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The Polluter in Bankruptcy: Obligations that "Run with the Waste." Torwico Electronics, Inc. v. State of N.J. Dep't of Envtl. Protection (In re Torwico Electronics, Inc.)

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THE POLLUTER IN BANKRUPTCY: OBLIGATIONS THAT "RUN WITH THE WASTE"

TORWICO ELECTRONICS, INC. V. STATE OF N.J., DEP'T OF ENVTL. PROTECTION (IN RE TORWICO ELECTRONICS, INC.) [1]

by THEODORE A. KARDIS

Torwico Electronics, Inc. ("Torwico") leased property at a site in Ocean County, New Jersey from the owner, George Allen Associates.[2] Torwico manufactured electronic transformers[3] at the Ocean County site until September 1985 when it relocated.[4]

Torwico filed for Chapter 11 bankruptcy[5] on August 4, 1989.[6] Torwico's bankruptcy schedules named the New Jersey Department of Environmental Protection and Energy ("NJDEPE") as a creditor.[7] The bankruptcy court mailed notice to NJDEPE on October 4, 1989, informing it that January 2, 1990 was the deadline for filing a proof of claim.[8]

On November 13, 1989, NJDEPE conducted an on-site inspection of the Ocean County site.[9] The inspection uncovered a concealed illegal seepage pit which held hazardous wastes that NJDEPE claimed were migrating into local waters.[10] Pursuant to this inspection, NJDEPE issued two notices of violation to Torwico for the hazardous wastes,[11] citing violations of New Jersey's Solid Waste Management Act[12] and regulations thereunder.[13] Torwico, which had since relocated to a different site, was also given a notice of violation for operating without an Environmental Protection Agency ("EPA") identification number at this new site.[14]

NJDEPE did not file a proof of claim before the January 2, 1990 deadline set by the bankruptcy court.[15] Meanwhile, Torwico took no action concerning the illegal seepage pit at the Ocean County site, although it did acquire an EPA identification number for its new site.[16] Because of Torwico's failure to take action on the seepage pit violation, NJDEPE issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("the Order") on April 9, 1990.[17] NJDEPE assessed Torwico a $22,500 penalty for its failure to comply with the November 1989 notice and ordered Torwico to present a written closure plan for the seepage pit.[18] The Order also contained a clause which purported to exclude the obligations it created from bankruptcy proceedings.[19]

In its motion for summary judgment filed with the bankruptcy court, Torwico contended that its obligations to the state were claims and that they were barred by NJDEPE's failure to meet the filing deadline.[20] The bankruptcy court granted Torwico's motion, denying NJDEPE's cross-motion for summary judgment.[21] NJDEPE appealed to the United States District Court for the District of New Jersey, which reversed the judgment of the bankruptcy court.[22] Torwico appealed to the instant court, the United States Court of Appeals, Third Circuit.[23]

The Third Circuit held that NJDEPE's efforts to compel Torwico to clean up the illegal seepage pit, which posed a continuing hazard, did not constitute a "claim" under the Bankruptcy Code.[24]

II. LEGAL HISTORY

The United States Supreme Court first

1 8 F.3d 146 (3rd Cir. 1993).
2 *Id.* at 147.
3 In re Torwico Electronics, Inc., 131 B.R. 561, 562 (Bankr. D.N.J. 1991).
4 *Torwico*, 8 F.3d at 147.
5 11 U.S.C. §§ 1101-1174 (1988).
6 *Torwico*, 8 F.3d at 147.
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 N.J. STAT. ANN. §§ 13:1E-1 to 1E-207 (West 1991).
13 In re Torwico Electronics, Inc., 131 B.R. 561, 563 (Bankr. D.N.J. 1991).
14 *Torwico*, 8 F.3d at 147.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* at 147-48.
19 *Id.* at 148. The clause read as follows: "No obligations imposed [by this order] . . . are intended to constitute a debt, damage claim, penalty or other civil action which should be limited or discharged in a bankruptcy proceeding. All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment." *Id.*
20 *Id.*
21 *Id.*
22 *Id.*
23 *Id.*
24 *Id.* at 151.

