all potentially responsible persons”); In re Combustion Equip. Assocs., 858 F.2d 35, 37 (2d Cir. 1988) (noting that goal of CERCLA is “cleaning up toxic waste sites promptly and holding liable those responsible for the pollution”); Daniel Klerman, Comment, Earth First? CERCLA Reimbursement Claims and Bankruptcy, 58 U. Chi. L. Rev. 795, 795 (1991) (finding that “core of CERCLA” is statute’s liability provisions); James K. McBain, Note, Environmental Impediments to Bankruptcy Reorganizations, 68 Ind. L.J. 233, 234 (1992) (“Environmental statutes, such as CERCLA, seek to protect the environment and the public health and safety by restraining polluters from further damaging the environment and by assessing the costs of cleanup to the responsible parties.”); Kevin J. Saville, Note, Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?, 76 Minn. L. Rev. 327, 327 (1991) (stating that goal of CERCLA is to recoup cleanup costs from responsible parties). For a further discussion of the goals of CERCLA, see infra notes 23-25 and accompanying text.

8. See Arlene Elgart Mirsky et al., The Interface Between Bankruptcy and Environmental Laws, 46 Bus. Law. 623, 626 (1991) (noting that costs of complying with environmental laws has led many companies to seek protection under federal bankruptcy laws); Douglas M. Weems, When Environmental Claims Arise for Bankruptcy Purposes, 7 Toxics L. Rep. 909, 909 (1993) (stating that some responsible parties have looked to bankruptcy for relief); McBain, supra note 7, at 233-35 (finding that many companies avoid “burdens of cleanup by using bankruptcy as a
laws has been described as "messy" and "grubby," and courts have struggled to reconcile the two competing objectives. 9

In re Jensen, 995 F.2d 925, 927-28 (9th Cir. 1993) ("The intersection of environmental cleanup laws and federal bankruptcy statutes is somewhat messy . . . . Conflict and confusion are almost inevitable."); In re Chicago, Milwaukee, St. Paul & Fac. R.R. Co., 3 F.3d 200, 201 (7th Cir. 1993) (hereinafter Chicago II) ("The interface of environmental cleanup laws and federal bankruptcy statutes is never tidy; jurisprudentially, it is somewhat grubby."); see Hemingway, 993 F.2d at 921 (stating that "intersection" between CERCLA and Bankruptcy is increasingly "crowded"); In re Chicago, Milwaukee, St. Paul & Fac. R.R. Co., 974 F.2d 775, 779 (7th Cir. 1992) (hereinafter Chicago I) (finding that although CERCLA and Bankruptcy Act are sweeping statutes with important purposes, those purposes do not always coincide); In re Chateaugay Corp., 944 F.2d 997, 1002 (2d Cir. 1991) (finding that bankruptcy and CERCLA point toward "competing objectives"); In re Chateaugay Corp., 193 B.R. 669, 673 (S.D.N.Y. 1996) (noting that "if Congress had intended CERCLA to limit the Bankruptcy Code, it could have amended the Code to achieve environmental objectives"); Mirsky et al., supra note 8, at 628 (finding that even cursory review reveals "significant tension between the different and conflicting policies" of statutes); Weems, supra note 8, at 909 (remarking on increasing conflict between statutes in recent years); Saville, supra note 7, at 327 & n.3 (noting that statutes have increasingly come into conflict). But see Chateaugay, 944 F.2d at 1002 (noting that conflict "might not be as stark as parties contend").

Reconciling the objectives of CERCLA and the Bankruptcy Act has proven difficult for courts. See In re National Gypsum Co., 139 B.R. 397, 404 (N.D. Tex. 1992) (noting "tension" that exists as courts try to reconcile CERCLA and Bankruptcy Act); see also United States v. Colorado & E. R.R. Co., 50 F.3d 1530, 1535 (10th Cir. 1995) (stating that "broad language of CERCLA has given courts many challenges"); Chicago I, 974 F.2d at 779 ("Prematurely cutting off a party's ability to recover for CERCLA cleanup costs could impede CERCLA's cost-distribution scheme."). In National Gypsum, the court stated:

[I]t is not a question of which statute should be accorded primacy over the other, but rather what interaction between the two statutes serves most faithfully the policy objectives embodied in the two separate enactments of Congress. In order to best serve the goals of CERCLA in the context of bankruptcy, the Court must recognize the circumstances particular to bankruptcy proceedings and the provisions of the Code that by necessity affect the PRP's ability to partake in environmental costs and remedies, as well as its ability to reorganize.

National Gypsum, 139 B.R. at 404.

The United States Supreme Court has not ruled on the precise issue of when a CERCLA claim arises for bankruptcy purposes, but the Court has indicated that, whenever possible, the conflicting goals of the statutes should be reconciled. See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 502, 507 (1986) (holding that bankruptcy court does not have "carte blanche" to ignore nonbankruptcy laws and court must formulate conditions to adequately protect public health); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) (finding that courts have duty to interpret conflicting statutes so that each is effective, absent express congressional intent to contrary); Chicago II, 3 F.3d at 201 ("The Supreme Court has indicated that, if possible, these two conflicting objectives should be reconciled."); Jensen, 995 F.2d at 928 (same); In re Remington Rand Corp., 836 F.2d 825, 826 (3d Cir. 1988) (same); Erman v. Lox Equip. Co., 142 B.R. 905, 907 (N.D. Cal. 1992) (same).

Many commentators have noted that the conflict between the policies of CERCLA and the goals of bankruptcy creates substantial problems for courts. See
In *In re Reading Co.*, the United States Court of Appeals for the Third Circuit resolved the conflict in favor of bankruptcy law. Reading Company, the nonrail entity successor of the bankrupt Reading Railroad, alleged that any liability it may have had for the Douglassville spill was cut off in bankruptcy. The court agreed. In a landmark decision, the Third Circuit held that third party plaintiffs’ contribution claims against Reading were not discharged in bankruptcy. Nevertheless, the claims failed as a matter of law because the parties did not share common liability to the United States. The court found that Reading’s liability to the United States was discharged despite the government’s argument that it did not know a claim existed. In short, the government’s failure to pursue its

Mirsy et al., *supra* note 8, at 627 (“It is not hard to see how these two sets of laws can come into conflict.”); Weems, *supra* note 8, at 909 (discussing "direct conflict" between policies of two statutes); McBain, *supra* note 7, at 234-35 (suggesting that Congress should amend Bankruptcy Code to provide procedures specifically for environmental claims); Saville, *supra* note 7, at 328 (remarking that Supreme Court left unanswered key question of when liability under CERCLA becomes claim for bankruptcy purposes). “[T]he unique nature of environmental obligations calls for a unique process to recognize the important federal objectives of the environmental laws.” McBain, *supra* note 7, at 251. But see Klerman, *supra* note 7, at 796 (“Instead of analyzing the problem in terms of a conflict between bankruptcy and environmental law, this Comment asks where CERCLA obligations fit into the bankruptcy priority scheme.”).

10. 115 F.3d 1111 (3d Cir. 1997).

11. *See id.* at 1126 (holding that there was no CERCLA contribution claim because common liability was discharged in bankruptcy); *In re Reading Co.,* 900 F. Supp. 798, 749 (E.D. Pa. 1995) (describing importance of holding for bankruptcy law), *aff’d,* 115 F.3d 1111 (3d Cir. 1997). In Judge Ditter’s district court opinion he noted: “My holding today will also further the bankruptcy policy of providing debtors with a fresh start. This policy seems especially pronounced in this case, where the Reading Railroad bankruptcy was consummated over 14 years ago, and Reading now shares little but its name with its debtor-predecessor.” *Reading, 900 F. Supp.* at 749.

12. *See Reading,* 115 F.3d at 1116 (noting that Reading Railroad’s successor, Conrail, was leading third party plaintiff seeking contribution from Reading). To differentiate between the bankrupt Reading Railroad Co. and the nonrail entity company that emerged from bankruptcy, the latter will be referred to as simply Reading.

13. *See id.* at 1125 (holding that Conrail and other third party plaintiffs’ contribution claims were not discharged because there was no statutory basis for contribution liability under CERCLA at time of bankruptcy consummation). The court added that to hold otherwise would be to “sanction Conrail for failing to allege claims that . . . had no recognized legal form.” *Id.; see Reading, 900 F. Supp.* at 747 (“Validity of CERCLA contribution claim between parties who do not share common liability to a third person because one of the party’s liability was discharged in bankruptcy is an issue of first impression in this circuit.”).

14. *See Reading,* 115 F.3d at 1123 (concluding that contribution claims cannot proceed because contribution requires common liability).

15. *See id.* at 1125 (stating that all four elements of government’s CERCLA claim existed at time of Reading’s bankruptcy consummation).
claim in bankruptcy destroyed the third party plaintiffs' claims for contribution, even though those claims never existed during bankruptcy.\textsuperscript{16}

This Note examines the reasoning of the Third Circuit in \textit{Reading}. Specifically, it discusses a debtor's ability to cut off liability for environmental claims through bankruptcy proceedings. Part II of this Note discusses the laws and judicial rulings that led the Third Circuit to reject Conrail's contribution claim.\textsuperscript{17} Additionally, Part II examines approaches taken by other courts to determine when environmental claims exist and may be discharged in bankruptcy.\textsuperscript{18} Part III recounts the facts and procedural history of \textit{Reading}.\textsuperscript{19} Part IV analyzes the Third Circuit's reasoning in \textit{Reading} and contrasts the Third Circuit's approach to the approaches used by other courts.\textsuperscript{20} Finally, Part V discusses the possible ramifications of the Third Circuit's holding and suggests that this decision may have widespread impact on the nation's environmental law.\textsuperscript{21}

\section*{II. Background}

\subsection*{A. CERCLA}

Congress enacted CERCLA in 1980 to protect public health and the environment in response to the national pollution problem caused by the improper disposal and uncontrolled release of hazardous substances.\textsuperscript{22}

\footnotesize{16. See id. at 1123-24 (finding that Conrail's contribution claim cannot proceed because government's claim against Reading was discharged).

17. For a discussion of the statutes and relevant case law, see \textit{infra} notes 22-82 and accompanying text.

18. For an examination of the various rules for discharging a claim in bankruptcy, see \textit{infra} notes 53-82 and accompanying text.

19. For a discussion of the facts governing the \textit{Reading} opinion, see \textit{infra} notes 83-104 and accompanying text.

20. For an analysis of the Third Circuit's reasoning in \textit{Reading}, see \textit{infra} notes 105-53 and accompanying text.

21. For a discussion of the impact of the Third Circuit's decision, see \textit{infra} notes 154-60 and accompanying text.

22. See H.R. Rep. No. 96-1016, pt. 1, at 17-22 (1980) (discussing background and need for CERCLA); S. Rep. No. 96-848, at 14 (1980) (stating purposes of CERCLA and need for CERCLA in light of inadequate existing remedies); S. Doc. No. 97-14, pt. 1, at 320 (1983) (noting that one of CERCLA's principal goals is "assuring that those who caused chemical harm bear the costs of that harm"); see also Exxon Corp. v. Hunt, 475 U.S. 355, 359-60 (1986) (finding that Congress enacted CERCLA in response to pollution problems); Final Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997) ("CERCLA was a response by Congress to the threat to public health and the environment posed by the widespread use and disposal of hazardous substances." (quoting Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986))); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1500 (11th Cir. 1996) (noting that CERCLA targets national problem—cleanup of hazardous substances); \textit{Chicago II}, 3 F.3d 200, 201 (7th Cir. 1993) (stating that CERCLA aims to protect public health and environment by facilitating cleanup of contamination and imposing costs on responsible parties); United States v. Rohm & Haas Co., 2 F.3d 1265, 1270 (3d Cir. 1993) (finding that CERCLA was enacted in response to Love Canal controversy during closing days of Carter administration); In re Jensen, 995 F.2d 925, 927 (9th Cir.)}
CERCLA aims to provide an effective response to releases of hazardous

1993) (noting CERCLA's twin aims); In re Hemingway Transp., Inc., 993 F.2d 915, 921 (1st Cir. 1993) (finding that CERCLA's settled objective includes expeditious cleanup of contaminated sites); Chicago I, 974 F.2d 775, 779 (7th Cir. 1992) (finding that "laudable goals" underlie CERCLA); United States v. Alcan Aluminum Corp., 964 F.2d 252, 257-58 (3d Cir. 1992) (stating that CERCLA was enacted in response to widespread concern over improper disposal of hazardous substances); In re CMC Heartland Partners, 966 F.2d 1143, 1146 (7th Cir. 1992) (stating that "idea of CERCLA is that sunk wastes differ from sunk costs . . . and it may be cheaper to purge or encapsulate the wastes than to let sleeping dogs lie"); In re Reading Co., 900 F. Supp. 738, 742 (E.D. Pa. 1995) ("Congress enacted CERCLA . . . to address the severe environmental and public health effects resulting from the improper disposal of hazardous waste."); aff'd, 115 F.3d 1111 (3d Cir. 1997); BRADFORD F. WHITMAN, SUPERFUND LAW AND PRACTICE 3-5 (1991) (noting that many sites had hazardous wastes in "open dumps" before CERCLA); Mirsky et al., supra note 8, at 673 (stating CERCLA was response to government's inability to "effectively and expeditiously" clean up hazardous waste); Michael V. Hernandez, Cost Recovery or Contribution?: Resolving the Controversy over CERCLA Claims Brought by Potentially Responsible Parties, 21 HARV. ENVTL. L. REV. 83, 86 (1997) (noting two-fold purpose of CERCLA); Klerman, supra note 7, at 795-97 (discussing goals and implementation of CERCLA); McBain, supra note 7, at 235 (finding that Congress enacted CERCLA to cope with "growing problem" of hazardous wastes); Saville, supra note 7, at 327 (same).

Congress enacted CERCLA to combat a new source of environmental concern—the improper, negligent and reckless disposal of hazardous substances. See H.R. Rep. No. 96-1016, pt. 1, at 17 (discussing need for CERCLA legislation). The legislative history contains specific references to over one dozen hazardous waste sites, including the well-publicized Love Canal controversy. See id. at 18-21 (reviewing hazardous waste problems).

Love Canal is the "most infamous waste dump in the United States and inspired the creation of a federal Superfund." David Olinger, Mistrust is Legacy of Love Canal, ST. PETERSBURG TIMES, Oct. 18, 1997, at 1A (reporting on 20th Anniversary of Love Canal disaster). From 1942 to 1952, the Hooker Chemical Company disposed of 21,000 tons of chemical waste at Love Canal in Niagara Falls, New York. See Valerie J. Stanley, Establishing Liability for the Damages from Hazardous Wastes: An Alternative Route for Love Canal Plaintiffs, 31 CATH. U. L. REV. 273, 278 (1982) (noting that Hooker had permission from City of Niagara Falls to dump chemicals at Love Canal). Despite Hooker's warnings, the city built an elementary school on property adjoining the dump site and developed the surrounding area as a residential community. See id. at 279 (adding that by 1976 over 200 homes surrounded Love Canal). "Although the problem of chemical seepage was not greatly publicized prior to 1976, Love Canal residents had reported injuries from the chemicals as early as 1958." Id. at 279-80. Children in the neighborhood skipped "pop rocks" across the school grounds and "they would actually flame or smoke." Olinger, supra, at 1A.

The EPA estimated that 50,000 waste sites existed in 1979, and as many as 2000 of those sites posed a "serious risk" to the public health. See H.R. Rep. No. 96-1016, pt. 1, at 18 (noting that even if EPA's numbers are off, "need for strong legislative response is evident"). Congress listed five goals of CERCLA:

(1) Provide for a State-by-State inventory of inactive hazardous waste disposal sites and the condition of such sites;
(2) Evaluate such sites, and set priorities among the sites, based on the danger they present;
(3) Establish a program to assure the containment of dangerous releases from inactive hazardous waste sites;
(4) Accelerate the elimination of the presence of any unsafe hazardous waste disposal sites; and
substances while ensuring that responsible parties bear the costs of cleanup. To accomplish this two-fold purpose, Congress gave the Envi-

(5) Provide a systematic method of funding for the identification of inactive hazardous waste disposal sites, the evaluation of such sites, and for the containment and other remedial action with respect to such sites to assure protection of the public health and the environment in a cost effective manner.

Id. at 2.

It has also been noted that CERCLA was enacted to fill the gaps left by other environmental statutes, particularly the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992k (1994). See Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 667 (5th Cir. 1989) (stating that CERCLA "substantially changed the legal machinery used to enforce environmental cleanup efforts"); Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1386 (5th Cir. 1989) (noting that CERCLA was response to failure of "partly redundant, partly inadequate" federal environmental laws). The United States Court of Appeals for the Fifth Circuit added:

The RCRA left inactive sites largely unmonitored by the EPA unless they posed an imminent hazard. CERCLA addressed this problem "by establishing a means of controlling and financing both governmental and private responses to hazardous releases at abandoned and inactive disposal sites." . . . [O]ne of CERCLA's key provisions for furthering this objective . . . permits both government and private plaintiffs to recover from responsible parties the costs incurred in cleaning up and responding to hazardous substances at those sites.

Amoco Oil, 889 F.2d at 667 (quoting Bulk Distribution Ctrs. v. Monsanto, 589 F. Supp. 1437, 1441 (S.D. Fla. 1984)).

A number of courts, however, have complained about the "inartful, confusing, and ambiguous language [of CERCLA] and the absence of useful legislative history." Rohm & Haas, 2 F.3d at 1270 n.6; see, e.g., Exxon, 475 U.S. at 363 (finding that CERCLA is "not a model of legislative draftsmanship"); Alcan Aluminum, 964 F.2d at 258 n.5 (noting "inconsistencies and redundancies" in statutory language of CERCLA); Amoco Oil, 889 F.2d at 667 (stating that compromise between three competing bills, CERCLA, RCRA and Solid Waste Disposal Act Amendment of 1980, 42 U.S.C. §§ 6901-6992k (1994), resulted in inconclusive legislative history); Walls v. Waste Resource Corp., 823 F.2d 977, 980 (6th Cir. 1987) (noting that legislative history of CERCLA is "vague, reflecting the compromise nature of the legislation enacted"); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1080 (1st Cir. 1986) (recognizing CERCLA's "deserved notoriety for vaguely-drafted provisions"); United States v. Mottolo, 605 F. Supp. 898, 902-05 (D.N.H. 1985) (recognizing that final version of CERCLA was "last minute compromise" and "acquired a well-deserved notoriety for vaguely drafted provisions and indefinite, if not contradictory, legislative history"); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111 (D. Minn. 1982) (concluding that legislative history should be read with caution); Whitman, supra, at 13 ("CERCLA's history falls far short of providing definitive answers to many of the questions of interpretation that have arisen from this hastily drafted compromise legislation."); Hernandez, supra, at 83 (noting that CERCLA was compromise bill enacted during lame-duck session in closing days of Carter Administration).

23. See S. REP. NO. 96-848, at 14 (stating purposes of CERCLA); H.R. REP. NO. 96-1016, pt. 1, at 17 (discussing Congress' intention that CERCLA provide effective response to health hazards and mechanism for recovery of response costs); see also Meghrig v. KFC W., Inc., 116 S. Ct. 1251, 1255 (1996) (noting that unlike other environmental statutes, CERCLA has two main purposes, cleanup of toxic waste sites and imposition of cleanup costs on responsible parties); Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989) (recognizing dual mechanisms of CERCLA—
cleanup and cost recovery); Pinal Creek, 118 F.3d at 1300 (noting twin purposes of CERCLA); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) ("CERCLA must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills; and (2) holding those parties responsible for the releases liable for the costs of the cleanup."); General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990) (stating two main purposes of CERCLA—cleanup of hazardous waste and imposition of cleanup costs on responsible parties); In re Charter Co., 862 F.2d 1500, 1503 (11th Cir. 1989) (noting that statute provides for government participation and financing of remedial efforts by responsible parties); Walls, 823 F.2d at 980-81 (stating that "two-fold purpose of CERCLA is reflected in the statute's bifurcated scheme"); Dedham Water, 805 F.2d at 1081 (recognizing twin purposes of CERCLA); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1455 (9th Cir. 1986) (noting twin purposes of CERCLA); Transtech Indus. v. A & Z Septic Clean, 798 F. Supp. 1079, 1084 (D.N.J. 1992) (discussing purposes of CERCLA); Reilly Tar & Chem., 546 F. Supp. at 1112 (reviewing legislative history and purposes of CERCLA); Mirsky et al., supra note 8, at 673 (addressing two-fold purpose of CERCLA); Hernandez, supra note 22, at 86-87 (discussing twin goals of CERCLA); Klerman, supra note 7, at 797 (explaining key difference between CERCLA and other environmental statutes is that CERCLA "attempts to remedy pre-existing pollution by empowering the EPA to take direct action and recoup its costs later").

In its thorough review of the legislative history of CERCLA, the United States District Court for the District of Minnesota noted:

A review of the statute and the Committee Reports reveals at least two Congressional concerns that survived the final amendments to the Act. First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created. To give effect to these congressional concerns, CERCLA should be given a broad and liberal construction.


To accomplish this two-fold purpose—prompt cleanup and recovery of cleanup costs—the EPA may order a responsible party to clean up a site or, alternatively, the EPA may take action itself and then recover its cleanup costs. See Rohm & Haas, 2 F.3d at 1270 ("CERCLA provides what essentially are two separate mechanisms for cleaning up waste sites: a government conducted cleanup . . . followed by a cost recovery action . . . and a private cleanup, ordered by EPA . . . ."); CMC Heartland, 966 F.2d at 1145 (explaining two routes available to EPA); In re Chateaugay Corp., 944 F.2d 997, 1000 (2d Cir. 1991) (finding that EPA can either order party to take remedial action or take remedial action itself); Mirsky et al., supra note 8, at 673 ("EPA has the option of using Superfund moneys for cleanup or requiring potentially responsible parties ('PRPs') to perform cleanups through judicial or administrative enforcement proceedings."); Hernandez, supra note 22, at 84 (discussing two ways in which PRP claims arise); McBain, supra note 7, at 286 ("Liability may arise from one of two routes: the EPA may order a party to clean up a site, or the EPA may undertake the clean up itself and utilize the Superfund."); Saville, supra note 7, at 331 (noting that EPA may choose between enforcement methods).

CERCLA defines the term "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22) (1994). Courts have interpreted the definition of "release" broadly. See Amoco Oil, 889 F.2d at 609 (noting that plain statutory language "fails to impose any quantitative requirement on the
NOTE

Ronald A. Marston: In re Reading Co.: Cutting Off Environmental Claims That Never Existed

Environmental Protection Agency (EPA) broad power to direct the "comprehensive response and financing mechanism" embodied in CERCLA.\textsuperscript{24}

The statute defines the term "hazardous substance" to mean:

(A) any substance designated pursuant to section 1321(b)(2)(A) of title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act . . . (D) any toxic pollutant listed under section 1317(a) of title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act . . . and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of title 15.


\textsuperscript{24} H.R. Rep. No. 96-1016, pt. 1, at 22; see 42 U.S.C. §§9604(a), 9605(a), 9606(a) (1994) (granting EPA power to create National Contingency Plan (NCP) and handle environmental cleanups); Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994) ("As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites."); In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 78 F.3d 285, 289 (7th Cir. 1996) ("One commentator has said that with one possible exception, CERCLA 'stands alone as a conspicuous example of legislative consequence outdistancing even the boldest imagination of its sponsors.'" (quoting William H. Rodgers, Jr., Environmental Law 685 (2d ed. 1994)), cert. denied, 117 S. Ct. 763 (1997); United States v. Colorado & E. R.R. Co., 50 F.3d 1530, 1535 (10th Cir. 1995) (finding that broad nature of CERCLA has given courts many challenges); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 100 (1st Cir. 1994) (describing "array of weapons" available to EPA under CERCLA); Hemingway, 993 F.2d at 921 (stating that EPA has broad discretion under CERCLA); Alcan Aluminum, 964 F.2d at 258 (finding that CERCLA is remedial in nature and, therefore, should be "construed liberally" to meet its fundamental goals); B.F. Goodrich, 958 F.2d at 1197 (characterizing CERCLA as broad remedial act); United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990) (stating that CERCLA's provisions should be liberally construed); Hernandez, supra note 22, at 87-90 (discussing different ways in which EPA can implement CERCLA); Mirsky et al., supra note 8, at 673-74 (addressing EPA's different powers under CERCLA).

In its review of the legislative history, the United States Court of Appeals for the Sixth Circuit stated:

On the one hand, CERCLA created a . . . Superfund . . . which provides money which the federal government is authorized to spend on dump site cleanup . . . . On the other hand, CERCLA creates a statutory mechanism authorizing civil suits by those who pay for the cleanup of hazardous waste dump sites against those who create them.

Walls, 823 F.2d at 980-81. The legislative history also reveals that CERCLA was intended to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with the abandoned and inactive hazardous waste disposal sites." H.R. Rep. No. 96-1016, pt. 1, at 22.

CERCLA actually authorizes the "President" to act. See, e.g., 42 U.S.C. §§9604(a), 9605(a), 9606(a). The President, however, delegated authority to the
Under section 105(a) of CERCLA, the EPA is required to prepare a National Contingency Plan (NCP) to develop procedures for responding to releases of hazardous waste. The EPA maintains a National Priorities List (NPL) of the most heavily polluted hazardous waste sites in the country to ensure prompt and efficient cleanup of the most contaminated sites first. Section 106(a) authorizes the EPA to issue administrative compliance orders or seek judicial injunctions to compel responsible parties to clean up hazardous substances. Alternatively, under section 104(a) the EPA Administrator. See Exec. Order No. 12,580, 3 C.F.R. 193 (1987), reprinted as amended in 42 U.S.C. § 9615 app. at 264-67 (1994); see also Key Tronic, 511 U.S. at 814 (stating that EPA or Attorney General act as President's delegated agent for CERCLA abatement and enforcement actions); CMC Heartland, 966 F.2d at 1145 (finding that President has delegated authority to EPA); Hernandez, supra note 22, at 87 (noting that EPA is principal actor on behalf of federal government).

25. See 42 U.S.C. § 9605(a) (discussing requirements for NCP, which is codified in 40 C.F.R. pt. 300 (1997)). The statute provides in part that “the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances.” Id.; see Redwing, 94 F.3d at 1496 n.8 (“The NCP is a body of regulations governing the cleanup of hazardous waste sites under CERCLA.”); Pinole Point Properties, Inc. v. Bethlehem Steel Corp., 596 F. Supp. 285, 286-87 (N.D. Cal. 1984) (reviewing NCP requirement of CERCLA).

The statute requires that the plan include: methods for discovering and investigating facilities; methods for evaluating, including analyses of relative cost; methods and criteria for determining the appropriate extent of removal and remedy; appropriate responsibilities for federal, state and local governments; a provision for identification, procurement, maintenance and storage of equipment; a method for and assignment of reporting responsibilities; a means of assuring that response actions are cost-effective; a hazard ranking system; specified roles for private organizations; and standards and testing procedures. 42 U.S.C. § 9605(a)(1)-(10).

26. See 42 U.S.C. § 9605(a) (8) (describing EPA's role in determining priority of hazardous waste sites); see also Rohm & Haas, 2 F.3d at 1270 (“EPA is required to identify and prioritize releases and threatened releases of hazardous waste by promulgating a National Priority List . . . .”); CMC Heartland, 966 F.2d at 1145 (stating that inclusion on NPL is "ominous sign" because "[i]t does nothing else, listing makes the parcel something less than prime real estate, with effects on the owners wealth"); Kent County v. EPA, 963 F.2d 391, 399-94 (D.C. Cir. 1992) (same); Anne Arundel County v. EPA, 963 F.2d 412, 413-14 (D.C. Cir. 1992) (same); Chateaugay, 944 F.2d at 1000 (noting that EPA determines if release or threatened release is "of sufficient severity" to warrant inclusion on NPL); Pinole Point, 596 F. Supp. at 286-87 (reviewing provisions of CERCLA); Hernandez, supra note 22, at 87 (addressing requirement that EPA maintain NPL); Mirsky et al., supra note 8, at 673 (discussing "continually expand[ing]" NPL). The statute provides:

To the extent practicable, the highest priority facilities shall be designated individually and shall be referred to as the "top priority among known response targets", and, to the extent practicable, shall include among the one hundred highest priority facilities one such facility from each State which shall be the facility designated by the State as presenting the greatest danger to public health or welfare or the environment . . . . 42 U.S.C. § 9605(a)(8)(B). The NPL is codified as part of the National Contingency Plan at 40 C.F.R. pt. 300 (1997).

27. See 42 U.S.C. § 9606(a) (describing abatement actions available to EPA). The statute provides in part:
EPA may clean up contamination on its own, funding the remediation through a "Superfund" established by CERCLA, and then sue to recover response costs from the responsible parties.\textsuperscript{28}

Section 107(a) designates four categories of potentially responsible parties (PRPs) and permits governments and private parties who clean up hazardous waste to assert cost recovery actions under CERCLA.\textsuperscript{29} More
Under CERCLA, governments and private parties who clean up hazardous substances may assert cost recovery actions against PRPs. See 42 U.S.C. § 9607(a) (describing PRPs' liability for cost recovery actions). Section 107(a) provides:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

1. the owner and operator of a vessel or a facility,

2. any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

3. any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

4. any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

A. all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

B. any other necessary costs of response incurred by any other person consistent with the national contingency plan;

C. damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

D. the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

Id.; see Key Tronic, 511 U.S. at 814 ("Section 107 sets forth the scope of the liabilities that may be imposed on private parties and the defenses that they may assert."); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1082 (1st Cir. 1986) (noting court's belief that section 107 is essential to CERCLA because resources of Superfund are "insufficient" to respond to national pollution problem); Jones v. Inmont Corp., 584 F. Supp. 1425, 1428-29 (S.D. Ohio 1984) (discussing liability provisions of CERCLA); Hernandez, supra note 22, at 89-91 (discussing liability under section 107).

Courts have been "virtually unanimous" in holding that section 107(a) (4)(b) authorizes some form of a private right of action. United States v. New Castle County, 642 F. Supp. 1258, 1262 (D. Del. 1986); see, e.g., General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1417 (8th Cir. 1990) (holding that section 107(a)(4)(B) authorizes private actions); Dedham Water, 805 F.2d at 1078 (reading applicable provisions of CERCLA to establish private right of action); Wickland Oil Terminals v. ASARCO, Inc., 792 F.2d 887, 890 (9th Cir. 1986) (same); Walls v. Waste Resource Corp., 761 F.2d 311, 318 (6th Cir. 1985) (same); Artesian Water Co. v. Government of New Castle County, 605 F. Supp. 1348, 1356 (D. Del. 1985) (same); Pinole Point, 596 F. Supp. at 288 (same); Jones, 584 F. Supp. at 1430 (same); Stepan Chem., 544 F. Supp. at 1143 (same). Indeed, many courts have interpreted this private right of action under section 107 to provide a right to contribution. See In re Reading Co., 115 F.3d 1111, 1118 (3d Cir. 1997) (conclud-
specifically, the statute imposes liability on PRPs for governmental and private response costs, health assessment costs and other environmental costs incurred as a result of a release or threatened release of hazardous substances.\textsuperscript{30} Thus, a CERCLA claim is generally said to arise when four elements exist: (1) the defendant is a PRP; (2) hazardous substances were disposed at a facility; (3) there was a release or threatened release into the environment; and (4) the release caused the incurrence of response costs.\textsuperscript{31}

30. See 42 U.S.C. § 9607(a) (listing four types of costs for which PRPs are liable); see also Stepan Chem., 544 F. Supp. at 1140-41 (discussing various types of costs for which PRPs are liable under CERCLA); Hernandez, supra note 22, at 90-91 (addressing liability and response costs).

31. See supra note 29.

Moreover, whether a plaintiff brings its claims under section 107(a) or section 113(f), the elements of the claim remain the same. See Redwing, 94 F.3d at 1496 (comparing elements required under both types of claims).

Some courts have also required a fifth element for CERCLA claims—proof that the response costs are consistent with the NCP. See County Line Inv. Co. v. Tinney, 953 F.2d 1508, 1512 (10th Cir. 1991) (adopting consistency requirement as element of "prima facie private cost recovery action under CERCLA"); Dutham Water, 889 F.2d at 1150 (requiring response costs consistent with NCP); Ascon Properties Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152, 1154 (9th Cir. 1989) (finding consistency with NCP to be one of elements of CERCLA claim); Weyerhaeuser Corp. v. Koppers Co., 771 F. Supp. 1406, 1413-14 (D. Md. 1991) (reasoning that CERCLA plaintiff must demonstrate consistency with NCP to establish liability); see also Redwing, 94 F.3d at 1496 n.8 (noting that circuits are split on whether there is fifth element).
Although as originally enacted CERCLA did not include an “express mechanism” by which one PRP could recover contribution from another PRP, many courts interpreted the statute to provide a private right to contribution. Then, in 1986, Congress enacted the Superfund Amend-

Most courts, however, read this “fifth element” as a measure of damages and do not require a showing of consistency with the NCP to bring a claim in court. See *Alcan Aluminum*, 990 F.2d at 720 (concluding that CERCLA plaintiff was entitled to summary judgment despite failure to demonstrate consistency with NCP); *Environmental Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992) (same); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) (“Under CERCLA, private plaintiff may recover only those response costs that are necessary and consistent with the NCP.”); *G.J. Leasing Co. v. Union Elec. Co.*, 825 F. Supp. 1363, 1377 (S.D. Ill. 1993) (same).

According to CERCLA, the term “facility” is defined as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.


32. See *Key Tronic*, 511 U.S. at 816 (noting that numerous courts have interpreted CERCLA to provide cause of action for contribution); *Sun*, 124 F.3d at 1190 (finding that courts developed implicit right to contribution to rectify inequity); *New Castle County*, 111 F.3d at 1122 (“Courts responded to this uncertainty by recognizing an implicit cause of action for contribution where persons have been subject to joint and several liability and have incurred costs in excess of their fair share.”); *Colorado & E. R.R.*, 50 F.3d at 1535 (stating that courts responded to “inequity” by recognizing implicit right to contribution); *United Techs. Corp. v. Browning-Ferris Indus.*, 33 F.3d 96, 100 (1st Cir. 1994) (finding that most courts eventually interpreted section 107 to confer right to contribution); *County Line*, 933 F.2d at 1516 (“Courts responded to the inequity... by recognizing implicit federal right to contribution.”); *Whitman*, supra note 22, at 197 (noting that “with virtual unanimity, the federal courts interpreted CERCLA and its legislative history as implying or at least permitting, a federal common law right of contribution”); *Hernandez*, supra note 22, at 92 (discussing pre-SARA right to contribution).

The United States Supreme Court has stated that if a right to contribution exists it must have been created in one of two ways: “first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of federal courts to fashion a federal common law of contribution.” *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981). With regard to CERCLA, courts have employed three methods as a basis for a right to contribution.

First, some courts found contribution was expressly authorized under section 107(a)(4)(B). See, e.g., *New Castle County*, 642 F. Supp. at 1262-63 (discussing courts that have adopted this interpretation); *Jones*, 584 F. Supp. at 1428 (finding private right to recover response costs from responsible third parties); *Stepan Chem.*, 544 F. Supp. at 1142-43 (noting that phrase “any other person” in section 107(a)(4)(B) is interpreted to allow contribution between PRPs).

Second, some courts judicially implied a right to contribution from section 107(a)(4)(B). See, e.g., *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 n.3 (9th Cir. 1986) (listing district courts that have interpreted section 107 to impose, "as a matter of federal law, joint and several liability for indivisible injuries with a correlative right of contribution"); *New Castle County*, 642 F. Supp. at 1263-65 (discussing courts that have adopted this interpretation); *United States v. Conser-
ments and Reauthorization Act (SARA) and included in section 113(f)(1) an express right to contribution. In the wake of SARA, courts

Finally, still other courts found authority for a right to contribution under federal common law. See, e.g., New Castle County, 642 F. Supp. at 1268 (analyzing all three ways of finding right to contribution and concluding that Congress intended that courts develop right through federal common law); Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1486 (D. Colo. 1985) (stating that right to contribution can arise through powers of federal court to create common law right).

Interpreting CERCLA to provide a right to contribution did not end the confusion. See United Techs., 33 F.3d at 100; Hernandez, supra note 22, at 95-96. The United States Court of Appeals for the First Circuit noted:

Although most courts ultimately ruled that section ... [107] conferred an implied right of action for contribution in favor of a PRP that paid more than its ratable share, the situation was clouded by the Court's refusal to imply rights of action under other statutes in the absence of an express direction from Congress.


33. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended in scattered sections of 42 U.S.C.). SARA was primarily responsible for the "expansion of the influence of CERCLA." In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 78 F.3d 285, 289 (7th Cir. 1996) (noting that CERCLA was "sleeper" at first and even contained "self-destruct" date of September 30, 1985), cert. denied, 117 S. Ct. 763 (1997); see In re Charter Co., 862 F.2d 1500, 1503 (11th Cir. 1989) (stating that SARA was enacted because EPA lacked funding and personnel to cope with pollution under CERCLA); WHITMAN, supra note 22, at 208-10 (discussing major features of SARA including policy favoring settlements). The United States Court of Appeals for the Seventh Circuit stated:

A look at a few things SARA added to the law will show what was missing in the original bill. SARA expanded the types of costs which could be recovered from responsible parties. These now include virtually every conceivable expense .... It provided specifically for actions for contribution. It dealt with the unanswered question as to how clean is clean. It provided for explicit cleanup standards .... SARA also gave the states the right to substantial and meaningful involvement in cleanup efforts.

Chicago, Milwaukee, 78 F.3d at 289 (citations omitted).

34. 42 U.S.C. § 9613(f)(1) (1994); see Key Tronic, 511 U.S. at 816 (noting that SARA included provision that "expressly created a cause of action for contribution" and "o[ther] SARA provisions ... appeared to endorse the judicial decisions recognizing a cause of action under § 107 by presupposing that such an action existed"); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997) (stating that Congress enacted SARA to explicitly provide for contribution claims); United Techs., 33 F.3d at 98 (stating that CERCLA and SARA create two different legal actions—cost recovery actions and contribution actions); County
Line, 933 F.2d at 1516 (noting that SARA included express right to contribution); United States v. Cannons Eng’g Corp., 899 F.2d 79, 92 (1st Cir. 1990) (finding that SARA created express right to contribution); H.R. Rep. No. 99-253, pt. 1, at 59 (1985) (explaining purpose of adding contribution action); S. Rep. No. 99-11, at 44 (1985) (recognizing need to clarify right to contribution in CERCLA cases); Hernandez, supra note 22, at 96-97 (noting that post-SARA, CERCLA provides express right to contribution).

Section 113(f)(1) provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

42 U.S.C. § 9613(f)(1). To encourage settlements, Congress also added section 113(f)(2), which provides contribution protection for PRPs that settle their liability with the federal government or a state government agency. See id. § 9613(f)(2). The statute provides:

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Id.; see United Techs., 33 F.3d at 103 (discussing settlement goal of section 113(f)(2)); Cannons Eng’g, 899 F.2d at 92 (noting that SARA encourages settlements and leaves those who opt not to settle in “sticky wicket”); Charter, 862 F.2d at 1503 (noting that goal of private party settlement is facilitated by section 113(f)); Allied Corp. v. Frola, No. Civ.A.87-462, 1993 WL 388970, at *5 (D.N.J. Sept. 21, 1993) (noting that section 113(f)(2) is “backbone” of two-part settlement strategy); Transtech Indus. v. A & Z Septic Clean, 798 F. Supp. 1079, 1086 (D.N.J. 1992) (discussing reasoning behind enactment of SARA’s express right to contribution); Hernandez, supra note 22, at 93 (discussing enactment of SARA and incentives for private settlements). The United States Court of Appeals for the First Circuit noted:

CERCLA seeks to provide EPA with the necessary tools to achieve prompt cleanups. One such tool is the ability to foster incentives for timely settlements. To this end, [section 113(f)(2)] provides that a party who settles with the government “shall not be liable for claims for contribution regarding matters addressed in the settlement.” . . . It was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle.”