attempted a resolution of the clash between the Bankruptcy Code and environmental laws in the 1985 decision of *Ohio v. Kovacs*.[25] The Court addressed the question of whether certain government actions gave rise to a dischargeable claim in bankruptcy.[26] In *Kovacs*, the State of Ohio had obtained an injunction which ordered William Kovacs, the chief executive officer and stockholder of a corporation, to clean up a hazardous waste site.[27] A $75,000 penalty for causing fish kills accompanied the injunction.[28] Subsequently, Ohio obtained the appointment of a receiver who was instructed to clean up the site.[29] The receiver was to take possession of the site as well as the property and assets of Kovacs and other corporations implicated in the lawsuit.[30] However, the receiver was unable to complete the clean-up before Kovacs filed a personal Chapter 7 liquidation.[31] The State of Ohio argued that Kovacs' obligation to clean up the hazardous waste was not a debt that could be discharged during the bankruptcy proceeding, since it was not even a "debt."[32] In order to reach its result, the Court construed various provisions in the Bankruptcy Code.

The Court reasoned that because a debt is defined as "liability on a claim"[33] and that a claim included the "right to an equitable remedy,"[34] the State had such a claim, as evidenced by the injunction it obtained ordering the cleanup.[35]

The State conceded that a $75,000 penalty for causing fish kills was a debt dischargeable in bankruptcy.[36] Given that the penalty was admittedly a debt, the Court found that the logical corollary was that the cleanup order, albeit a remedy for a statutory violation, nonetheless also constituted a bankruptcy claim.[37] The Court gave the term "claim" the broad construction it saw as apparent from the legislative history.[38]

The Court also turned to the holding of the Court of Appeals as a justification for its ruling. The Court of Appeals had found that Kovacs' cleanup obligation had been reduced to a monetary obligation by virtue of the receiver's actions.[39] The Court adopted this holding, while attaching much significance to the fact that the receiver had divested Kovacs of both the authority and means to clean up the site.[40] It also noted that subsequent to appointing the receiver, the State sought only money from Kovacs.[41]

The Court went on to declare what it had not decided. By way of clarification, it pointed out that its holding did not render Kovacs immune from prosecution for either his violations of Ohio environmental law or his failure to comply with the injunction.[42] Likewise, the Court reserved discussion of the hypothetical possibility that Kovacs might have filed for bankruptcy prior to the appointment of a receiver, with the resultant appointment of a bankruptcy trustee.[43] The Court also expressly stated that it did not hold that the injunction against conduct which would cause further pollution was dischargeable in bankruptcy.[44] Additionally, the Court pronounced it unquestionable that the possessor of the site must comply with state environmental law.[45] Concluding this dicta, the Court found it evident that a current possessor of the site could not maintain a nuisance, pollute the State's waters, or refuse to remove a polluting source.[46]

Since the Supreme Court's decision in Kovacs, two of the United States Courts of Appeals have addressed the issue of whether the obligation to clean up a hazardous waste site pursuant to an environmental injunction survives bankruptcy. In 1991, the Second Circuit was the first to do so in *In re Chateaugay Corp.*[47] *Chateaugay* involved a debtor corporation, LTV, who filed for

25 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985).
26 *Id.*
27 469 U.S. at 275-6, 105 S.Ct. at 706.
28 469 U.S. at 276, 105 S.Ct. at 706.
29 469 U.S. at 275-76, 105 S.Ct. at 706.
30 469 U.S. at 276, 105 S.Ct. at 706.
31 469 U.S. at 276, 276 n.1, 105 S.Ct. at 706.
32 469 U.S. at 278, 105 S.Ct. at 707.
33 11 U.S.C. § 101(12) (1988).
34 11 U.S.C. § 101(5) (1988). According to § 101(5), a "claim" means:
(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. *Id.*
35 *Kovacs*, 469 U.S. at 278-79, 105 S.Ct. at 707.
36 469 U.S. at 279, 105 S.Ct. at 708.
37 *Id.*
38 *Id.*
39 469 U.S. at 282, 105 S.Ct. at 709.
40 469 U.S. at 283, 105 S.Ct. at 709-10.
41 469 U.S. at 283, 105 S.Ct. at 710.
42 469 S.Ct. at 284, 105 S.Ct. at 710.
43 *Id.*
44 469 U.S. at 284-85, 105 S.Ct. at 710-11.
45 469 U.S. at 285, 105 S.Ct. at 711.
46 *Id.*
47 944 F.2d 997 (2d Cir. 1991).