United Techs., 33 F.3d at 102-03 (quoting Cannons Eng’g, 899 F.2d at 90-92) (citations omitted).

Not surprisingly, litigation has keyed on whether the contribution claims concern “matters addressed” in the settlement. See Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1255, 1242 (7th Cir. 1997) (noting that “matters addressed” must be assessed in manner consistent with reasonable expectations of parties and equitable apportionment of costs envisioned by Congress); Colorado & E. R.R., 50 F.3d at 1537 (stating that CERCLA is “silent on how [court is] to determine what particular ‘matters’ a consent decree addresses”); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 766 (7th Cir. 1994) (looking to reasonable expectations of
have struggled to determine whether Congress intended for section 113(f)(1) to replace the judicially implied right to contribution. Nevertheless, as amended, CERCLA lives up to its name, providing a comprehensive, response, compensation and liability plan for expeditious cleanup of hazardous waste.

### B. Bankruptcy Act

Contrary to CERCLA's goal of imposing unlimited liability for uncontrolled releases of hazardous substances, bankruptcy law seeks to discharge liability to give debtors a fresh start. Section 77 of the now repealed Bankruptcy Act seeks to discharge liability to give debtors a fresh start.

35. See Key Tronic, 511 U.S. at 816 (noting that SARA "expressly authorizes a cause of action for contribution in [section] 113 and impliedly authorizes a similar and somewhat overlapping remedy in [section] 107"); United Techs., 33 F.3d at 99 (finding that "Congress did not explicitly plot the boundary that divides these two types of actions").

36. See Key Tronic, 511 U.S. at 814 ("CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites.").

37. See Ohio v. Kovacs, 469 U.S. 274, 278 (1985) (holding that, except for nine exceptions, "discharge in bankruptcy discharges . . . debtor from all debts that arose before bankruptcy"); Chicago II, 3 F.3d 200, 201 (7th Cir. 1993) (noting that bankruptcy law was designed to give debtor "fresh start by discharging as many of its debts as possible"); In re Jensen, 995 F.2d 925, 928 (9th Cir. 1993) (same); Chicago I, 974 F.2d 775, 779 (7th Cir. 1992) (stating that bankruptcy laws serve important purpose of equitably distributing debtors' funds to maximize creditors' interests); In re Chateaugay Corp., 944 F.2d 997, 1002 (2d Cir. 1991) ("Code aims to provide reorganized debtors with a fresh start, an objective made more feasible by maximizing the scope of discharge."); In re Reading Co., 900 F. Supp. 738, 742 (E.D. Pa. 1995) (finding that "fresh start' policy lies at the heart of bankruptcy law").
Bankruptcy Act of 1898 ("Act")\(^{38}\) provided for the modification and alteration of creditors’ rights during a railroad reorganization.\(^{39}\) Under section 77(f), a creditor who failed to file a claim with the bankruptcy court prior to the consummation date may have been forever barred from asserting the claim against the debtor.\(^{40}\) Both section 77 of the Act and the current Bankruptcy Code ("Code")\(^{41}\) define "claim" broadly to facilitate the debtor’s fresh start.\(^{42}\) Consistent with this broad definition, both the

note 7, at 327 (stating that bankruptcy law provides "expedient and complete process for debtors to obtain relief from their indebtedness.")


39. See id. § 205(b) (explaining creditors’ rights during railroad reorganization under section 77). Because Reading Railroad began its reorganization in 1971, the now-repealed Bankruptcy Act of 1898 applies in this case. See Zulkowski v. Consolidated Rail Corp., 852 F.2d 73, 76 n.5 (3d Cir. 1988).

Section 77 of the Act was specifically tailored to reorganizations of railroads that were engaged in interstate commerce. See 11 U.S.C. § 205. The statute provided:

A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or any class of them, either through the issuance of new securities of any character, or otherwise . . .

Id. (emphasis added).

40. See 11 U.S.C. § 205(f) (addressing effect of confirmation on railroad’s creditors). The statute provided:

Upon confirmation by the judge, the provisions of the plan and of the order of confirmation shall, subject to the right of judicial review, be binding upon the debtor, all stockholders thereof, including those who have not, as well as those who have, accepted it, and all creditors secured or unsecured, whether or not adversely affected by the plan, and whether or not their claims shall have been filed, and, if filed whether or not approved, including creditors who have not, as well as those who have accepted it . . . . The property dealt with by the plan, when transferred and conveyed to the debtor or to the other corporation or corporations provided for by the plan, or when retained by the debtor pursuant to the plan, shall be free and clear of all claims of the debtor, its stockholders and creditors, and the debtor shall be discharged from its debts and liabilities, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan . . .

Id.; see Chicago I, 974 F.2d at 780 ("[I]t is clear that a creditor who fails to file a preconsummation claim before the applicable bar dates is forever discharged from raising this claim against the debtor or its successors."); In re Chateaugay Corp., 112 B.R. 513, 520 (S.D.N.Y. 1990) (noting that "bankruptcy discharges liability only for claims that arose before . . . petition was filed"). A creditor’s failure to file a claim with the bankruptcy court prior to consummation meets the same fate under the current Bankruptcy Code. See Saville, supra note 7, at 336 ("E xt for the prebankruptcy obligations reaffirmed in the debtor’s reorganization plan, the Chapter 11 debtor is discharged from all ‘claims’ that arose before the bankruptcy confirmation."). Compare 11 U.S.C. § 205, with 11 U.S.C. § 1141(d)(1)(A) (1994).


42. See In re Penn Cent. Transp. Co., 71 F.3d 1113, 1117 (3d Cir. 1995) [hereinafter Bessemer] (noting that distinction between Bankruptcy Code and section 77 of Bankruptcy Act is "distinction without a difference"), cert. denied, 116 S. Ct. 1851
Act and the Code permit a bankruptcy court to discharge two types of claims: (1) fully accrued claims or debts and (2) unliquidated or contingent claims or interests. Nevertheless, courts have struggled to define when either type of claim exists for bankruptcy purposes.

Both the Bankruptcy Act and the current Bankruptcy Code define claim broadly. Compare 11 U.S.C. § 205(b) (defining "claim" under Act to include "debts, whether liquidated or unliquidated, securities . . . liens, or other interests of whatever character"), with 11 U.S.C. § 101(5) (defining "claim" under Code to mean "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured").

Courts have consistently held that the bankruptcy law's definition of "claim" should be given the broadest possible interpretation. See Kovacs, 469 U.S. at 279 (stating that "it is apparent that Congress desired a broad definition of a 'claim'"); In re Hemingway Transp., Inc., 993 F.2d 915, 923 (1st Cir. 1993) (explaining that "expansive definition of 'claim' permits automatic allowance of most 'contingent' claims"); In re Jensen, 127 B.R. 27, 29 (B.A.P. 9th Cir. 1991) (stating that Congress expressed "clear intention" that claim be interpreted broadly), aff'd, 995 F.2d 925 (9th Cir. 1993); In re Frenville Co., 744 F.2d 332, 336 (3d Cir. 1984) (determining that Code's definition of claim is "very broad"); In re National Gypsum Co., 139 B.R. 397, 405 (N.D. Tex. 1992) (concluding that Code requires broad definition of claim so "'all legal obligations, no matter how remote or contingent will be able to be dealt with in the bankruptcy case'" (quoting H.R. REP. No. 95-595, at 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6266)); Weems, supra note 8, at 910 (finding that Code's definition is "extremely broad"); McBain, supra note 7, at 237-39 (concluding that broad definition of claim furthers goals of bankruptcy reorganization).

43. Compare 11 U.S.C. § 205(f) (stating that debtor emerges from bankruptcy free of all claims that are not provided for in confirmation plan), with 11 U.S.C. § 1141 (explaining effects of confirmation).

44. See Chicago I, 974 F.2d at 781 (stating that "it is not always clear at what point a party has a cause of action" and that such "uncertainty is particularly poignant when . . . a cause of action may exist before it accrues"); In re Central R.R. Co., 950 F.2d 887, 890 (3d Cir. 1991) (finding that determining date of accrual can be "matter of some complexity"); In re Remington Rand Corp., 836 F.2d 825, 831-32 (3d Cir. 1988) (noting that "party may have a bankruptcy claim and not possess a cause of action on that claim"). See generally Saville, supra note 7, at 337-45 (noting that courts have adopted at least three inconsistent approaches); Robert J. Scott, Note, When a Claim Arises Under the Bankruptcy Code, 24 Hofstra L. Rev. 255, 256-60 (1995) (discussing difficulty courts have encountered in defining accrued claims and contingent claims).

A number of other factors may play a role in the court's decision of whether a claim exists. See Chicago I, 974 F.2d at 781, 784 n.4 (finding that "courts seem more likely to hold that a party has a claim or contingent claim when dealing with actions in contract as opposed to actions in tort" and that "courts seem more willing to hold that a claim arises at an early point for purposes of bankruptcy when knowledge of [the] claim is not at issue").
1. Accrued Claims

While bankruptcy law clearly provides that any claim which accrues prior to reorganization but remains unasserted is discharged, the law is less clear regarding the definition of an accrued claim.\textsuperscript{45} Generally, courts have looked to nonbankruptcy law and determined that an accrued claim exists when the basis for liability is fully ripe or when there is a "right to payment."\textsuperscript{46}

2. Contingent Claims

A contingent claim, however, can exist before the right to payment accrues.\textsuperscript{47} "Just as it is not always clear at what point a party has an actual

\textsuperscript{45} See 11 U.S.C. § 205(b) (defining claim to include liquidated and unliquidated debts, but not defining liquidated and unliquidated debts); see also In re Jen-sen, 995 F.2d 925, 928 (9th Cir. 1993) (noting that courts have used "varying approaches" when considering when claim arose for environmental response costs); Chicago I, 974 F.2d at 783 (stating that there is no clear standard because courts have developed varying standards for determining when such claims arise).

\textsuperscript{46} See Jensen, 995 F.2d at 928 (stating that courts have found CERCLA claims to accrue when all elements of claim are established); Chicago I, 974 F.2d at 786 (finding that release of hazardous substances together with incurrence of response costs are two necessary elements for accrued CERCLA claim); Schweitzer v. Con-solidated Rail Corp., 758 F.2d 936, 941 (3d Cir. 1985) ("It is undisputed that a cause of action in tort is a 'claim' pursuant to section 77 ... "); In re Chatgaugy Corp., 193 B.R. 669, 678 (S.D.N.Y. 1996) ("[I]t has been persuasively argued that a 'claim' should be deemed to exist, whenever, in the absence of bankruptcy, a particular claimant has the right to reach the debtor's assets."); National Gypsum, 139 B.R. at 405 (finding accrued claim requires all elements of cause of action or right to payment must exist); United States v. Union Scrap Iron & Metal, 123 B.R. 831, 838 (D. Minn. 1990) (holding that all elements of CERCLA cause of action, including incurrence of response costs, are required for accrued claim); Scott, supra note 44, at 257 (adding that accrued claim occurs when there are "no procedural or substantive impediments to adjudication in non-bankruptcy court").

Typically, courts look to nonbankruptcy law to determine if an accrued claim exists. See Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 170 (1946) (finding that bankruptcy court does not have claim to recognize or reject unless nonbankruptcy law creates obligation); Bessemer, 71 F.3d at 1114 (holding that courts look to nonbankruptcy law to determine when claims accrue); Reming-ton Rand, 836 F.2d at 830 ("Reference to non-bankruptcy law is critical ... "); Schweitzer, 758 F.2d at 941 (concluding that starting point is rule that bankruptcy claim must be based on state or federal law that, apart from bankruptcy, creates substantial obligations); Premo 111, 744 F.2d at 335 (referring to New York contract law to determine when contribution and indemnity claims arose); National Gypsum, 139 B.R. at 405 (finding that determination of whether claim arises in bankruptcy requires "analysis of interests created by non-bankruptcy substantive law"); Scott, supra note 44, at 258 ("The point at which debtor's obligation comes into existence also must be determined by reference to the non-bankruptcy law that grounds or roots the obligation.").

\textsuperscript{47} See Remington Rand, 836 F.2d at 832 (noting that party may have bank-ruptcy claim without possessing cause of action on that claim); Schweitzer, 758 F.2d at 942 (concluding that person may hold contingent claim and be creditor within meaning of Bankruptcy Act, even though they presently have no cause of action against debtor); National Gypsum, 139 B.R. at 405 (recognizing that "creditor need not have a cause of action that is ripe for suit outside of bankruptcy in order for it
claim, it is often less clear when a party has a contingent claim." Because a contingent claim exists before an actual claim accrues, many courts have focused their efforts on determining when a contingent claim arises. As a result, courts are notorious for neglecting to define "contingent claim" and instead defining when a contingent claim is discharged.

48. Chicago I, 974 F.2d at 781; see Scott, supra note 44, at 258 (noting that courts have struggled with issue).

49. See Bessemer, 71 F.3d at 1116 ("In our view, before one can have an 'interest' which is cognizable as a contingent claim under section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow." (quoting Schweitzer, 758 F.2d at 943)), cert. denied, 116 S. Ct. 1851 (1996); Chicago I, 974 F.2d at 786 (defining earliest point when CERCLA claim can exist and stating that at that moment, claimant has "at least, a contingent CERCLA claim" for bankruptcy purposes); Paoli Yard, 944 F.2d 164, 168 (3d Cir. 1991) (holding that contingent CERCLA claim did not arise because CERCLA had not yet been enacted and therefore no legal relationship existed); In re Central R.R. Co., 950 F.2d 887, 892 (3d Cir. 1991) (concluding that contingent claim could not arise in tort case until injury manifested); Remington Rand, 836 F.2d at 832 (finding legal relationship that justified discharging contingent claim); Schweitzer, 758 F.2d at 943 (concluding that there is no legal relationship between tortfeasor and tort victim until injury manifests and therefore there is no contingent claim that can be discharged); In re Radio-Keith-Orpheum Corp., 106 F.2d 22, 26-27 (3d Cir. 1939) (finding contingent claim between landlord and guarantors was discharged because legal relationship existed); Chateaugay, 112 B.R. at 520 (noting that contingent claim refers to obligations that will become due upon happening of future event that was "within the actual or presumed contemplation of the parties at the time the original relationship [between the parties was created"] (quoting All Media, 5 B.R. at 133)).

50. See Bessemer, 71 F.3d at 1117 (holding that for discharge of contingent claim, there must be some preconsummation legal relationship between debtor and claimant, and relationship must be relevant to claimant’s cause of action); Chicago I, 974 F.2d at 786 (concluding that when a potential CERCLA 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, [then] this potential claimant has, at least a contingent CERCLA claim"); In re Chateaugay Corp., 944 F.2d 997, 1004 (2d Cir. 1991) (determining that unmatured and contingent refer to obligations that "will become due upon happening of a future event that was 'within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created'" (quoting All Media, 5 B.R. at 133)); Frenville, 744 F.2d at 336 n.7 (finding that contingent claim is claim that becomes due only on occurrence of future event); All Media, 5 B.R. at 133 (discussing definition of contingent claim).

In All Media, the United States Bankruptcy Court for the Southern District of Texas noted:
Courts have wrestled with the two different types of claims and in the process have developed different rules for determining when environmental claims arise for bankruptcy purposes. The three most popular approaches are the Third Circuit's manifestation of injury rule, the Seventh Circuit's knowledge rule and the Second Circuit's prepetition release rule.

C. Relevant Case Law

1. The Third Circuit's Manifestation of Injury Rule

In Schweitzer v. Consolidated Rail Corp., the Third Circuit held that asbestos exposure claims by former railroad workers who did not manifest injury until after consummation were not discharged in bankruptcy.

A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created.

In Schweitzer, the railroad workers brought claims against their employer under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1994), for asbestos exposure. Schweitzer, 758 F.2d at 939. The workers did not manifest injuries from the preconsummation exposure until after Reading's consummation date and, therefore, they argued that their claims were not discharged. See id. at 940.

First, the Third Circuit determined that the FELA claims did not accrue prior to Reading's consummation because there is "no cause of action in tort until a plaintiff has suffered identifiable, compensable injury." Id. at 942. Second, the
The court noted that "[i]f mere exposure to asbestos were sufficient to give rise to a . . . cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court." The Third Circuit specifically rejected the possibility that the former railroad workers had contingent claims that were discharged in bankruptcy because there was no "legal relationship" between the tortfeasor and the tort victim.

In other cases, the Third Circuit has followed the Schweitzer analysis and required that all of the elements of the cause of action, including manifestation of injury, must exist before a claim can be discharged in bankruptcy. This approach, however, has been "widely criticized" court examined the possibility that the workers had contingent claims that were discharged. See id. The Third Circuit concluded that the FELA claims were not contingent because until manifestation of injury, there was no "legal relationship" between the parties from which an interest could flow. See id. at 945. The court noted that to hold otherwise would lead to results that Congress did not intend. See id. The court stated:

Thus, in Reading's view, a person who had no inkling that years in the future he would be killed by a product produced by the debtor would be required to file a claim in the debtor's section 77 bankruptcy proceedings so as to preserve any rights that he might have in a future tort suit. One court has already described such procedure as "absurd."

Id. (quoting Gladding, 20 B.R. at 568).

55. Id. at 942. Other circuits have noted the wisdom of the Third Circuit's decision. See, e.g., Chateaugay, 944 F.2d at 1003 (concluding that to expect claims to be filed by those who have not yet had any contact with tortfeasor is "absurd"). Even before Schweitzer was decided, some bankruptcy courts used similar reasoning to determine when claims arose. See Gladding, 20 B.R. at 567 (holding that claim alleging defective recreational vehicle did not arise until defect became manifest—in this case, after consummation).

In Gladding, the United States Bankruptcy Court for the District of Massachusetts stated:

This is a classic example of a possible claim which, at the time required for proof, would have been so incapable of proof as to prohibit its allowance. If the Court were to adopt the debtor's argument, every retailer and consumer who purchases an item from a manufacturer prior to the bankruptcy of the manufacturer, would then be compelled to file in the bankruptcy proceeding a proof of claim for some as yet unknown and undetermined possibility of damage. Such a procedure would be absurd.

Id. at 568 (citations omitted).

56. See Schweitzer, 758 F.2d at 943. The Third Circuit stated: "In our view, before one can have an 'interest' which is cognizable as a contingent claim under section 77, one must have a legal relationship relevant to the purported interest from which that interest may flow." Id. The court held that there is no such legal relationship between a tortfeasor and a tort victim until the tort has actually occurred and "there is no tort . . . until injury manifests itself." Id.

57. See Bessemer, 71 F.3d 1113, 1116 (3d Cir. 1995) (following Schweitzer and holding that claims for contribution and indemnity did not accrue until payment of underlying judgment; claims were not contingent because there was no legal relationship from which interest could flow), cert. denied, 116 S. Ct. 1851 (1996); In re Central R.R. Co., 950 F.2d 887, 892 (3d Cir. 1991) (following Schweitzer reasoning but adding that "claim is not manifest until the claimant discovers, or a reasonable person would have discovered, his injury and knows, or has reason to know, the cause thereof"); Paoli Yard, 944 F.2d 164, 165 (3d Cir. 1991) (holding that
outside the Third Circuit at least in part because it appears to ignore congressional intent to define claim broadly.\textsuperscript{58} Not surprisingly, as a result of

CERCLA claims did not accrue until after CERCLA was enacted and claims were not contingent because legal relationship did not exist pre-enactment.

In \textit{Paoli Yard}, the Third Circuit held that hazardous waste cleanup costs arising from preconsummation acts of debtor were not discharged in bankruptcy because consummation occurred before the enactment of CERCLA. \textit{See Paoli Yard}, 944 F.2d at 165 (reversing district court and permitting claims against reorganized debtor). The court concluded that prior to CERCLA's enactment there was no statutory basis for liability and therefore no right to payment. \textit{See id}. In addition, the court specifically rejected the possibility that a contingent claim existed because there was no legal relationship until after the enactment of CERCLA. \textit{See id}. at 167.

Other circuits have followed the Third Circuit's manifestation of injury rule, at least with respect to FELA actions. \textit{See Albert \textit{v}. Maine Cent. R.R. Co., 905 F.2d 541, 543-44 (1st Cir. 1990) (finding that First, Fourth and Fifth Circuits have reached same conclusion as Third Circuit with respect to accrual of FELA claims)}.

\textsuperscript{58} \textit{See In re Jensen}, 995 F.2d 925, 930 (9th Cir. 1993) (noting that Third Circuit's approach is "widely criticized... because it would appear to excise 'contingent' and 'unmatured' claims" from bankruptcy definition of claim (quoting Mirsky et al., \textit{supra} note 8, at 652)); \textit{In re Dant & Russell}, 855 F.2d 700, 709 (9th Cir. 1988) (distinguishing Third Circuit's rule); \textit{In re National Gypsum Co.}, 139 B.R. 397, 405 n.20 (N.D. Tex. 1992) (stating that Third Circuit has retreated from its position in \textit{Schweitzer}); Mirsky et al., \textit{supra} note 8, at 652 (noting that "most courts do not equate when a claim arises with the accrual of a cause of action," but adding that result may be different in Third Circuit); Saville, \textit{supra} note 7, at 345-49 (noting major criticisms of Third Circuit's approach); Scott, \textit{supra} note 44, at 262-63 (same). One commentator noted:

Another fundamental weakness in the [Third Circuit's] approach is that it may undermine the debtor's fresh start. A cause of action under CERCLA may not accrue until the EPA detects the release of hazardous substances, expends cleanup funds, or completes the entire cleanup. These events may not transpire until years after the debtor's bankruptcy case concludes, even though the EPA could foresee, and the court could estimate, the debtor's liability much earlier.

Saville, \textit{supra} note 7, at 348.

A few district courts have held that a tort claim arises for bankruptcy purposes at the "earliest possible point" or when the tortious act occurs. \textit{See In re Johns-Manville Corp.}, 57 B.R. 680, 690 (Bankr. S.D.N.Y. 1986) (holding that contribution claim arose for bankruptcy purposes when underlying acts giving rise to alleged liability were performed); \textit{In re A.H. Robins Co.}, 63 B.R. 986, 990 (Bankr. E.D. Va. 1986) (holding that Dalkon Shield claim arose for bankruptcy purposes when claimant received product, regardless of when claimant became aware of her injuries); \textit{In re Edge}, 60 B.R. 690, 699 (Bankr. M.D. Tenn. 1986) (concluding that bankruptcy law recognizes right to payment at "earliest point in the relationship between victim and wrongdoer"—at moment of wrongful act). \textit{In Johns-Manville}, the court stated:

This court also chooses not to follow the [Third Circuit] rationale, because it ignores congressional intent to define "claim" broadly... [and] the focus should be on the time when the acts giving rise to the alleged liability were performed... Therefore for federal bankruptcy purposes, a prepetition "claim" may well encompass a cause of action that, under state law, was not cognizable until after the bankruptcy petition was filed. The analysis propounded by [the Third Circuit] is therefore inappropriate. It permits parties to artificially juggle their existing substantive rights by deciding for themselves the best time to serve process.

\textit{In re National Gypsum Co.}, 139 B.R. 397, 405 n.20 (N.D. Tex. 1992) (stating that Third Circuit has retreated from its position in \textit{Schweitzer}); Mirsky et al., \textit{supra} note 8, at 652 (noting that "most courts do not equate when a claim arises with the accrual of a cause of action," but adding that result may be different in Third Circuit); Saville, \textit{supra} note 7, at 345-49 (noting major criticisms of Third Circuit's approach); Scott, \textit{supra} note 44, at 262-63 (same). One commentator noted:

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This court also chooses not to follow the [Third Circuit] rationale, because it ignores congressional intent to define "claim" broadly... [and] the focus should be on the time when the acts giving rise to the alleged liability were performed... Thus for federal bankruptcy purposes, a prepetition "claim" may well encompass a cause of action that, under state law, was not cognizable until after the bankruptcy petition was filed. The analysis propounded by [the Third Circuit] is therefore inappropriate. It permits parties to artificially juggle their existing substantive rights by deciding for themselves the best time to serve process.
its narrow definition of claim, the Third Circuit has also been criticized as being "creditor-friendly." 59

2. The Seventh Circuit's Knowledge Rule

In In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co. ("Chicago I"), 60 the United States Court of Appeals for the Seventh Circuit took a different approach in the never ending Milwaukee Railroad bankruptcy litigation. 61 The court held that when a potential CERCLA claimant has knowledge of a release of hazardous substances that the claimant knows will lead to CERCLA response costs, the claimant has at least a contingent claim for bankruptcy purposes. 62 The Seventh Circuit rejected approaches taken by other courts and held that knowledge was an essential

Johns-Manville, 57 B.R. at 690.

59. In re Chateaugay Corp., 193 B.R. 669, 678 (S.D.N.Y. 1996) (noting difference between rules adopted by Third and Second Circuits). The court stated: [Debtor] contends that the defendants seek to withdraw the reference so that they can transfer the case to Pennsylvania where they will bask in the Third Circuit's creditor-friendly, narrow definition of a bankruptcy "claim" . . . or at least dodge the Second Circuit's debtor-protective, expansive definition of "claim" announced in Chateaugay.

Id. (citations omitted).

60. 974 F.2d 775 (7th Cir. 1992).

61. See In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 78 F.3d 285, 286 (7th Cir. 1996) ("Like the Energizer Bunny, litigation growing out of the Milwaukee Road's bankruptcy proceedings keeps going and going and going."), cert. denied, 117 S. Ct. 763 (1997).

62. See Chicago I, 974 F.2d at 787 (holding that contingent claim was discharged in bankruptcy because potential CERCLA claimant had knowledge of claim).

In Chicago I, Milwaukee Railroad filed for bankruptcy on December 19, 1977. See id. at 777 (noting that consumption date was November 25, 1985). In 1979, two years after the railroad filed for reorganization, one of its trains carrying copper ore derailed and spilled hazardous waste in Tacoma, Washington. See id. at 778 (finding that spill led to contamination and subsequent need for cleanup at Tacoma). The Washington State Department of Transportation (WSDOT) purchased the Tacoma crash site from the bankruptcy trustee in 1984. See id. (adding that WSDOT knew of contamination problems at Tacoma). In 1985, Washington state officials determined that the site needed cleaning and WSDOT employees took soil samples that confirmed the presence of hazardous chemicals at Tacoma. See id. (noting that WSDOT had results of samples by consumption date). The court stated that "[d]espite the fact that WSDOT was well informed that a train derailment resulted in a containment problem that would require treatment, removal, and/or storage costs, neither WSDOT nor the State of Washington filed a proof of claim with the bankruptcy court before the December 26, 1985 bar date." Id. In fact, WSDOT did not file a claim against the Milwaukee Railroad until 1989, more than four years after the bar date. See id. (stating that complaint asked for recovery of cleanup costs and damages under CERCLA).

"[T]his dispute turns[ed] on the issue of when the CERCLA claim or contingent claim arose for purposes of bankruptcy." Id. at 783. While response costs were a necessary element of an accrued CERCLA claim, the Seventh Circuit concluded that when there is a release of hazardous substances that the claimant knows will lead to response costs, the claimant has at least a contingent CERCLA claim. See id. at 786.
element of a bankruptcy claim. The court stated that it saw "no reason in the context of this case to adopt a standard which has the potential of cutting off future creditors' claims even though these creditors had no reason to know about the release or threatened release of a hazardous substance." More recent Seventh Circuit decisions have also followed this approach.

63. See id. at 785-86 (rejecting Union Scrap's rule that claim accrues as soon as party incurs response costs, whether they know it or not). The court noted: [S]uch a rule might encourage a responsible person under CERCLA to postpone response costs until the close of bankruptcy. Encouraging such stall tactics would not only frustrate the bankruptcy court's interest in having all claims before it and the debtor's interest in a fresh start, but it would frustrate CERCLA's interest in a speedy cleanup of hazardous sites. Id. at 786.

In addition, the Seventh Circuit examined two cases from the Second and Ninth Circuits where the courts had adopted a different reasoning. See id. at 784. The Seventh Circuit concluded that both cases involved claimants who had some knowledge of the release of hazardous substances and some idea that the bankruptcy debtor was a PRP. See id. "In short, the creditors in those cases knew they had potential CERCLA claims before the close of the bankruptcy proceedings." Id. So while the Seventh Circuit disagreed with the reasoning adopted by the other circuits, the court agreed with the result. See id.

64. Id. at 784.

65. See AM Int'l, Inc. v. Datacard Corp., 106 F.3d 1342, 1347-48 (7th Cir. 1997) (holding that preconsummation purchaser of spill site was not barred from seeking contribution from debtor because purchaser did not have sufficient knowledge of environmental claim); Chicago II, 3 F.3d 200, 207 (7th Cir. 1993) (holding that purchaser seeking contribution from debtor had at least constructive knowledge of contamination at site, which was sufficient to discharge CERCLA claim).

In AM International, the court rejected the debtor's argument that the purchaser of the spill site had sufficient knowledge because he employed some of the debtor's employees who were responsible for the spill. See AM Int'l, 106 F.3d at 1347-48 (adding that purchaser's own engineers inspected site). The court noted:

When mixing the chemicals, Multigraphics' employees sometimes spilled a little. Sometimes they spilled a lot. In 1971, for example, an employee named Ron Proper didn't exactly live up to his name. Instead, Mr. Proper failed to properly close a valve, a misstep that allowed thousands of gallons of Blankrola to pour onto the ground. Id. at 1345. The court held that the debtor's attempt to equate the data available to the purchaser with the knowledge present in other cases "doesn't fly." Id. at 1348. "Mr. Proper's work file was not the red flag that AMI would have us believe." Id.

In Chicago II, the court held that a purchaser had at least constructive knowledge of the contamination at a well-publicized Superfund site. See Chicago II, 3 F.3d at 207 (finding that purchaser could tie debtor to known release of hazardous substance). In December 1980, Union Pacific purchased property, which was located within a Superfund site, from the bankruptcy trustee for the Milwaukee Railroad. See id. at 203 (noting that EPA had conducted studies of site). The site had even earned the "dubious distinction" of being dubbed one of the ten worst Superfund sites. See AM Int'l, 106 F.3d at 1347. Union Pacific's own engineers examined the site and recommended cleanup. See Chicago II, 3 F.3d at 204-05 (noting that Union Pacific still waited until after consummation to bring claim).

In affirming the district court's finding of constructive knowledge, the Seventh Circuit noted that "on the basis of the record before it, the [district] court could have found actual knowledge as well." Id. at 207. The court stated:
Additionally, in *In re Jensen*, the United States Court of Appeals for the Ninth Circuit adopted the Seventh Circuit's reasoning and required that a creditor have knowledge of a claim before it could be discharged. The court examined the legislative history of the Bankruptcy Code and determined that "nothing . . . suggests that Congress intended to discharge a creditor's rights before the creditor knew or should have known that its rights existed." While some courts and commentators have favored *Chicago I*, the Seventh Circuit's knowledge approach is not without its drawbacks. Most notably, the rule is subjective and gives debtors complete control of when a claim arises.

One does not need an engineering degree to conclude that grease, oil and fuel left standing for a long period of time have the capacity to seep into the subsurface of soil. This was five years before the bar date . . . . With EPA conducting a massive investigation of one of the ten most hazardous sites in the country, in which the railyard was located, Union Pacific cannot now argue that it did not know of potential environmental claims regarding the railyard. Our national environmental policy does not permit a commercial landowner in a tainted area to put on blinders or attempt an "ostrich defense."

*Id.*

66. 995 F.2d 925 (9th Cir. 1993).

67. *See id.* at 931 (concluding that "state had sufficient knowledge of the [debtor's] potential liability to give rise to a contingent claim for cleanup costs").

In *Jensen*, the Jensens owned a lumber company that quickly went bankrupt. *See id.* at 926 (noting that company was in business for only seven months before it filed for bankruptcy). Several weeks after the filing, the California Regional Water Quality Control Board informed the Jensens that their "dip tank" was a threat to the environment. *See id.* (noting that tank was used to treat lumber with fungicide solution). Following the bankruptcy proceedings, the state took actions to clean up the site and brought an action against the Jensens to recover its response costs. *See id.* at 927 (noting that state spent $900,000 cleaning up site). The United States Court of Appeals for the Ninth Circuit held that the state had sufficient knowledge of the Jensens' potential liability to give rise to a contingent claim. *See id.* at 931 (concluding that contingent claim was discharged by Jensens' bankruptcy).

68. *Id.* at 930 (quoting *Saville*, supra note 7, at 348).

69. *See AM Int'l*, 106 F.3d at 1347-48 (adopting *Chicago I*'s knowledge approach); *Jensen*, 995 F.2d at 930 (noting similarity between knowledge rule and foreseeability test court adopts); *In re National Gypsum Co.*, 139 B.R. 397, 407-08 (N.D. Tex. 1992) (adopting "fairly contemplated" test similar to knowledge rule); *Saville*, supra note 7, at 360-61 (proposing foreseeability rule that resembles Seventh Circuit's knowledge requirement).


If this Court determines that the knowledge which the government possessed of a CERCLA claim against the Railroad was insufficient to allow the claim's discharge, EPA's "duties" will no longer be "triggered by the mere discovery of a site linked to" a debtor. Instead, the accrual of knowledge sufficient to discharge a CERCLA claim will be determined solely by EPA's administration of CERCLA—a result inconsistent with a regime that allows costs incurred both outside EPA's enforcement of CERCLA and before CERCLA was even enacted to establish liability.

*Id.* (quoting *National Gypsum*, 139 B.R. at 409).
3. The Second Circuit’s Prepetition Release Rule

In *In re Chateaugay Corp.*,\(^1\) the United States Court of Appeals for the Second Circuit took a debtor-friendly approach and held that as long as the release of hazardous substances occurred prepetition, the subsequent environmental claims were discharged in bankruptcy regardless of when response costs were incurred.\(^2\) Most remarkably, the Second Circuit’s approach does not even require that a potential claimant have knowledge of the release to have a claim discharged.\(^3\) The court’s reasoning favored bankruptcy over environmental law because if unincurred response costs were not claims, then companies might never be able to reorganize.\(^4\)

The reaction to *Chateaugay’s* approach has been mixed. On the one hand, courts have criticized the holding for its overly broad definition of claim, which conflicts with CERCLA’s goal of cleaning up the environment.\(^5\) On the other hand, some courts have followed *Chateaugay*, at

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\(^{1}\) 944 F.2d 997 (2d Cir. 1991).


*Chateaugay*, LTV Corporation and its related companies (“LTV”) with operations in diversified steel, aerospace and energy, filed for bankruptcy on July 16, 1986. See *Chateaugay*, 994 F.2d at 999. The government claimed it did not have a bankruptcy claim until response costs were incurred. See *id.* at 1000 (stating that government brought action for declaratory judgment seeking judicial determination that response costs incurred postconsummation would still be viable). The Second Circuit disagreed with the government and held that response costs were not a necessary element of a contingent claim. See *id.* at 1005 (“If unincurred CERCLA response costs are not claims, some corporations facing substantial environmental claims will not be able to reorganize at all.”).

\(^{3}\) See *Chateaugay*, 944 F.2d at 1005. The Second Circuit stated: EPA is acutely aware of [the debtor] and vice versa. The relationship between environmental regulating agencies and those subject to regulation provides sufficient “contemplation” of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of “claims.” True, EPA does not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose upon [the debtor], and it does not yet even know the location of all the sites at which such wastes may yet be found. But [those] are all steps that may fairly be viewed, in the regulatory context, as rendering EPA’s claim “contingent,” rather than as placing it outside the Code’s definition of “claim.” *Id.*; see McBain, *supra* note 7, at 238 (noting that Second Circuit gave “expansive” reading to “contingent claim”).

\(^{4}\) See *Chateaugay*, 944 F.2d at 1005 (stating that corporations facing substantial environmental claims might not be able to reorganize if “claim” was not given broad definition).

\(^{5}\) See *In re Jensen*, 995 F.2d 925, 930 (9th Cir. 1993) (stating that “discharging liability solely because a release . . . occurred pre-petition may conflict with CERCLA’s goal” (quoting Saville, *supra* note 7, at 50)); *In re National Gypsum Co.*, 139 B.R. 397, 407-08 (N.D. Tex. 1992) (criticizing *Chateaugay* for favoring bankruptcy’s goal over CERCLA’s objective of environmental cleanup); United States v. Union Scrap Iron & Metal, 123 B.R. 831, 836-37 (D. Minn. 1990) (rejecting *Chateaugay’s* approach because it would undermine goals of CERCLA); McBain,
least in part, by holding that regulatory agencies are presumed to know that prepetition releases could result in postpetition claims.\textsuperscript{76}

4. \textit{Alternative Approaches}

In light of the circuit split, courts and commentators have developed alternative approaches for determining when a claim arises for bankruptcy purposes. For example, in \textit{In re Erie Lackawanna Railway Co.},\textsuperscript{77} the United States Court of Appeals for the Sixth Circuit avoided the issue altogether and held that a debtor escaped liability because the bankruptcy resembled liquidation more than reorganization.\textsuperscript{78} In \textit{In re National Gypsum}

\textsuperscript{supra} note 7, at 252 (noting that Second Circuit's approach is less "practical" than other approaches); Saville, \textsuperscript{supra} note 7, at 351-53 (stating several criticisms of "underlying acts" approach); Scott, \textsuperscript{supra} note 44, at 263-66 (discussing Second Circuit's approach that author labeled "the conduct test").

The Ninth Circuit noted that \textit{Chateaugay}'s reasoning presents an overly broad definition of claim. See \textit{Jensen}, 995 F.2d at 930. "Several courts . . . have rejected the argument that a CERCLA claim arises upon the release or threatened release of hazardous waste, holding instead that each element of a CERCLA claim must be established, including the incurrance of response costs, before a dischargeable claim arises." \textit{Id.} at 928 (citing \textit{Union Scrap Iron & Metal}, 123 B.R. at 838). "The criticism of the conduct test cases is that they seem to focus on the contingent, unmatured, language in the definition of 'claim' without requiring that some legal obligation must exist." Scott, \textsuperscript{supra} note 44, at 264.

\textsuperscript{76} See \textit{National Gypsum}, 139 B.R. at 407 ("The \textit{Chateaugay} ruling covers releases that have occurred pre-petition, even though they have not been discovered by EPA or anyone else. The powers and knowledge of a regulatory agency are presumed to 'fairly' allow for 'sufficient contemplation of [such] contingencies.'" (quoting \textit{Chateaugay}, 112 B.R. at 52)); \textit{Chicago I}, 974 F.2d 775, 784 (7th Cir. 1992) (finding that claimants in \textit{Chateaugay} had some knowledge about release and had some idea debtor was PRP); see also Scott, \textsuperscript{supra} note 44, at 264 (concluding that Second Circuit's approach is "well suited to the mass tort context where pre-petition conduct on the part of the debtor causes an injury that does not manifest itself until post-petition or post-confirmation").

\textsuperscript{77} 803 F.2d 881 (6th Cir. 1986).