Chapter 11 bankruptcy and listed some 24 pages of "contingent" claims resulting from its operation of hazardous waste sites.[48] The creditors enumerated in these pages included the EPA, every state, and the District of Columbia.[49] The EPA contended that the $32 million in already-incurred Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[50] response costs for which it had filed a proof of claim were just the tip of the iceberg since cleanup was not completed at the sites it had identified and moreover it had not completed the process of identifying all sites for which LTV might be a "potentially responsible party" under CERCLA.[51]

The court ruled that an injunction would constitute a dischargeable "claim" under the Bankruptcy Code if it imposed an obligation to clean up purely as an alternative to an obligation to pay.[52] On the other hand, the court held that an injunction which requires the polluter to take any action that terminates or assuages current pollution is not a "claim" under the Bankruptcy Code.[53] The court pointed out that environmental-based injunctions often combine an obligation to clean up existing wastes with an obligation to end or assuage current, ongoing pollution.[54] The court went on to rule that the former obligation, as it applied to LTV and its creditor, the EPA, was a "claim" under the Bankruptcy Code since CERCLA gave the EPA a right to clean up the site itself and sue for the response costs, which immediately transformed that portion of the injunction into a monetary obligation.[55] Conversely, the court ruled that the latter of these two obligations was not a "claim" since the EPA had no right to a payment as an alternative to continued pollution.[56] In conclusion, the court speculated that most environmental injunctions would not constitute "claims" if its temporal distinction was employed.[57]

The next Circuit to address a similar issue was the Seventh Circuit, which did so in 1992 in *In the Matter of CMC Heartland Partners*.[58] In *CMC*, the Milwaukee Road railroad had gone through a reorganization under § 77 of the Bankruptcy Act of 1898[59] and had emerged as CMC Heartland Partners.[60] The Milwaukee Road had leased property known as the Wheeler Pit to General Motors Corporation in 1956, which dumped paint sludge and coal ash into the pit for nearly 20 years.[61] Although the EPA had knowledge of the Wheeler pit prior to the Milwaukee Road's filing for bankruptcy, it did not file a claim during the proceeding.[62] In an abatement action pursuant to § 106(a) of CERCLA,[63] the EPA ordered GM and CMC to clean up the Wheeler Pit, but did not do so until after the deadline for filing claims in the Milwaukee Road bankruptcy proceeding had passed.[64]

The Seventh Circuit held that CERCLA created a "claim" in bankruptcy at least where it required a debtor to pay money due to acts that had been committed before the bankruptcy proceedings.[65] Thus, since the EPA had not filed a claim in bankruptcy, CMC could not be held liable for its ownership and operation of the Wheeler Pit as the Milwaukee Road.[66] Nonetheless, the court found that CMC was liable for cleanup costs by virtue of its current ownership of the site, which had continued after the reorganization.[67] The court held that CMC could be held liable under §§ 106 and 107(a)(1) of CERCLA[68] because CERCLA creates a claim running with the land by vesting power in the executive branch to direct a current owner to clean up a hazardous waste site.[69]

In dicta, the court pointed out that CMC would have to accept the economic responsibility for the cleanup regardless of whether it disposed of the property or held onto it through the bankruptcy proceeding.[70] The court reasoned that CMC would "pay" for the cleanup even if it sold the