\textsuperscript{78} See \textit{id.} at 882 & n.1 (holding that debtor's restructuring was "more in the nature of a liquidation than reorganization" and therefore, court did not reach issue of when appellant's claims arose).

In \textit{Erie}, workers brought asbestos claims against the railroad for injuries that occurred prepetition, but did not manifest until after consummation. \textit{See id.} at 882-83 (noting that railroad conveyed its rail assets to Conrail as part of liquidation process). Despite the factual similarities to \textit{Schweitzer}, the Sixth Circuit never addressed the question of whether to follow the Third Circuit. \textit{See id.} at 882 & n.1 (concluding that liquidation bars workers' recovery). As the court explained:

If \textit{Erie} underwent a "straight" liquidation, then it is clear [that] appellants' claims could not ensue: there would be no company left which [the] suit could be brought against. Conversely, if the present restructuring should be characterized as a conventional reorganization, then it is arguable that claims could be brought.

\textit{Id.} at 883-84. The \textit{Erie} court added that appellants were not without remedy for their alleged injuries. \textit{See id.} at 885 (stating that appellants were free to sue asbestos manufacturers and that subjecting unsecured creditors to liability, when other avenues of redress existed, would be "palpably unjust").

the United States District Court for the Northern District of Texas adopted a variation on the Chateaugay approach and held that response costs based on prepetition releases that were "fairly contemplated" by the parties constituted a claim capable of discharge. \(^{80}\) Finally, in United States v. Union Scrap Iron & Metal\(^{81}\) the United States District Court for the District of Minnesota rejected Chateaugay, holding that a prepetition release or threatened release did not constitute a discharged claim. \(^{82}\) Against this backdrop, the Third Circuit confronted the issue of whether Conrail's contribution claim against Reading was barred by bankruptcy.

### III. Facts

Once the largest corporation in the world, Reading Railroad collapsed in 1971 and filed for reorganization under the Bankruptcy Act. \(^{83}\)

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\(^{80}\) See id. at 409 (holding that all costs based on prepetition conduct that can be "fairly contemplated" by parties at time of debtor's bankruptcy are claims). The court was not willing to favor bankruptcy's objective of a fresh start over CERCLA's environmental cleanup goals to the extent exhibited by Chateaugay. See id. at 407-08. The court added:

> The only meaningful distinction that can be made regarding CERCLA claims in bankruptcy is one that distinguishes between costs associated with pre-petition conduct resulting in a release or threat of release that could have been 'fairly' contemplated by the parties; and those that could not have been 'fairly' contemplated by the parties.

\(^{81}\) 123 B.R. 831 (D. Minn. 1990).

\(^{82}\) See id. at 838 (holding that "mere release of a hazardous substance prior to the confirmation of a bankruptcy reorganization plan does not give rise to a CERCLA claim which is discharged by that confirmation").

In Union Scrap Iron & Metal, the court rejected the debtor's argument that a toxic release constituted a contingent claim because such a rule would "undermine the goals of CERCLA." Id. at 837 (finding that keeping debtor involved as PRP supports CERCLA's objectives). The court stated:

> Adopting [debtor's] position would effectively require pre-enforcement CERCLA litigation by forcing the EPA to investigate and assess its potential CERCLA claims every time a conceivable potentially responsible party filed for bankruptcy. This would reverse the CERCLA scheme and threaten the effectiveness of EPA action . . . . Congress did not intend the EPA to be embroiled in litigation over the wisdom, scope, and costs of various possible remedies to clean up dangerous sites . . . .

\(^{83}\) See In re Reading Co., 115 F.3d 1111, 1114 (3d Cir. 1997) (adding that "roots" of dispute between Reading and Conrail relate back to bankruptcy); In re Reading, 24 B.R. 858, 859 (E.D. Pa. 1980) (noting that railroad's financial base "eroded" as demand for passenger and freight transportation by rail diminished).
By 1973, six more railroads had joined Reading Railroad in reorganization.\(^8\) Congress responded by enacting the Regional Rail Reorganization Act (RRRA)\(^8\) to regulate railroad reorganizations because "public convenience and necessity require[d] adequate and efficient rail service... .\(^8\) One year later, the United States District Court for the Eastern District of Pennsylvania subjected Reading Railroad to the RRRA and "[f]or all practical purposes, Reading ceased to be a railroad on April 1, 1976."\(^8\) The Consummation Order and Final Decree ("Order") that offi-

\(^8\). See Reading, 115 F.3d at 1114. The seven railroad systems that filed for reorganization were: The Reading System, Central Railroad of New Jersey, Erie-Lackawanna Railway, Lehigh Valley Railroad, Lehigh and Hudson River Railroad, Ann Arbor and Penn Central Transportation Company. See In re Penn Cent. Transp. Co., 596 F.2d 1127, 1135 n.2 (3d Cir. 1979) (explaining railroad reorganization). Penn Central Railroad was the first of the seven railroads to file for reorganization and its filing apparently had a domino effect on the other major railroads in the east. See generally JOSEPH R. DAUGHEN & PETER BINZEN, THE WRECK OF THE PENN CENTRAL 308-47 (1971) (examining reasons behind railroad reorganizations); ALBRO MARTIN, RAILROADS TRIUMPHANT: THE GROWTH, REJECTION, AND REBIRTH OF A VITAL AMERICAN FORCE 385 (1992) (discussing Penn Central's demise and noting that "[s]ick as it was, the American railroad system was not dead ... ").

\(^8\) See Chicago and North Western Railway Co. v. Inland Steel Co., 71 F.3d 1113, 1114 (3d Cir. 1995) (stating that railroad bankruptcies motivated Congress to enact RRRA), cert. denied, 116 S. Ct. 1851 (1996); Zulkowski v. Consolidated Rail Corp., 852 F.2d 73, 74 (3d Cir. 1988) (finding that RRRA was passed because "essential rail service" was threatened (quoting 45 U.S.C. § 701(1)(2))); Reading, 24 B.R. at 859 (concluding that "glowy financial statistics" of northeast and midwest railroads together with "great public need for continuing rail service and the enormous inherent value of the railroads" provoked congressional action).

\(^8\) Reading, 115 F.3d at 1115 (noting, however, that Reading did not fully emerge from bankruptcy until after court issued Consummation Order and Final Decree ("Order") on December 23, 1980).
cially closed the books on Reading Railroad included a "sweeping" injunction which insulated the reorganized Reading from all liability based on the obligations of its bankrupt predecessor.88

Operations at Douglassville started in 1941 when Berks Associates began operating a crankcase oil recycling business on the south bank of the Schuylkill River.89 As early as 1959, the "conservation" firm was cited for health code violations.90 Following the massive oil spills at Douglassville in

88. See id. Section 7.02 of the Order states:
All persons, firms, governmental entities and corporations, wherever situated, located or domiciled, are hereby permanently restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suits or proceedings, at law or in equity or otherwise against the Reorganized Company or its successors or assigns or against any of the assets or property of the Reorganized Company or its successors or assigns, directly or indirectly, on account of or based upon any right, claim or interest of any kind or nature whatsoever which any such person, firm, governmental entity or corporation may have in, to or against the Debtor, the Reading Trustees, or any of their assets or properties . . . by reason or on account of any obligation or obligations incurred by the Debtor or any of its Trustees in these proceedings, except the obligations imposed on the Reorganized Company by the Plan or by this Order or reserved for resolution or adjudication by this Order.


The Reading injunction is broad in scope and in that regard it is no different from the injunctions in other railroad bankruptcies. See Paoli Yard, 944 F.2d 164, 165 (3d Cir. 1991); In re Central R.R. Co., 950 F.2d 887, 888 (3d Cir. 1991). Such orders, however, do not insulate the reorganized company from liability for claims that arise after the consummation date. See Zulkowski, 852 F.2d at 77 ("While we decide this case on the basis of the application of section 77 and the Rail Act, we note that general corporation law is consistent with our result.").

89. See Reading, 115 F.3d at 1115.

90. See Thomas J. Madden, Sludge Spillage Was Accident, Head of Processing Firm Says, PHILA. INQUIRER, Nov. 16, 1970, at 1 (listing 14 violations issued against Berks Associates by Pennsylvania Health Department from 1959 to 1970); see also Phillips, supra note 1, at 1 (reporting that Berks Associates had been listed as 1 of 10 most chronic polluters in Pennsylvania); Sama & Linedecker, supra note 1, § 1, at 1 (same).

Ironically, Berks Associates, the party responsible for the spill, was engaged in conservation—recycling used crankcase oil. See Madden, supra, at 1; Phillips, supra note 1, at 1 (noting that reprocessed oil is re-used in motors and excess sludge is used to make fuel and plastics). Roy Schurr, the 82 year old founder and president of Berks Associates, said that by collecting used crankcase oil from service stations, his company gave owners an alternative to dumping their oil in the woods or down the sewer. See Madden, supra, at 1. He stated:

We're conserving . . . We get used oil and turn it back into useful merchandise. People only point the finger when something goes wrong, but we have prevented millions of gallons of dirty oil from getting into the river . . . . What do you think happens to your old crankcase oil? . . . If we didn't pick it up from the stations, it would get into the river.

Id. Schurr's company, however, had difficulty living up to its laudable conservation goals. See id. (discussing numerous violations at Douglassville).
1970 and 1972, the EPA invoked the provisions of the Clean Water Act and responded to the oil spill. “As part of the clean-up, the EPA transported sludge from the Douglassville site, using boxcars supplied by the Reading Railroad, which had a rail line serving the facility.” On October 21, 1980, prior to CERCLA's enactment, the EPA identified Douglassville as a potentially hazardous site under the Resource Conservation and Recovery Act.

Twenty days before Reading Railroad's December 31, 1980 consummation date, Congress enacted CERCLA, which imposes retroactive liability on any person who has generated, transported or arranged for the disposal of hazardous substances at a site from which those substances are

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91. 33 U.S.C. § 1251 (1994). The Clean Water Act is primarily concerned with pollution of surface water and ground water. See Mirsky et al., supra note 8, at 629-50. The act prohibits the discharge of all pollutants unless otherwise permitted. See id. at 630 (noting that states are permitted to have their own expanded clean water programs). “In addition to routine monitoring and reporting, the Clean Water Act requires notification in the event of any spill or discharge of oil or hazardous substances into navigable waters.” Id. Notably, unlike CERCLA, the Clean Water Act does not provide a finance mechanism that allows the federal government and private parties to recover cleanup costs from responsible parties. See id.

92. See Reading, 115 F.3d at 1116 (adding that Department of Interior also responded, invoking provision of Clean Water Act); see also Collins, supra note 3, at 5 (stating that Coast Guard and EPA responded to Douglassville spills); Madden & Clark, supra note 1, at 1 (reporting that among others, Department of Interior team of investigators responded to spill); Sama, supra note 3, at B2 (noting that EPA was coordinating river cleanup). William R. Ruckelshaus, administrator of the EPA, visited Douglassville to see the effects of the spill first hand and said, “I've seen oil spills ... [b]ut this is worse than anything I've ever seen.” Collins, supra note 3, at 1.

The newspapers contained extensive coverage of the disaster. See Phillips, supra note 1, at 1 (describing three million gallon spill in 1970); Sama & Linedecker, supra note 1, § 1, at 1 (same); Collins, supra note 3, at 1 (reporting on six million gallon spill following Hurricane Agnes in 1972).

After the spill in 1972, the head of Berks Associates apologized, labeling the spill “an act of God.” Heymsfeld, supra note 3, at 13. “Our lagoon walls held .... The water was more than six feet over the tops of the lagoons. It just lifted the sludge and carried it away.” Id. (quoting H. Lester Schurr). Neighbors who lived along the Schuylkill near Berks Associates were not satisfied with Schurr’s apology, however, and one resident said many wanted to shoot Schurr. See id. (reporting that another neighbor said, “you couldn’t even put in writing the way people feel about this”).

93. Reading, 115 F.3d at 1116.

94. See id. at 1115-16 (stating that EPA was familiar with Douglassville based on environmental problems that occurred in 1970s). The EPA did not, however, add Douglassville to the NPL until September 8, 1983, well after the Reading bankruptcy was complete. See id. at 1116 & n.2 (noting that EPA began actively investigating Douglassville in 1982 and agency's initial identification of Douglassville as potentially hazardous site was made under Resource Conservation and Recovery Act in 1980).
released or threatened to be released into the environment. The EPA included Douglassville on the first NPL when the list was published on September 8, 1983, but it did not identify Reading as a PRP until June 29, 1988, when the agency alleged Reading had shipped its own waste or the waste of others to Douglassville.

On July 31, 1991, the United States brought an action under CERCLA against thirty-six PRPs—including Conrail but not including Reading—to recover response costs incurred at Douglassville. Acting as third party plaintiffs, Conrail and most of the other PRPs directly named by the United States responded with a third party action against Reading and approximately 600 other PRPs, seeking contribution for any liability from Douglassville. On April 5, 1993, Reading in turn sought an injunction from the court that had presided over its reorganization in bankruptcy.

95. See 42 U.S.C. § 9607(a) (1994). Despite the unique nature of railroad reorganizations, “CERCLA’s embrace would encompass Conrail and the nation’s railroads.” Reading, 115 F.3d at 1115.

96. See Reading, 115 F.3d at 1116 (noting that Reading was one of over 600 PRPs for spills at Douglassville); see also In re Reading Co., 900 F. Supp. 738, 742 (E.D. Pa. 1995) (stating that “[f]rom July 6, 1965, until March 12, 1976, the Reading Railroad either shipped its own waste oil or the waste oil of others to this site”), aff’d, 115 F.3d 1111 (3d Cir. 1997).

97. See Reading, 115 F.3d at 1116 (finding that United States’ suit against PRPs followed government’s order that PRPs undertake remedial action at Douglassville); see also Reading, 900 F. Supp. at 741 (noting that United States participated in Reading’s reorganization, but did not assert any environmental claims against Reading).

In oral argument before the Third Circuit on July 15, 1996, John A. Bryson, counsel for the United States, addressed the government’s failure to file a claim against Reading Railroad.

Chief Judge Sloviter: Why didn’t you file a claim against Reading when you filed the claim against Conrail and all these other PRPs?

Mr. Bryson: Well, I don’t have any information personally on that. I mean the Government chose the defendants it chose for a reason I can’t—I don’t know. But the government often times does not sue every PRP.

Judge Cowen: You haven’t to this date filed a claim against Reading directly.

Mr. Bryson: Right.

Judge Cowen: It’s the same claim that you would file today which you haven’t even filed today that you didn’t file in the bankruptcy. When are you going to file a claim [against Reading Railroad]?

Mr. Bryson: I mean one possible scenario is a settlement and consent decree which will—could possibly have a claim against Reading.


98. See Reading, 115 F.3d at 1116 (finding that Conrail’s action against Reading and 600 other PRPs followed on heels of United States’ action against Conrail); Reading, 900 F. Supp. at 742 (stating that Conrail and other primary PRPs sought to spread $39 to $53 million in cleanup costs over as large group as possible).
arguing that the Order discharged any liability Reading may have had for the Douglassville site.99

The United States District Court for the Eastern District of Pennsylvania granted Reading's request for injunctive relief on September 13, 1995.100 The court held that the third party plaintiffs' claim was for contribution under CERCLA section 113(f)(1) and contribution required common liability to a third party.101 As such, "Reading's liability to Conrail was dependent on whether Reading was potentially liable to the United States."102 The district court concluded that Reading's liability to the United States was discharged in bankruptcy because all the elements of the CERCLA claim existed preconsummation and the United States had constructive knowledge of its claim.103 Without Reading's potential

While the EPA still has not to date asserted a claim against Reading for Douglassville, the government participated in Conrail's third party action against Reading because the existence of Conrail's contribution claim would increase the pool of money from which the EPA could collect cleanup costs. See Transcript of July 15, 1996 Oral Argument at 17-18, In re Reading Co., 115 F.3d 1111 (3d Cir. 1997) (Nos. 95-1987, 95-1988). Mr. Bryson, counsel for the government, stated, "the maximum amount of liable parties does contribute to resolution and settlement of these cases. There's no question about that." Id. at 18.

99. See Reading, 115 F.3d at 1116 (stating that Reading claimed its liability was discharged by bankruptcy Order).

100. See Reading, 900 F. Supp. at 741 (granting motion to enjoin third party plaintiffs from prosecuting claims against Reading); see also Reading, 115 F.3d at 1116 (adding that both Conrail and United States appealed district court's grant of Reading's injunction).

101. See Reading, 900 F. Supp. at 744 ("When one PRP sues another PRP to recover cleanup costs incurred under CERCLA, the suit is properly treated as one for contribution."). The district court held that Conrail cannot "bootstrap" a section 113(f)(1) contribution claim onto purported section 107(a)(4)(B) liability. See id. at 747-48. In Judge Ditter's district court opinion, he stated, "The courts considering this issue have uniformly held that allowing non-settling PRPs to recover against settling PRPs by simply couching their claim as one for 'reimbursement' rather than 'contribution' would frustrate CERCLA's policy of encouraging PRPs to settle." Id. at 747.

102. Reading, 115 F.3d at 1116; see Reading, 900 F. Supp. at 744 (noting that conclusion that Reading is liable to Conrail requires that Reading be liable, or at least potentially liable, to United States).

103. See Reading, 900 F. Supp. at 743 (finding that United States failed to assert CERCLA claim against Reading during 20-day window between CERCLA's enactment and bankruptcy court's prohibition against future lawsuits); see also Reading, 115 F.3d at 1116. The district court held that the United States possessed a preconsummation response costs claim against Reading. See Reading, 900 F. Supp. at 745. The court stated:

[T]he 1970 and 1972 costs were "response costs," and they can be recovered under CERCLA despite the fact that the Federal government's actions were authorized by the Clean Water Act, not CERCLA. Thus, because all four elements for CERCLA § 9607(a)(4)(A) liability existed preconsummation, the United States possessed a preconsummation CERCLA claim.

Id. (citations omitted).

Moreover, the district court determined the United States had constructive knowledge of its claim. See id. (finding that although United States had construc-
liability to the government, the district court concluded that Conrail's contribution claim failed as a matter of law. 104

IV. ANALYSIS

A. Narrative Analysis

In Reading, the Third Circuit affirmed the district court and held that Reading's bankruptcy absolved it of any liability to Conrail or the other third party plaintiffs for the Douglassville cleanup. 105 In reaching its decision, the Third Circuit considered whether Conrail's contribution claim was discharged in bankruptcy. 106 First, the court examined the nature of Conrail's claim against Reading. 107 Next, the court considered the effect of Reading's reorganization on Conrail's claim. 108

The court began its analysis by examining the four causes of action alleged by Conrail and the third party plaintiffs: (1) cost recovery under CERCLA section 107(a)(4)(B); (2) contribution under CERCLA section 113(f)(1); (3) common law contribution; and (4) common law restitution. 109 The court rejected the common law claims because it determined that both claims were preempted by CERCLA. 110 The court reasoned that to hold otherwise would permit independent common law remedies to thwart the settlement scheme embodied in CERCLA. 111 The interaction of constructive knowledge of its CERCLA claim it "sat on its rights"). The district court stated that constructive knowledge was based primarily on three factors: 1) the United States knew Douglassville was a "trouble spot" and knew of Reading Railroad's connection to the site; 2) publicity surrounding the enactment of CERCLA gave EPA notice of its "new weapon" against environmental spills; and 3) the United States was an active participant in the Reading Railroad bankruptcy. Id. at 745-46.

104. See Reading, 900 F. Supp. at 749 ("[A]bsence of common liability between Reading and the third party plaintiffs to another CERCLA claimant is fatal."); see also Reading, 115 F.3d at 1116 (discussing district court's holding).
105. See Reading, 115 F.3d at 1114.
106. See id. at 1117 ("The core question posed by this appeal is whether Conrail can make a claim against Reading for the costs of the Douglassville clean-up.").
107. See id. at 1117-21.
108. See id. at 1121-26.
109. See id. at 1117.
110. See id. (finding Congress expressly created statutory right of contribution that preempted common law remedies). The Third Circuit followed the district court's reasoning in holding that CERCLA preempted Conrail's common law remedies. See id. The district court opinion reasoned:

With respect to the state law claims, I find that CERCLA's own contribution provision controls any potential Third-Party Plaintiffs' recovery against Reading because a contrary result under state law could potentially frustrate federal policy. Thus, third-party plaintiffs' claims for restitution and common law contribution are preempted by CERCLA and cannot be pursued.

111. See Reading, 115 F.3d at 1117. The court determined that Conrail's common law claims for contribution and restitution conflicted with CERCLA's remedies and obstructed the intent of Congress. See id. ("Conflict may arise either
between section 113(f)(1) and section 107(a)(4)(B), however, presented a more difficult question of statutory construction.\textsuperscript{112}

As originally enacted in 1980, "CERCLA lacked any express mechanism by which one party could recover from another for paying more than its \textit{pro rata} share of the costs of a clean-up."\textsuperscript{113} The Third Circuit noted that courts "filled the gap" by interpreting section 107(a)(2)(B) as providing a private right of action for contribution.\textsuperscript{114} According to the court, the legislative history indicated that SARA’s express provision for contribution in section 113(f)(1) was intended to replace the judicially implied right to contribution under section 107(a)(4)(B).\textsuperscript{115} Therefore, the court concluded that Conrail’s "only viable claim" against Reading was one for contribution under section 113(f)(1).\textsuperscript{116}

because 'compliance with both federal and state regulations is a physical impossibility,' or because the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” (quoting California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281 (1987))). The Third Circuit stated:

> [W]hen Congress expressly created a statutory right of contribution in CERCLA § 113(f) ... it made that remedy a part of an elaborate settlement scheme aimed at the efficient resolution of environmental disputes. Permitting independent common law remedies would create a path around the statutory settlement scheme, raising an obstacle to the intent of Congress. We conclude therefore that Conrail’s common law claims are preempted by CERCLA § 113(f).\textit{Id.}

\textsuperscript{112} See \textit{id.} (declaring that review of statutory construction necessarily begins with language of statute). The interaction of sections 113 and 107 was confusing at best, and Judge Cowen’s remarks during oral argument reveal that the court struggled with the question. See Transcript of July 15, 1996 Oral Argument at 25-26, \textit{In re Reading Co.}, 115 F.3d 1111 (3d Cir. 1997) (Nos. 95-1987, 95-1988). Judge Cowen noted:

> Well, unfortunately the environmental laws do not—all these laws do not spell it out clearly. It’s very hazy. I mean I spent a lot of time on this. And I waffled on it. And the commentators even say the statute is a terribly drafted statute, the way it’s not clear whether 113 supercedes 107, whether it’s supplemental to it or what—how they relate to one another.\textit{Id.}

\textsuperscript{113} \textit{Reading}, 115 F.3d at 1118.

\textsuperscript{114} See \textit{id.} (concluding that prior to SARA those who spent money on cleanup efforts could seek contribution from other PRPs under section 107(a)(4)(B) (citing Key Tronic Corp. v. United States, 511 U.S. 809, 816 n.7 (1994); United States v. New Castle County, 642 F. Supp. 1258, 1269 (D. Del. 1986))). “Until the passage of SARA in 1986, the judicially-created expansion of § 107(a)(4)(B) served as the sole means by which parties could obtain contribution.” \textit{Id.} at 1119.

\textsuperscript{115} See \textit{id.} (relying on legislative history and complicated scheme that SARA created). “[T]he fact that § 113(f)(1) specifically permits an action for contribution to be brought ‘in the absence of a civil action under ... section [107]’ reinforces our conclusion that Congress intended § 113 to be the sole means for seeking contribution . . . .” \textit{Id.} at 1120.

\textsuperscript{116} \textit{Id.} at 1114. The court stated:

> [I]f a party should instead seek contribution under § 107(a)(4)(B), that would throw the proverbial monkey wrench into the works. If a party
Next, the court examined Third Circuit case law and concluded that Conrail’s contribution claim against Reading was not discharged in bankruptcy.\(^{117}\) The court followed the leading Third Circuit case, *Schweitzer*, and held that a claim does not accrue for bankruptcy purposes until all

could end run § 113(f)(2) and (3) by suing a settling party under § 107(a)(4)(B) for “costs of response,” the settlement scheme would be bypassed. The incentive to early settlement would disappear, and the extent of litigation involved in a CERCLA case would increase dramatically.

*Id.* at 1119.

The court rejected Conrail’s argument that it could maintain a contribution action under section 107(a)(4)(B). *See id.* at 1119-20. Conrail based its argument on a comment in *Key Tronic* where the Supreme Court observed that after SARA, CERCLA “now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.” *Key Tronic*, 511 U.S. at 816. The Third Circuit stated:

To the extent that the Supreme Court refers to an “overlap,” we construe this overlap to consist of the fact that some courts have held that a landowner may bring a direct action under § 107(a)(4)(B) to recover its own clean-up costs from a polluter . . . . The fact, however, that a direct action might be brought under § 107(a) does not open the door for a PRP to bring an action for contribution under that same section.

*Reading*, 115 F.3d at 1120.

Moreover, the court cited a number of cases that supported its conclusion. *See United States v. Colorado & E. R.R. Co.*, 50 F.3d 1530, 1534-36 (10th Cir. 1995) (finding that Congress codified judicially implied right of contribution when it enacted SARA in 1986); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 99 (1st Cir. 1994) (holding that contribution is standard legal term that refers to claim by and between jointly and severally liable parties for division of payment one party has been required to make); *Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1993) (holding that action for cleanup costs was one for contribution rather than direct cost recovery action); *In re Reading Co.*, 900 F. Supp. 738, 743 (E.D. Pa. 1995) (“When one PRP sues another PRP to recover cleanup costs incurred under CERCLA, the suit is properly treated as one for contribution.”), aff’d, 115 F.3d 1111 (3d Cir. 1997). In *Akzo*, the United States Court of Appeals for the Seventh Circuit stated:

> [T]he gist of [the creditor’s] claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible . . . . That is a quintessential claim for contribution . . . . Whatever label [the creditor] may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. [The creditor’s] suit accordingly is governed by section 113(f).

*Akzo*, 30 F.3d at 764.

Furthermore, the court’s decision that Conrail’s contribution claim could not proceed as a cost recovery action came as no surprise based on the Third Circuit’s holding in another case decided just 10 days earlier. *See New Castle County v. Halliburton Nus Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997) (holding that action brought by PRP is “by necessity” section 113(f)(1) action for contribution). In *New Castle County*, the court stated, “Every court of appeals that has examined this issue has come to the same conclusion: a section 107 action brought for recovery of costs may be brought only by innocent parties that have undertaken clean-ups.” *Id.* (emphasis added).

117. *See Reading*, 115 F.3d at 1121-23.
the elements of the claim are manifest. In addition, the Third Circuit adopted Schweitzer's definition of contingent claim and held that such an unmatured claim could not arise without some legal relationship between the parties. The court examined environmental cases where the Third Circuit followed Schweitzer and noted that even the court's most recent case on point followed the same principles.

118. See id. at 1121-22 (adopting reasoning from Schweitzer). In Schweitzer, the plaintiff's claims for asbestos exposure against Reading were not discharged in bankruptcy because the asbestos injuries did not manifest until after consummation. See Schweitzer v. Consolidated Rail Corp., 758 F.2d 936, 942 (3d Cir. 1985) (rejecting possibility that asbestos claims were contingent because necessary legal relationship did not exist until after injury manifested itself). In Reading, the Third Circuit explained its prior reasoning and stated:

We looked to federal tort law to determine when the claim arose. Noting that identifiable, compensable injury was a basic element of a tort claim, we held that no cause of action accrued until that element had been satisfied. Because the plaintiffs' injuries did not become manifest until after the reorganization, their claims did not exist until after plan consummation, and for that reason the claims were not discharged.

Reading, 115 F.3d at 1121.

119. See Reading, 115 F.3d at 1121 (recognizing statutory support for contingent claims in language of Bankruptcy Act that defined claims as "interests of whatever character"). The Third Circuit cited In re Radio-Keith-Orpheum Corp., 106 F.2d 22 (2d Cir. 1939), as an example of a contingent claim. See Reading, 115 F.3d at 1121.

In Radio-Keith, a landlord brought a claim against a debtor-guarantor of a lease, after the guarantor's consummation date. Radio-Keith, 106 F.2d at 26 (adding that in ordinary bankruptcy, landlord's claim would not be provable or dischargeable). The Second Circuit found that the landlord's claim on the guarantee was discharged pursuant to section 77(B) of the Bankruptcy Act. See id. at 26-27 (noting guarantor relationship that existed between creditor and debtor). "The court found that because an express contract of guarantee existed, the landlord could not stand idly by while the guarantor went into bankruptcy." Reading, 115 F.3d at 1121. Nonetheless, in Schweitzer, the Third Circuit held that for personal injuries, there was no possibility of contingent claims. See id. (concluding that in tort, "there [i]s no guarantee, no legal relationship, and no contingent claim that c[an] be discharged").

120. See Reading, 115 F.3d at 1121-22. In Paoli Yard, the Third Circuit held that Conrail's CERCLA claim against Penn Central was not discharged in bankruptcy because CERCLA was not enacted until after Penn Central's consummation date. Paoli Yard, 944 F.2d 164, 167 (3d Cir. 1991) (noting that "at the time of the Consummation Order, there was no statutory basis for liability to be asserted against [Penn Central] by the petitioners"). "'Just as the employees in Schweitzer had no recognizable tort causes of action under the FELA prior to the employer railroad's relevant consummation dates, the petitioners here could not have brought claims under CERCLA prior to the Consummation Date.'" Reading, 115 F.3d at 1122 (quoting Paoli Yard, 944 F.2d at 167). Furthermore, the Paoli Yard court held that a contingent claim did not exist because there was no legal relationship between the parties. See Paoli Yard, 944 F.2d at 167-68 (finding legal relationship was not present until after CERCLA was enacted).

In Pinney Dock, the Third Circuit held that antitrust claims were discharged in bankruptcy because the claims existed prior to confirmation. Pinney Dock, 771 F.2d 762, 767 (3d Cir. 1985) (noting that effect and purpose of bankruptcy law would be frustrated if "discharge of debtors were not complete and absolute"). "We expressly distinguished Pinney Dock's facts, where all elements of the claim arose
These cases established the framework for the court's bankruptcy discharge analysis: first, look to the substantive area of law governing the underlying claim to determine whether a CERCLA claim had accrued before bankruptcy, and second, if the claim has not accrued, determine whether the claimant possessed an interest rising to the level of a contingent claim.\textsuperscript{121} “Applying these principles to Conrail’s contribution claim yields a relatively straightforward answer . . . Conrail’s [section] 113 claim was not discharged because SARA had not yet been enacted” when Reading Company filed bankruptcy.\textsuperscript{122} The court rejected the possibility that Conrail had a contingent claim because there was no legal relationship between the parties until after SARA was enacted.\textsuperscript{123} Holding otherwise, the Third Circuit concluded, would lead to a “harsh result” and “sanction Conrail for failing to allege claims that in December 1980 had no recognized legal form.”\textsuperscript{124}

Although Conrail’s contribution claim against Reading was not discharged in bankruptcy, the Third Circuit held it nevertheless failed as a matter of law.\textsuperscript{125} The court found that contribution under CERCLA re-

before reorganization, from Schweitzer, where one element of the claim, the manifestation of the injury, did not appear until after consummation.” \textit{Reading}, 115 F.3d at 1122.

In \textit{Bessemer}, the Third Circuit examined a contribution claim in the context of antitrust litigation between the Bessemer Railroad and USX Corporation. \textit{Bessemer}, 71 F.3d 1113, 1114 (3d Cir. 1995) (finding that “predicate conduct” of USX’s antitrust liability began before Penn Central filed for bankruptcy reorganization), \textit{cert. denied}, 116 S. Ct. 1851 (1996). USX argued that it could not have brought contribution and indemnification claims against Penn Central prior to consummation because it was not sued until after the consummation date. \textit{See id.} The Third Circuit stated that “[t]his case is analogous to Schweitzer. Like the subclinical injuries there, appellants here had no cause of action against Penn Central pre-consummation. Because they could not have filed this action during the Penn Central bankruptcy, Schweitzer’s lesson is that their claims could not have been discharged.” \textit{Id.} at 1115.

\textsuperscript{121}. \textit{See Reading}, 115 F.3d at 1123 (explaining Third Circuit framework for determining when claim is discharged in bankruptcy).

\textsuperscript{122}. \textit{Id.}

\textsuperscript{123}. \textit{Id.} at 1122-23 (adopting Schweitzer analysis of contingent claims).

\textsuperscript{124}. \textit{Id.} at 1123. Reading argued that section 113(f)(1) permitted a contribution action based on “prospective liability” because the statute provides that “any person may seek contribution from any other person who is liable or potentially liable . . . .” \textit{Id.} (quoting 42 U.S.C. § 9163(f) (1994)). In addition, Reading noted that courts, “finding an implied right of action under § 107(a)(4)(B), interpreted that section as extending to cases of potential liability.” \textit{Id.} Nevertheless, the Third Circuit rejected Reading’s arguments because it found that courts did not begin recognizing an implied right of action under section 107(a)(4)(B) until two years after CERCLA’s enactment. \textit{See id.} (noting that one of earliest cases to recognize implied right to contribution was not decided until two years after Reading’s consummation date).

\textsuperscript{125}. \textit{See id.} (stating that ruling on discharge does not end matter). The Third Circuit noted:

Although Conrail’s contribution claim was not discharged by Reading’s bankruptcy, the claim nevertheless fails as a matter of law. Conrail’s contribution claim depends on Conrail and Reading both being liable to a
quires some form of joint liability. Therefore, “Conrail’s contribution claim depend[ed] on Conrail and Reading both being liable to a third party, in this case to the United States.” Unlike Conrail’s potential claim that survived bankruptcy, the court found that the United States’ cost recovery claim against Reading was discharged in bankruptcy.

The government’s claim accrued prior to consummation because all four elements of the CERCLA claim existed prior to consummation. The court rejected the government’s argument that a claim could not accrue before the claimant knew of its existence. The court stated that this “novel interpretation of Schweitzer” was wrong because it “metamorphose[d] the legal relationship requirement [of Schweitzer] into a test turn-

third party, in this case to the United States. Because . . . we find that the United States’s claim was discharged by Reading’s bankruptcy, Conrail’s contribution action, based on Reading’s common liability with Conrail to the United States, cannot proceed.

Id.

126. See id. at 1124 (“We held . . . that § 113(f) uses the term contribution in its traditional, common law sense . . . [which] requires some form of joint liability.” (citing David B. Lilly Co. v. Fisher, 18 F.3d 1112, 1123 (3d Cir. 1994) (stating that contribution claim is available only when proposed contributor shares with defendant some common liability to plaintiff); Green v. United States Dept. of Labor, 775 F.2d 964, 971 (8th Cir. 1985) (finding that indemnity and contribution require common liability))).

Moreover, the court looked to the statutory language of section 113(f)(1) and concluded that “[c]ontribution, by its own definition, requires a common liability for the same injury.” Id.

127. Id. at 1123.

128. See id. at 1125 (discussing effect of bankruptcy on United States’ CERCLA claim against Reading). The Third Circuit rejected the government’s argument that the court should not “reach the issue of Reading’s liability to the United States.” See id. at 1123 (noting that government claimed sole issue on appeal was whether third party plaintiffs’ contribution claim was discharged). The court rejected the government’s argument for two reasons. First, because “as a matter of judicial efficiency, remand would be wasteful,” and second, because the court found that joint liability was an essential element of any contribution claim. Id. at 1123-24.

129. See id. at 1125 (discussing government’s cost recovery claim against Reading). The Third Circuit set out the four elements of a CERCLA claim: (1) defendant is a PRP; (2) hazardous substances are disposed at a “facility”; (3) there is a release or threatened release into the environment; and (4) the release causes the incurrence of response costs. See id. at 1118.

“As to the four elements, there is no dispute that Reading was a ‘responsible party,’ that hazardous substances were disposed of at the Douglassville ‘facility,’ or that a ‘release’ occurred. The only issue is whether the United States incurred response costs prior to December 31, 1980. It did.” Id. at 1125. The court found that the federal government incurred response costs in connection with Douglassville in both 1970 and 1972 when it acted to clean up the site pursuant to the Clean Water Act. See id. (concluding that cleanups met CERCLA’s definition of “removal action”).

130. See id. at 1125-26. The court stated that the United States’ argument was “simply wrong.” Id. at 1125. “Schweitzer requires a legal relationship only for the discharge of a contingent claim in bankruptcy. No such relationship is needed for an accrued claim.” Id.
ing on whether the government had knowledge of the potential claim."

Moreover, the court stated that even if knowledge was a prerequisite for discharge, it would not reverse the district court's finding that the government had constructive knowledge of its claim prior to consummation.

In sum, the Third Circuit affirmed the decision of the district court to enjoin Conrail and the other third party plaintiffs from pursuing environmental claims against Reading. The Third Circuit held that the United States' failure to pursue a claim against Reading in bankruptcy effectively barred Conrail from asserting its contribution claim against Reading.

B. Critical Analysis

Reading is the first case in the Third Circuit to test the "validity of a CERCLA contribution claim between parties who do not share common liability to a third person because one of the party's liability was discharged in bankruptcy . . . ." Even though Conrail's contribution claim against Reading was not discharged in bankruptcy, the Third Circuit properly concluded that the claim nevertheless failed as a matter of law because the parties lacked common liability to the United States. Moreover, in reaching its decision the court acknowledged the Seventh Circuit's view.

131. Id.

132. See id. at 1126 (stating that "even if we were to accept the United States's argument and assume that some degree of knowledge is a prerequisite for discharge of an accrued claim (and under Schweitzer it is not), we would still hold that the claim was discharged"). The Third Circuit found that the district court's factual finding regarding knowledge merited deference. See id. (finding question of knowledge is question of fact subject to review only for clear error); see also Brock v. Claridge Hotel and Casino, 846 F.2d 180, 188 (3d Cir. 1988) ("Whether [defendant] knew it was violating the Act, whether it intended to violate the Act, is obviously a question of fact."); Riehl v. Travelers Ins. Co., 772 F.2d 19, 24 (3d Cir. 1985) (noting that issues of knowledge and intent are particularly inappropriate for summary judgment).

In Reading, the Third Circuit reviewed the district court's factual findings that the government had knowledge of its claim prior to consummation:

[T]he United States knew the Douglassville site was an environmental trouble spot and Reading Railroad was connected to it; by October 31, 1980, the EPA had identified the site as [a] potential hazardous waste site; federal officials had twice responded to cleanup needs at the site; EPA knew Reading Railroad had operated a rail line to the site; in 1972 EPA had ordered Reading Railroad to haul waste from the site; and ICC tariffs, available as part of the bankruptcy proceedings, showed that Reading transported hazardous materials to the site.

Reading, 115 F.3d at 1126.

133. See Reading, 115 F.3d at 1125-26 (rejecting government's "novel interpretation" of Schweitzer).

134. See id. at 1126 (adding that holding does not elevate bankruptcy law over CERCLA).


136. For a further analysis of the Third Circuit's reasoning, see infra notes 138-53 and accompanying text.
that a claim does not arise for bankruptcy purposes until the claimant has knowledge of its existence.\(^{137}\)

The Third Circuit properly held that Conrail's only viable claim against Reading was for contribution under section 113(f)(1).\(^{138}\) First, the court's conclusion that CERCLA preempted Conrail's state common law claims for contribution and restitution is consistent with preemption case law.\(^{139}\) Second, the court properly interpreted the legislative history of SARA and determined that a section 107(a)(4)(B) cost recovery action was not available to Conrail.\(^{140}\) Third, the court's decision to limit Conrail

\(^{137}\) See Reading, 115 F.3d at 1126 (noting that holding would not change if some degree of knowledge was prerequisite for discharge). For a further discussion of the approaches taken by other courts in deciding when a claim arises, see supra notes 60-65 and accompanying text.