48 *Id.* at 999.
49 *Id.*
50 *See* 42 U.S.C. §§ 9601-9675 (1988 & Supp. I-III 1989-91); 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1993).
51 *Chateaugay*, 944 F.2d at 999. According to 42 U.S.C. § 9607 (a), a potentially responsible party includes (1) the owner and operator of a facility, (2) the owner and operator of a facility at the time of disposal of hazardous substances, (3) a person who arranged for disposal or transport of their hazardous substances at a facility which contains hazardous substances, and (4) a person who accepts hazardous substances for transport to a facility from which there is a threatened or actual release of these substances.
52 *Chateaugay*, 944 F.2d at 1008.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 966 F.2d 1143 (7th Cir. 1992).
59 11 U.S.C. § 205 (1976) (repealed 1978).
60 *CMC*, 966 F.2d at 1144-45.
61 *Id.* at 1145.
62 *Id.* at 1146.
63 42 U.S.C. § 9606 (1988).
64 *CMC*, 966 F.2d at 1145-46.
65 *Id.* at 1146.
66 *Id.*
67 *Id.* at 1146-47.
68 *See* 42 U.S.C. §§ 9606, 9607(a)(1) (1988).
69 *CMC*, 966 F.2d at 1146.
70 *Id.* at 1147.

property, since the cleanup costs would be reflected in the lower price it would have to accept in order to sell.[71]

In determining whether the EPA's order survived bankruptcy, the court first stated that a statutory obligation attached to current ownership would survive.[72] The court then identified the question as whether or not the EPA's order was dependent on CMC's current ownership.[73] To answer this question, the court articulated the standard that the EPA must establish that harmful releases are threatened or ongoing.[74] The court found that the EPA had met this standard and had avoided the conclusion that it was "repackaging a forfeited claim for damages."[75]

Few courts have addressed the important issue of which portions, if any, of an environmental injunction survive a bankruptcy proceeding. The United States Court of Appeals, Third Circuit, was the most recent court to find itself at the crossroads of environmental and bankruptcy law, as it did in the instant decision.

III. The Instant Decision

In the instant decision, the Torwico court began its analysis by stating the principle that a debtor must comply with state environmental laws and may not maintain a nuisance.[76] Concomitant with this principle, the court reasoned that a state can compel a debtor to comply with its laws, even to the extent of requiring the debtor to take action which would incur expenses, so long as it does not require the debtor to pay money directly to it.[77]

The Torwico court held that the state's Order did not require Torwico to pay money directly to it.[78] The court found it evident that the state's Order requiring Torwico to present a written closure plan for the seepage pit constituted compelling Torwico to take action which would bring it into compliance with state laws.[79] Despite finding that no payment of money was required by the injunction, the court recognized the possibility that such an injunction could still constitute a "claim" under the Bankruptcy Code.[80]

The court proceeded to articulate two additional tests which it would use to analyze the possibility that the injunction was a "claim."[81] First, it stated that for an order not to be a "claim," it must be in response to an ongoing and continuing threat, not just a disguised reformulation of a previously barred claim for damages.[82] Second, the court found that an order would constitute a claim if the state was authorized to do the cleanup itself and sue for its costs afterwards, since such a situation would create a breach that gives rise to a right to payment.[83]

After applying these tests to the facts of the case, the court ruled that the findings of the state's inspection met the first test.[84] Since the state had shown that the seepage pit was an ongoing and continuing threat in that it continued to leak wastes into local waters, the Order was not merely a "repackaged claim for damages."[85] Moreover, the Order passed the second test as well since it created an obligation in Torwico to remedy ongoing pollution, and not a right to payment in the state.[86] Returning to the general principle which began its discussion of the case at hand, the court reiterated that the state could force Torwico to comply with its environmental laws to the extent that it was mal·ing Torwico remedy an existing hazard.[87]

The court than proceeded to reject Torwico's position that it could not be held responsible for the cleanup since it no longer occupied the Ocean County site.[88] The court distinguished the instant case from Kovacs by pointing out that Torwico could conduct the cleanup since it had access to the site and the state had not cleaned it up either.[89] Applying New Jersey law, the court found that Torwico had an ongoing responsibility for the wastes it had generated.[90] Despite the fact that Torwico was no longer in possession of the Ocean County site, the