\(^{138}\) For a complete discussion of the Third Circuit's decision limiting Conrail to a claim for contribution under section 113(f)(1), see supra notes 109-16 and accompanying text.


As the United States Supreme Court has noted, a federal statute preempts state law in three instances: 

(1) where Congress expressly states it in the federal statute; (2) where the federal statutory scheme is so pervasive as to occupy the field and leave no room for supplemental legislation; or (3) where the federal statute and state law actually conflict." California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987).

Reading presents an obvious example of the third type of preemption. If parties were permitted to pursue state claims then the contribution protection provision of section 113(f)(2) would be defeated. See Pretty Prod., 780 F. Supp. at 1495 n.3. The United States District Court for the Southern District of Ohio stated that allowing the state law claims for contribution would make CERCLA's immunity for settling parties illusory, in other words, "a stick with no carrot . . . . Congress enacted the SARA amendments to encourage quick settlements . . . . [and] could not possibly have intended to allow non-settling parties to negate CERCLA's settlement incentive through the use of state contribution claims." Id.

\(^{140}\) See S. REP. No. 99-11, at 44 (1985) (recognizing need to clarify judicially implied right to contribution); H.R. REP. No. 99-253, pt. 1, at 59 (1985) (noting incentive created by bill to "encourage quicker, more equitable settlements, decrease litigation and thus facilitate cleanups"); 131 CONG. REC. 24,450 (1985) (statement of Sen. Stafford) (predicting amendment would "remove[] any doubt as to the right of contribution"); see also Sun Co. v. Browning-Ferris, Inc., 124 F.3d 1187, 1190 (10th Cir. 1997) ("Congress codified this implicit right to contribution with the enactment of the Superfund Amendments and Reauthorization Act of 1986 (SARA) . . . ."); New Castle County v. Halliburton Nus Corp., 111 F.3d 1116, 1122 (3d Cir. 1997) (holding that Congress codified right to contribution in section 113(f)(1)); United States v. Colorado & E. R.R. Co., 50 F.3d 1530, 1535 (10th Cir. 1995) (finding that with SARA, Congress codified implied right to contribu-
Fourth, the Third Circuit appropriately left open the possibility to a contribution action under section 113(f)(1) is supported by other courts.\textsuperscript{141} Fourth, the Third Circuit appropriately left open the possibility

141 United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 98-101 (1st Cir. 1994) (employing cannons of statutory construction to conclude that Congress codified right to contribution); County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1516 (10th Cir. 1991) (finding that Congress "ratified" courts' efforts to recognize implicit right to contribution); Ninth Ave. Remedial Group v. Allis Chalmers Corp., 974 F. Supp. 684, 689 (N.D. Ind. 1997) (finding that Congress codified implicit right to contribution).

The legislative history provides strong support for the Third Circuit's decision to restrict Conrail to a contribution claim under section 113(f)(1). For example, the Senate Report states:

This amendment clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.


Moreover, a number of other factors support the Third Circuit's decision to limit Conrail to a claim for contribution under section 113(f)(1). First, the purpose of SARA, to promote private action through settlement with the EPA, is best served by limiting PRPs to contribution actions under section 113(f)(1). Otherwise, the enticement for PRPs to settle—the contribution protection provision of section 113(f)(2)—would have no effect because PRPs would be able to bypass settlement agreements and bring cost recovery actions under section 107(a).\textsuperscript{142} See 42 U.S.C. § 9613(f)(2) (1994) (providing for settlement as means of avoiding liability); H.R. Rep. No. 99-253, pt. 1, at 80 ("Private parties may be more willing to assume the financial responsibility for some or all of the cleanup if they are assured that they can seek contribution from others."); see also United Techs., 33 F.3d at 103 (holding that method for encouraging settlements "would be gutted" if courts allowed PRPs to bring cost recovery actions); In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1026-27 (D. Mass. 1989) (finding that SARA's contribution provision creates "carrot and stick" assisting EPA in obtaining settlements).

Additionally, the fact that CERCLA assigns different statutes of limitations to cost recovery actions under section 107 (six years) and contribution actions under section 113 (three years) is evidence that Congress intended the two actions to be distinct and separate from one another.\textsuperscript{143} See New Castle County, 111 F.3d at 1121 (contrasting claims under sections 107 and 113); Colorado & E. R.R., 50 F.3d at 1536 (stating that permitting PRPs to recover from other PRPs under section 107 renders section 113 meaningless); United Techs., 35 F.3d at 101 (finding that each subsection in statute must be given effect); Ninth Ave., 974 F. Supp. at 689 ("To permit a PRP to sue under section 107 directly would render contribution causes of action under section 113 and the statute of limitations for 113 actions meaningless."); Town of New Windsor v. Tesa Tuck, Inc., 919 F. Supp. 662, 681 (S.D.N.Y. 1996) (same); Boyce v. Bumb, 944 F. Supp. 807, 810 (N.D. Cal. 1996) (same).\textsuperscript{144}

141 See Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997) (holding that cost recovery under section 107(a) is limited to innocent parties and adding that conclusion that section 107 incorporates claim for contribution is "unremarkable"); New Castle County, 111 F.3d at 1120 (joining several other circuits in holding that action by PRP is "by necessity" one for contribution); Rumpke of Ind., Inc. v. Cummins Engine Co., 107 F.3d 1235, 1240 (7th Cir. 1997) (noting agreement with other circuits that cost recovery under section 107 is generally not available to PRPs); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1513 (11th Cir. 1996) (finding that PRP who disposed of most, if not all, of contaminating substances was limited to contribution under section 113(f)(1));
NOTE 681

Colorado & E. R.R., 50 F.3d at 1536 (holding that PRP who brought cost recovery actions against other PRPs had "quintessential claim for contribution" under CERCLA).

The Third Circuit decided New Castle County just 10 days before Reading. See New Castle County, 111 F.3d at 1116; Reading, 115 F.3d at 1111. Because the three year statute of limitations for contribution claims under section 113(f)(1) had run, New Castle argued that it could assert a cost recovery claim within the six year limitations period for section 107. See New Castle County, 111 F.3d at 1120 (noting that primary question is whether New Castle's claim is for cost recovery or contribution). The Third Circuit rejected New Castle's approach, stating that “[i]f New Castle is correct, a potentially responsible person found liable under section 107 could bring a section 107 action against another potentially responsible person and could recoup all of its expenditures regardless of fault.” Id. at 1121. The court added that “[t]his strains logic. '[I]t is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures.’” Id. (quoting United Techs., 33 F.3d at 100).

In light of the strong precedent from the other appeals courts, the Third Circuit appropriately decided to limit Conrail to a claim for contribution under section 113(f)(1). See generally Pinal Creek, 118 F.3d at 1302 (noting that majority of courts have restricted PRP to claim for contribution); New Castle County, 111 F.3d at 1120 (discussing decisions of other circuits that section 107 cost recovery may only be brought by innocent party); Boyce, 944 F. Supp. at 809 (noting that First, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits have held that action by PRP against another PRP is claim for contribution under section 113(f)(1) and noting that remaining circuits have not yet decided issue). In New Castle County, the Third Circuit noted:

Every court of appeals that has examined this issue has come to the same conclusion: a section 107 action brought for recovery of costs may be brought only by innocent parties that have undertaken clean-ups. An action brought by a potentially responsible person is by necessity a section 113 action for contribution . . . . We agree with the conclusion reached by our sister courts. New Castle County, 111 F.3d at 1120 (citations omitted).

Although the district courts are in sharp conflict on this issue, a number of courts have concluded that a claim by one PRP against another PRP is one for contribution under section 113(f)(1). See, e.g., M & M Realty, 977 F. Supp. at 687 (finding that PRP must “adequately plead its status as an innocent landowner” to pursue cost recovery under section 107); Ninth Ave., 974 F. Supp. at 689 (noting that all circuits deciding issue have held that PRP can only sue for contribution under section 113); Boyce, 944 F. Supp. at 809 (finding that actions between PRPs are “in the [n]ature of contribution”; SC Holdings, Inc. v. A.A.A. Realty Co., 935 F. Supp. 1354, 1362-65 (D.N.J. 1996) (finding that majority rule limits PRPs who are liable for “at least some of the response costs” to contribution under section 113(f)); Borough of Sayreville v. Union Carbide Corp., 923 F. Supp. 761, 677-78 (D.N.J. 1996) (noting numerous courts that have limited PRPs to contribution actions against other PRPs).

that a PRP may, in some instances, be entitled to bring a cost recovery action under section 107(a)(4)(B), because as one commentator noted, "Some PRP claims are only for cost recovery, others are only for contribution, and still others qualify as both."142

142. Hernandez, supra note 22, at 113 (discussing controversy and proposing resolution); see Reading, 115 F.3d at 1120 (preserving innocent landowner exception that courts have recognized).

The innocent landowner exception permits one who did not contribute to the hazardous condition at the site to bring a cost recovery action under section 107(a)(4)(B) to recover its cleanup costs, even though the landowner, as a PRP, is generally restricted to contribution actions under section 113(f)(1). See Rumpke, 107 F.3d at 1241-42 (holding that landowner "seeking to recover for direct injury to its property inflicted by [another party]" was entitled to bring action under section 107(a)); AM Int'l, Inc. v. Datacard Corp., 106 F.3d 1342, 1347 (7th Cir. 1997) (concluding that PRP qualified for exception because it faced liability solely because of its status as landowner); Redwing, 94 F.3d at 1513 (noting that to bring cost recovery action under section 107(a), plaintiff must be "not themselves liable for contamination"); United Techs., 33 F.3d at 100 ("[I]t is sensible to assume that Congress intended only innocent parties—not parties who were themselves liable—to be permitted to recoup the whole of their expenditures."); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 765 (7th Cir. 1994) (finding that PRP did not experience type of injury that could lead to cost recovery action under section 107(a)); M & M Realty, 977 F. Supp. at 686 (adopting innocent landowner exception and permitting plaintiff to amend complaint to include cost recovery claim under section 107(a)); Ninth Ave., 974 F. Supp. at 690 (noting innocent landowner exception); Wolf, Inc. v. L. & W. Serv. Ctr., Inc., No. 4:CV96-3099, 1997 WL 141685, at *7-8 (D. Neb. March 27, 1997) (following Rumpke and holding that plaintiffs' cost recovery claim under section 107 survived summary judgment because plaintiffs alleged they did not contribute to hazardous condition of site); Boyce, 94 F. Supp. at 812 (finding that courts of appeals have adopted innocent landowner exception); Bethlehem Iron Works, Inc. v. Lewis Indus., 891 F. Supp. 221, 223 (E.D. Pa. 1995) (finding that some courts limit section 107 actions to innocent parties).

The innocent landowner exception has its roots in the Seventh Circuit's decision in Akzo Coatings. In dicta, the court noted that the plaintiff had not experienced any "injury of the kind that would typically give rise to a direct claim under section 107(a)—it is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands." Akzo, 30 F.3d at 764.

In a more recent decision, the Seventh Circuit affirmed Akzo and noted that the innocent landowner exception did not thwart CERCLA's statutory scheme promoting allocation of liability. See Rumpke, 107 F.3d at 1240-41 (noting that party who is "partially responsible" could not recover under section 107). The court stated:

[O]ne of two outcomes would follow from a landowner suit under §107(a): either the facts would establish that the landowner was truly blameless, in which case the other PRPs would be entitled to bring a suit under §113(f) within three years of the judgment to establish their liability amongst themselves, or the facts would show that the landowner was
The Third Circuit's holding that Conrail's potential contribution claim against Reading was not discharged in bankruptcy is supported by a number of decisions that have held a claim must exist before it can be discharged.\textsuperscript{143} Other courts, however, would find that Conrail's potential claim was contingent in nature and subject to discharge.\textsuperscript{144} The Third

also partially responsible, in which case it would not be entitled to recover under its § 107(a) theory and only the § 113(f) claim would go forward.\textsuperscript{Id. at 1240.}

Additionally, the United States District Court for the Middle District of Pennsylvania recently noted that the Third Circuit's decision in \textit{Reading} preserves the innocent landowner exception. See \textit{M & M Realty}, 977 F. Supp. at 686 ("While the Third Circuit expressly deferred ruling on this question in New Castle... dicta in \textit{In re Reading Co.} seems to suggest that the court believes that an innocent owner may, at least in some circumstances, have standing to bring a cost recovery action under Section 107(a).")\textsuperscript{143}

\textsuperscript{143} See \textit{Urie v. Thompson}, 337 U.S. 163, 170 (1949) (stating that "'afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves" (quoting \textit{Associated Indem. Corp. v. Industrial Accident Comm'n}, 124 Cal. App. 378, 381 (1932)));\textit{Bessemer}, 71 F.3d 1115, 1117 (3d Cir. 1995) (finding that antitrust claims for contribution and indemnity against Penn Central were not discharged because claims did not arise until plaintiffs were sued), \textit{cert. denied}, 116 S. Ct. 1851 (1996); \textit{In re Central R.R. Co.}, 950 F.2d 887, 892 (3d Cir. 1991) (concluding that claims under Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1994), did not arise until plaintiff discovered injury or should have discovered injury and knew or should have known of its cause); \textit{Paoli Yard}, 944 F.2d 164, 165 (3d Cir. 1991) (holding that claimants were entitled to bring CERCLA claims against debtor because CERCLA did not exist during bankruptcy and therefore CERCLA claims could not exist during bankruptcy); \textit{Albert v. Maine Cent. R.R. Co.}, 905 F.2d 541, 543-44 (1st Cir. 1990) (following Third Circuit, at least with respect to FELA claims); \textit{Zulkowski v. Consolidated Rail Corp.}, 852 F.2d 73, 74 (3d Cir. 1988) (finding that FELA claims for asbestos exposure were not discharged because claims did not arise until after reorganization when injuries became manifest); \textit{In re Remington Rand Corp.}, 856 F.2d 825, 830-32 (3d Cir. 1988) (holding that claim does not arise for discharge until all elements of claim are present and right to payment exists); \textit{Schweitzer v. Consolidated Rail Corp.}, 759 F.2d 986, 943 (3d Cir. 1985) (concluding that railroad workers' claims for asbestos exposure did not arise until injuries became manifest); \textit{In re M. Frenville Co.}, 744 F.2d 332, 336 (3d Cir. 1984) (stating that "threshold requirement" of claim, right to payment, must exist before claim can be discharged); \textit{In re Gladding Corp.}, 20 B.R. 566, 568 (Bankr. D. Mass. 1982) (holding that claim alleging defective recreational vehicle did not arise until defect became manifest, in this case, after consummation).

\textsuperscript{144} See \textit{Acme Printing Ink Co. v. Menard, Inc.}, 812 F. Supp. 1498, 1517 (E.D. Wis. 1992) (adhering to "majority rule that the absence of a government enforcement action against a party" does not bar party from seeking contribution); \textit{Alloy Briquetting Corp. v. Niagara Vest, Inc.}, 756 F. Supp. 713, 718 (W.D.N.Y. 1991) (finding that plaintiff's claim for contribution was not premature even though it preceded determination of plaintiff's underlying liability for response costs); \textit{Mathis v. Velsicol Chem. Corp.}, 786 F. Supp. 971, 975-76 (N.D. Ga. 1991) ("Because this Court has already determined that Plaintiffs are liable parties under CERCLA, Velsicol has a cause of action for contribution against Plaintiffs regardless of the existence of a civil action... ").

Moreover, the Third Circuit's decision in \textit{Bessemer} could also be read to permit the discharge of Conrail's contribution claim. See \textit{Bessemer}, 71 F.3d at 1117 (noting that Penn Central became potentially liable to Conrail for contribution and indem-
Circuit, however, remarked that to discharge Conrail's claim would lead to a "harsh result" and improperly "penalize Conrail for failing to register a claim which would not be judicially recognized for two years."145

Additionally, the Third Circuit properly concluded that the United States' CERCLA claim against Reading was discharged in bankruptcy, despite the government's argument that it did not know the claim existed until after bankruptcy.146 In reaching its decision, the court acknowledged as soon as CERCLA was enacted) (emphasis added). In Bessemer, the plaintiffs were successful in arguing that their antitrust claims against Conrail did not exist until after the consummation date and that therefore the claims could not have been discharged. See id. at 1114-15 (adding that plaintiffs' claims for contribution and indemnity could not have been filed until plaintiffs were sued). Reading relied on the dicta in Bessemer to support its argument that Conrail had a contingent claim as soon as CERCLA was enacted on December 11, 1980, exactly 20 days before the Reading consummation date. See Amended Brief for Appellee at 24-25, In re Reading Co., 115 F.3d 1111 (3d Cir. 1997) (Nos. 95-1987, 95-1988).

145. Reading, 115 F.3d at 1125. In Reading, there was no statutory basis for a contribution claim under CERCLA until SARA was enacted in 1986. See id. (following Paoli Yard and holding that claim for contribution was not discharged because SARA had not yet been enacted). Even if a statutory right to contribution under CERCLA had existed prior to consummation, Conrail's claim would not have accrued until Conrail paid the United States the primary response costs. See Bessemer, 71 F.3d at 1115 (holding that contribution claim accrues at time of payment of primary judgment); Sea-Land Serv., Inc. v. United States, 874 F.2d 169, 171 (3d Cir. 1989) (reaching similar rule for federal admiralty law), aff'd, 919 F.2d 888 (3d Cir. 1990); Frenville, 744 F.2d at 337 ("For both separate actions and third-party complaints, a claim for contribution or indemnification does not accrue at the time of the commission of the underlying act, but rather at the time of the payment of the judgment flowing from the act."); In re Reading Co., 404 F. Supp. 1249, 1251 (E.D. Pa. 1975) (stating that joint tortfeasor is not entitled to contribution until it "has by payment discharged the common liability" or paid more than its fair share).

146. See Reading, 115 F.3d at 1126. The case law, especially within the Third Circuit, supports the court's holding. See In re Chateaugay Corp., 944 F.2d 997, 1005-06 (2d Cir. 1991) (finding that CERCLA claim exists and can be discharged provided release occurred prepetition); Central R.R., 950 F.2d at 892 (holding that claim does not arise "until claimant discovers, or a reasonable person would have discovered, his [or her] injury and knows, or has reason to know, the cause thereof"); Zulkowski, 852 F.2d at 76-77 (concluding that claim cannot be discharged unless all elements of cause of action, including manifestation of injury, exist prior to consummation); Pinney Dock, 771 F.2d 762, 766 (3d Cir. 1985) (holding that antitrust claims were discharged because all elements of cause of action existed prior to reorganization proceeding); Schweitzer, 758 F.2d at 942 (concluding that FELA claim did not exist until all elements of cause of action exist); Frenville, 744 F.2d at 337 (finding that claim for contribution did not accrue until payment of primary judgment).

In holding that the government's claim against Reading accrued prior to bankruptcy and was discharged, the Third Circuit properly determined that all the elements of the claim existed prior to bankruptcy. See Reading, 115 F.3d at 1125 (noting that only issue was whether government incurred response costs prior to bankruptcy, and concluding that it did). EPA's response costs at Douglassville pursuant to the Clean Water Act constituted CERCLA response costs. See United States v. Rohm & Haas Co., 2 F.3d 1265, 1275 & n.15 (3d Cir. 1993) (stating that "removal" is removal whether it is undertaken pursuant to CERCLA or another statute); see also Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989).
edged the Seventh Circuit's alternative approach that a claim cannot arise until the claimant has knowledge of its existence. The court was correct to reject the United States' argument that it should prevail under this

(finding that response cost is interpreted liberally to include variety of actions designed to protect public health); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 747-48 (8th Cir. 1986) (concluding that "all costs' incurred by the government that are not inconsistent with the NCP are conclusively presumed to be reasonable"); United States v. Kramer, 757 F. Supp. 397, 420 (D.N.J. 1991) (holding that CERCLA permits recovery of all response costs not inconsistent with NCP); Chemical Waste Management, Inc. v. Armstrong World Indus., 669 F. Supp. 1285, 1290 (E.D. Pa. 1987) (permitting RCRA owners and operators to recover CERCLA response costs); Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1054 (D. Ariz. 1986) (requiring consistency with NCP for response cost recovery), aff'd, 804 F.2d 1454 (9th Cir. 1986); United States v. Wade, 577 F. Supp. 1326, 1336 (E.D. Pa. 1983) (finding that "defendants err[ed] in attempting to link liability under § 107 to restrictions placed on Superfund expenditures under § 104").

147. See Reading, 115 F.3d at 1126 (noting that outcome of case would not change if knowledge was prerequisite for discharge of accrued claim); see also Chicago I, 974 F.2d 775, 786 (7th Cir. 1992) (providing alternative analysis for when claim arises in bankruptcy).

In Reading, Conrail and the United States argued that a claim could not accrue without the claimant's knowledge of its existence. See Reply Brief for Appellant at 8, In re Reading Co., 115 F.3d 1111 (3d Cir. 1997) (Nos. 95-1987, 95-1988) ("Stated generally, whether one has a contingent claim depends upon how much the putative claimant knows or should know"); Reply Brief for the United States of America at 2, In re Reading Co., 115 F.3d 1111 (3d Cir. 1997) (Nos. 95-1987, 95-1988) (stating that determination of legal relationship requires assessment of claimant's knowledge of rights against debtor).

As previously mentioned, the government's argument that its claim against Reading could not be discharged in bankruptcy unless the government had knowledge of the claim's existence finds support in caselaw outside the Third Circuit. See Chicago I, 974 F.2d at 786 (concluding that claim exists when claimant can tie debtor to F.known release of hazardous substance that claimant knows has led to response costs); see also AM Int'l, 106 F.3d at 1348 (holding that where claimant lacked constructive knowledge of CERCLA claim against debtor prior to bankruptcy, claim was not discharged); Chicago II, 3 F.3d 200, 207 (7th Cir. 1993) (finding that claimant had sufficient knowledge of its potential CERCLA liability to warrant discharge); In re Jensen, 995 F.2d 925, 931 (9th Cir. 1993) (holding that claimant possessed sufficient knowledge to justify discharge of claim).

Moreover, in two Third Circuit decisions, the court appeared to adopt the Seventh Circuit's knowledge requirement. See Central R.R., 950 F.2d at 892 (finding that "a claim is not manifest until the claimant discovers, or a reasonable person would have discovered, his injury and knows, or has reason to know, the cause thereof") (emphasis added); Remington Rand, 836 F.2d at 832-35 (finding that claimant "knew it possessed a right to payment for breach of contract" and therefore contingent claim was discharged) (emphasis added). The Third Circuit noted:

In most cases, we anticipate that the government will not possess sufficient knowledge to assert a potential claim until completion of a post-award audit. Only then would parties' "legal relationship" ... be such that the government would be in a position to determine and assert its right to payment. Indeed, the post-award audit is expressly designed to ascertain possible contract breaches. Therefore, the government's bankruptcy claim would likely not arise until that time.

Remington Rand, 836 F.2d at 833 n.7.
approach because the facts suggest the government had at least constructive knowledge of its claim against Reading.148 Under the Second Circuit's debtor-friendly approach, however, the United States would have fared even worse.149 The court's approach is sound because it follows the

In Reading, Conrail and the United States pursued this line of reasoning and argued that a contingent claim could not arise unless the claimant had knowledge of its existence. Therefore, because a contingent claim arises before an accrued claim, it is logical to conclude that the latter must have at least all the elements of a contingent claim. In Reading, however, the Third Circuit held otherwise. Reading, 115 F.3d at 1122 (noting that lack of knowledge or legal relationship prevented existence of contingent claim).

During oral argument, the court questioned the government's counsel on this very issue:

MR. BRYSON: Well, your Honor, the crucial thing that's missing here is any indication that the Government knew that Reading was potentially the responsible party.... [T]he information that the United States collected about Reading's involvement did not come to the Environmental Protection Agency's knowledge until 1985 which was some five years after the discharge, five years after CERCLA was enacted.

CHIEF JUDGE SLOVITER: Your argument here is that there was no—let me just paraphrase it so I understand it because it's a complicated position, everybody is taking different positions on different issues, that the United States' position is it didn't have a CERCLA claim against Reading before 12/31/80, the date of the consummation, because it didn't know that Reading was responsible—

MR. BRYSON: That's correct.

CHIEF JUDGE SLOVITER: —for this contamination.

MR. BRYSON: Right. The phrase that one sees in the cases is knowledge that ties a potentially responsible party to a site. And there has to be knowledge of the responsible nature of that tie, just simply that Reading has a rail line that goes to the site doesn't allow an inference that EPA knew that they had sent, you know, sent their own waste there for deposit and therefore are responsible under CERCLA.

Transcript of July 15, 1996 Oral Argument at 7-10, In re Reading Co., 115 F.3d 1111 (3d Cir. 1997) (Nos. 95-1987, 95-1988). The Third Circuit's opinion fails to address the line of cases Mr. Bryson referred to at oral argument supporting the knowledge requirement. Rather, the court followed its own line of cases and held that an accrued claim could be discharged without the claimant's knowledge of the existence of the claim. See Reading, 115 F.3d at 1125 (rejecting opposing argument that knowledge was required). The Third Circuit did, however, implicitly acknowledge the Seventh Circuit's knowledge test when it stated: "Moreover, even if we were to accept the United States' argument and assume that some degree of knowledge is a prerequisite for discharge of an accrued claim (and under Schweitzer it is not), we would still hold that the claim was discharged." Id. at 1126.

148. See Reading, 115 F.3d at 1126 (reviewing district court's finding that United States possessed constructive knowledge of its claim against Reading).

149. See Chateaugay, 944 F.2d at 1005 (stating that contingent claim arises as soon as response costs are incurred); In re Combustion Equip. Assocs., 883 F.2d 35, 40 (2d Cir. 1988) (stating that "[a]n issue in any attempt by [debtor] to discharge its CERCLA liability is whether the EPA had enough notice of what was happening in the bankruptcy proceeding to make barring its claim fair").
reasoning of previous decisions and charges a party with knowledge of a claim as soon as the claim accrues.\textsuperscript{150}

Finally, the Third Circuit appropriately concluded that without Reading’s potential liability to the United States, Conrail’s contribution claim against Reading failed as a matter of law.\textsuperscript{151} The court followed well-established precedent and held that contribution under CERCLA requires common liability and Reading’s common liability to the United States was discharged in bankruptcy.\textsuperscript{152} Although the Third Circuit accurately applied the law in \textit{Reading}, its holding nevertheless elevates bankruptcy law over environmental law.\textsuperscript{153}

\textsuperscript{150} See \textit{Reading}, 115 F.3d at 1121-22 (discussing Third Circuit cases in accord with court’s decision to discharge government’s claim).

\textsuperscript{151} See id. (holding that Conrail’s contribution claim against Reading cannot proceed absent Reading’s potential liability to United States).

The Third Circuit’s decision to require common liability is supported by the legislative history of SARA, which states that the “amendment clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties.” S. Rep. No. 99-11, at 44 (1985).

\textsuperscript{152} See \textit{Reading}, 115 F.3d at 1123; Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1513 (11th Cir. 1996) (finding that contribution under section 113(f)(1) is means of allocating response costs among PRPs); United States v. Colorado & E. R.R. Co., 50 F.3d 1530, 1555 (10th Cir. 1995) (discussing legislative attempt to clarify contribution with respect to joint and several liability); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 100-01 (1st Cir. 1994) (concluding that CERCLA uses term contribution in traditional sense to refer to claims by and between “jointly and severally liable parties”); Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764-65 (7th Cir. 1994) (concluding that claimant had “quintessential claim for contribution”); County Line Inv. Co. v. Tinney, 933 F.2d 1508, 1516 (10th Cir. 1991) (holding that “‘contribution is only available where joint and several liability can be imposed’” (quoting Colorado v. ASARCO, Inc., 608 F. Supp. 1484, 1492 (D. Colo. 1985))); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989) (finding that contribution entails one liable party suing another liable party); Avnet, Inc. v. Allied-Signal, Inc., 825 F. Supp. 1132, 1138 (D.R.I. 1991) (noting that suit “by one PRP against another to obtain reimbursement is contribution claim”); see also Northwest Airlines, Inc. v. Transportation Workers Union, 451 U.S. 77, 87 n.17 (1981) (noting that 39 states and District of Columbia recognize right to contribution generally among joint tortfeasors); \textit{In re Agent Orange Prod. Liab. Litig.}, 818 F.2d 201, 207 (2d Cir. 1987) (“Contribution is the proportionate sharing of liability among tortfeasors.”); \textit{Restatement (Second) of Torts} § 886(A)(1) at 197 (1997) (requiring common liability before contribution claim exists); \textit{Uniform Contribution Among Tortfeasors Act} § 1 (1955) (same); \textit{Black’s Law Dictionary} 399 (6th ed. 1990) (defining contribution as right “of one who has discharged a common liability to recover of another also liable, the aliquot portion which he ought to pay or bear”); Hernandez, supra note 22, at 100-04 (discussing history of contribution and concluding that no uniform approach to contribution exists in America).

Some district courts, however, have held that contribution under CERCLA does not require common liability and therefore, under this approach, Conrail’s claim would not have depended on the government. See, e.g., Sylvester Bros. Dev. Co. v. Burlington N. R.R., 133 B.R. 648, 653 (D. Minn. 1991) (holding that goals of CERCLA would be thwarted if common liability was required to pursue contribution claim).

\textsuperscript{153} See \textit{Reading}, 115 F.3d at 1126 (holding that there was no CERCLA contribution claim because common liability was discharged in bankruptcy).
Despite its intentions otherwise, the Third Circuit's decision has the "harsh effect" that the court sought to avoid.\textsuperscript{154} The immediate impact of

As previously mentioned, the Supreme Court has indicated that the conflicting goals of statutes should be reconciled. See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494, 502, 507 (1986) (holding that bankruptcy courts and trustees do not have "carte blanche to ignore nonbankruptcy law"); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1018 (1984) (finding that courts have duty to interpret conflicting statutes so that each is effective). Perhaps in an attempt to demonstrate its intent to follow Supreme Court precedent and reconcile bankruptcy law and CERCLA, the Third Circuit noted at the end of its decision: "In reaching this conclusion, we have not elevated bankruptcy law over CERCLA, nor do we perceive a clash between the two systems. Each performs its respective function. Our opinion merely demonstrates that CERCLA claims are treated like any other claim in bankruptcy." \textit{Reading}, 115 F.3d at 1126.

Indeed, other circuits have used a similar tactic. See \textit{Chicago II}, 3 F.3d 200, 207 (7th Cir. 1993) (stating that court was not "vaunting the national bankruptcy policy over environmental concerns"); \textit{Chicago I}, 974 F.2d 775, 779 (7th Cir. 1992) ("Fortunately on these particular facts we can resolve this question in a manner that seems to comport with the policies underlying both CERCLA and the Bankruptcy Act."). The Seventh Circuit later stated, "If anything, we are acknowledging the importance of facilitating the cleanup of environmental contamination by placing upon property owners . . . the obligation of performing an environmental audit as early as possible." \textit{Chicago II}, 3 F.3d at 207.

In \textit{Reading}, the district court reached the same holding as the Third Circuit, but it had a different view of the effect of its decision on the two statutes. See \textit{In re Reading Co.}, 900 F. Supp. 738, 749 (E.D. Pa. 1995) ("My holding today will also further the bankruptcy policy of providing debtors with a fresh start. This policy seems especially pronounced in this case, where the Reading Railroad bankruptcy was consummated over fourteen years ago, and Reading now shares little but its name with its debtor-predecessor."). \textit{aff'd}, 115 F.3d 1111 (3d Cir. 1997).

\textit{Reading}, 115 F.3d at 1123 (expressing concern over adopting Reading's arguments). Conrail could not have filed its claim during the Reading bankruptcy because at that time, Conrail did not have a claim to file. \textit{See id.} Still, despite the Third Circuit's holding to the contrary, Conrail could have filed a contingent claim against Reading during bankruptcy. As the court noted, the pre-SARA judicially implied right to contribution was recognized two years after Reading's bankruptcy. \textit{See id.} (stating that City of Phila. v. Stepan Chem. Co., 544 F. Supp. 1135 (E.D. Pa. 1982), was one of first cases to recognize implied right to contribution). There is no reason, however, why that same right could not have been recognized in 1980. Had that been the case, courts and commentators would be citing \textit{Reading} as the first case to recognize the implied right to contribution, not \textit{City of Philadelphia}.

In the more typical post-SARA scenario, a party may know it has a contribution claim, but it will not know whom to file against because the EPA does not release a list of PRPs. \textit{See generally Whitman, supra note 22, at 196-209} (discussing right of contribution under CERCLA generally). The situation that results, where a party is required to file its contribution claim against an unknown PRP, bears remarkable similarity to the precise outcome the Third Circuit sought to avoid in \textit{Schweitzer}. There the court stated:

[A] person who had no inkling that years in the future he would be killed by a product produced by the debtor would be required to file a claim in the debtor's section 77 bankruptcy proceedings so as to preserve any rights that he might have in a future tort suit. One court has already described such procedure as "absurd.

\textit{Schweitzer v. Consolidated Rail Corp.}, 758 F.2d 936, 943 (3d Cir. 1985).
Reading is that parties seeking contribution from bankrupt PRPs are dependent upon the EPA to take action against the debtor to preserve the contribution claim. Despite this drawback, overall, the Reading decision may have a positive impact on environmental enforcement.

Moreover, even if parties know whom to sue for contribution, their claims will most likely be rejected by the bankruptcy court as too speculative. See 11 U.S.C. § 502(e)(1)(B) (1994) (stating process for filing claims and defining “allowable claims”); Bessem, 71 F.3d 1113, 1118 (3d Cir. 1995) (concluding that it is impossible to affix value to contingent claims and that “uncertainty thus created would render any reorganization plan unworkable”), cert. denied, 116 S. Ct. 1851 (1996); In re Hemingway Transp., 993 F.2d 915, 923-24 (1st Cir. 1993) (noting that contribution claims are often unallowed by statute to prevent “double-dipping” in certain situations); In re Charter Co., 862 F.2d 1500, 1502 (11th Cir. 1989) (refusing to allow contingent claim in bankruptcy proceeding); Schweitzer, 758 F.2d at 942 (noting speculative nature of damages in cases where manifest injury is not required to bring tort claim); In re Gladding Corp., 20 B.R. 566, 568 (Bankr. D. Mass. 1982) (finding that contingent claim for defective recreational vehicle was “classic example of a possible claim which, at the time required for proof, would have been so incapable of proof as to prohibit its allowance”). The Bankruptcy Code provides, in pertinent part:

[T]he court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured, the claim of a creditor, to the extent that... such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution . . . .


As the United States Court of Appeals for the Eleventh Circuit noted, this statute “epitomizes a considered Congressional policy” underlying bankruptcy law, namely that “the bankrupt’s estate should not be burdened by estimated claims contingent in nature.” Charter, 862 F.2d at 1502. To make their claims allowable, “those seeking contribution [i.e., Conrail] will have to incur the expenses associated with a cleanup, or pay pursuant to a judgment or negotiated settlement, prior to stating an allowable claim . . . .” Id. at 1504. The United States Supreme Court has held that costs associated with identifying PRPs are recoverable because “[t]racking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for.” Key Tronic Corp. v. United States, 511 U.S. 809, 820 (1994).

Following Reading, it appears that Conrail might have been better suited to base its argument on constitutional due process. In a number of other cases, the due process argument was raised but avoided when the court decided the case on other grounds. See Paoli Yard, 944 F.2d 164, 169 (3d Cir. 1991) (“Having determined that the petitioners are entitled to bring their CERCLA claims against [the debtor, we need not reach the petitioners’ due process claim.”); Schweitzer, 758 F.2d at 944 (avoiding “thorny constitutional issues”). One commentator noted that “[c]onflicts between the [Bankruptcy] Code and CERCLA raise important constitutional issues which few courts have yet to examine.” McBain, supra note 7, at 248.

155. See Hemingway, 993 F.2d at 924 (noting inconsistencies in allowing PRPs to escape liability in bankruptcy process). But see Charter, 862 F.2d at 1504 (concluding that even though equitable allocation of costs is thwarted, outcome encourages expeditious cleanups).

The First Circuit recognized that this “onerous CERCLA remediation process” may leave “PRPs holding the bag” because their million dollar claims for contribution are dependant on government action. See Hemingway, 993 F.2d at 924 (explaining problems of disallowing contribution claims). The court explained:
In the long term, the Third Circuit’s decision should boost environmental law by removing the assumption, implicit in the government’s argument, that the EPA controls when a claim arises and therefore the agency need not act to protect its interests when such interests are threatened by bankruptcy.\textsuperscript{156} In short, \textit{Reading} alerts both the United States and the private sector to the perils of inaction when environmental protection clashes with bankruptcy law. To protect itself and the private sector against the consequences of such inaction, at a minimum, the Third Circuit’s decision should force the EPA to provide public access to PRP databases similar to existing environmental databases.\textsuperscript{157} Furthermore, in

\textit{Reading} alerts both the United States and the private sector to the perils of inaction when environmental protection clashes with bankruptcy law. To protect itself and the private sector against the consequences of such inaction, at a minimum, the Third Circuit’s decision should force the EPA to provide public access to PRP databases similar to existing environmental databases.\textsuperscript{157}
promoting reorganization, the Third Circuit’s decision actually furthers environmental law by avoiding dissolutions and liquidations that leave no money for hazardous waste cleanups.\(^{158}\)

In the end, the irony of Reading is that the Third Circuit’s decision will probably have little impact on the Douglassville site that sparked the controversy. Thirty-eight years after the first violation at Douglassville, the dump site remains on the NPL as one of the worst hazardous waste sites in the nation.\(^{159}\) The sludge still lies like a “poisonous pudding,” and runoff from the site drains directly into the Schuylkill River.\(^{160}\)

David W. Marston Jr.

\(^{158}\) See Chateaugay, 944 F.2d at 1002 (noting that conflict between bankruptcy and CERCLA “might not be quite as stark as the parties contend”); Jackson, supra note 37, at 51-52 (finding that if claims are not discharged, they may impair viable reorganization of debtor and lead to liquidation or dissolution). It has been noted that “[c]leaning up the environment will not necessarily be aided by agreeing with the agencies that they do not yet have ‘claims.’” Chateaugay, 944 F.2d at 1002. Liquidation and dissolution often result in the company’s assets being unavailable for environmental cleanup and at that point the “claimants are finished . . . in essence, [they] have been sold down the river with zero.” Jackson, supra note 37, at 52.

\(^{159}\) See Budget Fight Halts Superfund Cleanups EPA Has Long Been Targeted For Cuts By Republicans, Chi. Trib., Jan. 15, 1996, at 11 [hereinafter Budget Fight] (reporting that Superfund is in “disarray” and listing Douglassville as one example of statute’s ineffectiveness).

\(^{160}\) See John H. Cushman Jr., Toxic Waste Cleanup is in Shambles, N.Y. Times, Jan. 21, 1996, at 5A (noting that City of Pottstown’s water supply is four miles downstream and 2800 people live within one mile of Douglassville); Budget Fight, supra note 159, at 11 (explaining that Douglassville remains on NPL and Superfund is in “disarray”). “The EPA had estimated that $51 million would be needed in 1996 to dig up the waste and burn it, but now it does not know if it will have the money.” Cushman, supra, at 5A.