71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 *Torwico*, 8 F.3d at 150.
77 *Id.*
78 Id.
79 *Id.* at 150, 150 n.5.
80 *Id.*
81 *Id.* at 150-51. The court did not expressly adopt these tests, which are lifted from the *CMC* and *Chateaugay* decisions, but such an inference is readily made from the fact that the court stated that *CMC* and *Chateaugay* were "both persuasive and consistent" and the fact that it went on to utilize both tests. *Id.*
82 *Id.* at 150.
83 *Id.* This second test could be conceptualized as a subtest of the first, since the court prefaced it by stating that such an order would be separate from an obligation to cease or alleviate ongoing pollution. *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.* at 151.
89 *Id.*
90 *Id.*

court found that it was still responsible for the nuisance it had created since the wastes it had generated continued to threaten the environment.[91] The court ruled that the obligations the state's Order had created were not "claims" dischargeable in bankruptcy.[92]

The court also factually distinguished the instant decision from Kovacs. The court pointed out that the instant decision was unlike Kovacs since the state's Order did not require the payment of money to the state nor did it create a right to payment under the applicable New Jersey laws.[93] The court was satisfied that the Order was not a "claim," as the injunction in Kovacs was, since the state was pursuing cleanup of a current pollution-producing site.[94] Furthermore, the state's lack of an option to accept payment in place of continued pollution also persuaded the court that the Order was not a claim.[95] Since the state lacked this option, and the Order was intended to ameliorate ongoing pollution, the court ruled that it was not a "claim" under the Bankruptcy Code.[96]

The court held that Torwico's obligations "r[a]n with the waste."[97] It reasoned that since the waste was Torwico's and it presented an ongoing and continuing environmental hazard, Torwico was responsible for cleanup no matter where Torwico or the waste might be.[98] The court found it significant that the Order was not addressed to past damages, but rather to future harm caused by Torwico's waste.[99]

The Third Circuit concluded by summarizing its holding that the state's Order requiring Torwico to clean up the Ocean County site, a site which continued to pollute the surrounding environment, was not a "claim" for purposes of the Bankruptcy Code.[100] Furthermore, the court held that the state's inherent regulatory and police powers entitled it to issue the Order.[101]

IV. Comment

In relation to existing precedent, the Torwico court propounds to be faithful to *Kovacs*, *CMC*, and *Chateaugay*.[102] To this extent, Torwico joins the few courts which have decided the question of whether an injunction requiring a debtor to clean up a hazardous waste site survives a bankruptcy proceeding. Faithfulness to these prior holdings was not difficult for the Torwico court to claim, since none of them truly constrained the Third Circuit. As far as Kovacs was concerned, the Torwico court only had to distinguish factually the instant case in order to escape the confines of Kovacs' narrow holding. Once it had accomplished this, it was free to explore the issues which Kovacs explicitly stated it did not address.[103] Since the holding of Kovacs is limited to injunctions which mandate the payment of money, the Torwico court looked to *CMC* and *Chateaugay* as persuasive authority although it was not required to.

Nonetheless, while Torwico is admittedly consistent with *CMC* and *Chateaugay*, it breaks new ground without explicitly announcing that it is doing so. Torwico's unique holding was that an injunction requiring cleanup is valid where the debtor is not in possession but has access to the site and the ability to conduct the cleanup, the debtor generated the hazardous waste, and the hazardous waste continues to threaten the environment. In the words of the court, Torwico's obligations "run with the waste."[104] This precedentially unique holding requires the polluting debtor to remedy the harm caused by the waste it has created regardless of the debtor's location, the waste's "location" (e.g. migration onto adjacent lands or waters), or the debtor's post-reorganization financial condition. In comparison, the court in *CMC* only held that the debtor's obligations run with the land, a considerably narrower ruling.

The policies which underlie both environmental and bankruptcy law and helped shape the Torwico decision are weighty indeed. On the one hand, the Bankruptcy Code embodies the ideal of a "fresh start"[105] for reorganized debtors by providing a means of allocating pre-bankruptcy assets to various creditors and preserving future profits for the debtor which should save otherwise viable businesses.[106] On the other hand, environmental laws, whether they are state or federal, seek to protect public health,

91 *Id.* The court went on to argue that *Kovacs*, *CMC*, and *Chateaugay* all suggested that Torwico had such an ongoing responsibility. *Id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.* See also *Chateaugay*, 944 F.2d at 1008; 11 U.S.C. § 101(5)(B) (1988).
97 *Torwico*, 8 F.3d at 151.
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* at 150-51.
103 *See supra* notes 41-45 and accompanying text.
104 *Torwico*, 8 F.3d at 151.
105 *See* H.R. Rep. No. 595, 95th Cong., 2d Sess. 174 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5968-69, 6135; Fallick v. Kehr, 369 F.2d 899, 904 (2nd Cir. 1966).
106 *See Chateaugay*, 944 F.2d at 1002; *CMC*, 966 F.2d at 1146; James K. McBain, Note, *Environmental Impediments to Bankruptcy Reorganizations*, 68 Ind. L.J. 233, 233-4 (1992).

public safety, and (obviously) the environment.[107] The state and federal legislation found in Torwico and its supporting authorities have the objective of the cleanup of environmentally hazardous materials.[108]

When the competing policies are analyzed interactively, it is difficult to favor a bankruptcy policy path. A rule which disallowed injunctions against ongoing pollution by a post-reorganization debtor would have the effect of giving the debtor a right it did not have prior to bankruptcy. Dicta in *Kovacs* stated as a foregone conclusion that the possessor of a site, whether a debtor or its successor in interest, cannot refuse to remedy ongoing pollution, regardless of its origins.[109] It would not be just to allow the debtor to skirt his statutory obligations by merely transferring his possession.

Many commentators argue that the policy goals of bankruptcy are paramount, observing that environmental laws such as CERCLA sometimes cause the "sudden death of otherwise viable firms."[110] However, this also would require the conclusion that a debtor should be less accountable under applicable environmental laws inside bankruptcy than it would be outside of it.

Furthermore, the ramifications of allowing proven polluters to survive bankruptcy should be considered when the relative merits of reorganization versus compliance with environmental regulations are compared. Ideally, the onus of statutory fines and cleanup costs would weed out those firms whose production-induced detriment to the environment outweighs their benefit as a producer in the marketplace. However, this "survival of the socially-fit" can only be accomplished if environmental laws retain their force through a bankruptcy proceeding. If irresponsible firms are allowed to avoid environmental regulation by ducking in and out of bankruptcy, these "otherwise viable" firms would certainly be doing more harm than good to society. The "fresh start" policy goal of the Bankruptcy Code must be subordinated to society's greater interest in the preservation of public health, safety, and the environment.

In fact, the very applicability of the "fresh start" doctrine to Chapter 11 reorganizations is questionable.[111] The doctrine was originally developed to give a second chance to individual debtors, not to bail out inefficient or mismanaged businesses.[112] In fact, some commentators go so far as to say that the discharge of claims against a corporation in bankruptcy has nothing to do with the "fresh start" doctrine.[113] Instead, the discharge has been conceptualized as an incentive to favor reorganization over dissolution when the corporation's value as a going concern significantly exceeds its liquidated assets.[114] Regardless, it is difficult to endow this net retained corporate value with a higher public policy status than the public health, safety, and environmental concerns addressed by the environmental legislation.

Conceptual attempts at a resolution of this conflict have produced a myriad of approaches. Several theories would require that policy-makers legislate the injunction into a claim in bankruptcy. Some commentators suggest that injunctions should be classified based on their dependence on a debtor's continued existence.[115] Thus, if the pollution would cease when the debtor ceased to exist, the injunction would be deemed a non-dischargeable claim.[116] Conversely, if the pollution would continue regardless of the debtor's continued existence, it would be a dischargeable claim.[117] Such a scheme would certainly favor bankruptcy policy considerations over environmental ones. Essentially, it would allow debtors to hide under the veil of bankruptcy proceedings. Debtors would emerge from bankruptcy immune from statutory obligations related to waste which they themselves had created; waste that is continuing to pollute the environment. In fact, some courts have criticized this classification scheme for its inability to cope with the ongoing pollution fact pattern.[118]

A possible alternative method of reconciling the current state of the intersection of environmental and bankruptcy law would be to enact legislation to give environmental violations resulting in judgments or injunctions priority in bankruptcy proceedings. This idea was proffered in a concurring opinion by Justice O'Connor in *Kovacs*.[119]

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107 *See* Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1201 n.7 (1984); *CMC*, 966 F.2d at 1146.
108 *See Chateaugay*, 944 F.2d at 1002.
109 *Kovacs*, 469 U.S. at 285.
110 McBain, *supra* note 106, at 234.
111 Phillipe J. Kahn, Comment, *Bankruptcy Versus Environmental Protection: Discharging Future CERCLA Liability In Chapter 11*, 14 CARDOZO L. REV. 1999, 2034-37 (1993).
112 *Id.* at 2033.
113 *See* Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 110 n.45 (1984); THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 227 n.5 (1986).
114 *Id.* at 190-91.
115 Baird; *supra* note 107, at 1204.
116 *Id.*
117 *Id.*
118 *Chateaugay*, 944 F.2d at 1007.
119 *Kovacs*, 469 U.S. at 286, 105 S.Ct. at 711.

However, it would be necessary to make these judgments and injunctions "claims" under the Bankruptcy Code. Additionally, the problem of calculating future cleanup costs would remain, although the tool of claim estimation has been suggested as a means of partially alleviating concerns about uncertainty.[120] A slightly more encouraging proposal advocates the use of a foreseeability approach which would release debtors from liability to the extent that environmental harm is foreseeable before the closure of bankruptcy.[121] While Justice O'Connor's suggestion does promise resolution and finality in bankruptcy, a debtor going through reorganization with meager assets could have its environmental liabilities entirely discharged by the proceeding at a fraction of the cost to be incurred by the public afterwards. Thus, the question remains whether the Bankruptcy Code should be amended to account for environmental concerns or whether courts like the one in Torwico should be left to continue to sort out the conflict.

In comparison to the patchwork quilt of available legislative possibilities, it would appear that the Third Circuit has forged a viable, if temporary, solution to the conflicting policies advanced by environmental law and the Bankruptcy Code. By synthesizing the teachings of *Kovacs*, *CMC*, and *Chateaugay* into an administrable set of tests for determining what portions of an environmental injunction constitute a "claim" for purposes of a bankruptcy proceeding, the court has set an example for other jurisdictions to follow. Until legislative reconciliation of the Bankruptcy Code and environmental law, Torwico will serve as a model of how states can enforce their environmental laws and regulations without having enforcement hampered or destroyed by debtors ducking in and out of Chapter 11. Moreover, Torwico's holding that a debtor's obligations "run with the waste" will serve to expand the reach of environmental laws to post-reorganization debtors that have relocated and to liability for waste that has migrated past the boundaries of the original hazardous waste site. Torwico is also a reaffirmation of the ability of a state to use its police and regulatory powers to enforce its environmental laws.[122] Torwico is important as one of only a handful of decisions which allow a state to force a debtor, newly emergent from bankruptcy, to remedy the ongoing pollution which it has spawned.

120 McBain, *supra* note 106, at 240. The Bankruptcy Code, § 502(c), gives courts discretion in the estimation of contingent and unliquidated claims. *Id.*; 11 U.S.C. §502(c) (1988).

121 Kevin J. Saville, Note, *Discharging CERCLA Liability in Bankruptcy: When Does a Claim Arise?*, 76 MINN. L. REV. 327, 354-361 (1991).

122 Ironically, the Third Circuit has come full circle back to its decision in Penn Terra Ltd. v. Dept. of Environmental Resources, Com. of Pa., 733 F.2d 267 (3d Cir. 1984). Penn Terra's holding affirmed the use and significance of a state's police power. Oddly, the court in *Torwico* downplayed the significance of *Penn Terra*, relegating the parties' extensive arguments concerning it to a brief discussion in note 2.