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WHAT SHOULD YOU NOTICE WHEN YOU GET NOTICE?: UNDISCOVERED BUT DISCOVERABLE ENVIRONMENTAL CLAIMS IN BANKRUPTCY

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This paper addresses one of the presently unresolved areas of conflict between bankruptcy law and environmental law. Specifically, what, if any, are the duties of a party holding an undiscovered, but discoverable, environmental claim upon being given notice of the bankruptcy filing by the person against whom the claim can be brought? Two recent cases, giving stunningly incompatible answers to this question, highlight the issue in conflict: *In re Texaco, Inc.*[1] and *AM International, Inc. v. Datacard Corp.*[2]

I. GENERAL PUBLIC POLICY CONFLICT

Bankruptcy law provides uniform mechanisms designed to serve multiple goals.[3] Originally designed for seizing and equitably distributing the assets of insolvent debtors to creditors, bankruptcy mechanisms also simultaneously ensure that insolvent debtors are not left destitute so that they

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[1] 182 B.R. 937 (Bankr. S.D.N.Y. 1995).

[2] 146 B.R. 391 (Bankr. N.D. Ill. 1992), *aff'd in part*, 106 F.3d 1342 (7th Cir. 1997).

[3] The Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2594 (1978), was codified as amended at 11 U.S.C. §§ 101-1330 (1994 & Supp. I 1995), and commonly is referred to as the Bankruptcy Code.

might have a meaningful fresh start.[4] Since the promulgation of the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"),[5] bankruptcy law also has provided options for the discharge of debts through reorganization rather than liquidation, allowing debtors to develop their own repayment plans without losing substantial assets.[6]

Environmental law, on the other hand, responds "to the vast threats to public health and safety presented by unsafe disposal of toxic chemicals and hazardous substances."[7] The goal of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),[8] for example, is to promote both spontaneous cleanup by private parties and equitable distribution of cleanup costs among the responsible parties.[9]

The problem arises where environmental law imposes liability for cleanup costs on a responsible party who files for bankruptcy protection. It is generally well settled that cleanup costs constitute claims, which are dischargeable in bankruptcy.[10] If the debtor is responsible for hazardous waste dumping, then a fresh start in bankruptcy under either Chapter 7 or Chapter 11[11] will thwart the goal of having responsible parties pay the costs of cleanup. If liability for the cleanup stays with the debtor responsible for

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[4] *See, e.g.*, 11 U.S.C. § 332(d)(1)-(3) (allowing debtors to exempt certain property from liquidation, including $15,000 interest in a residence as well as $800 worth of selected personal property).

[5] Pub. L. 95-598, 92 Stat. 2594 (1978) (codified as amended at 11 U.S.C. §§ 101-1330 (1994 & Supp. I 1995)).

[6] *See* 11 U.S.C. §§ 1101-1174.

[7] *In re* National Gypsum Co., 139 B.R. 397, 403 (Bankr. N.D. Tex 1992) (citing Voluntary Purchasing Group v. Reilly, 889 F.2d 1380 (5th Cir. 1989)).

[8] 42 U.S.C. §§ 9601-9675 (1994 & Supp. I 1995).

[9] *See generally In re* National Gypsum Co., 139 B.R. at 403-06 (discussing the background and purpose of CERCLA).

[10] The Bankruptcy Code defines a claim as the "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." 11 U.S.C. § 101(5)(a)-(b).

[11] Chapter 7 is a liquidation provision, while Chapter 11 allows for reorganization. *See id.* §§ 701-766, 1101-1174.

the pollution, then the debtor does not get a fresh start. In either case, it is clear that one policy will suffer at the expense of another; a polluter's clean site is generally incompatible with a debtor's clean slate. Presumably, the Chapter 7 debtor does not have enough money to pay for cleanup costs. Alternatively, if held responsible for cleanup costs, there is a greatly increased chance that a Chapter 11 reorganization debtor will end up in Chapter 7 liquidation.[12] In either case, the costs of cleanup are not borne by the party responsible for the pollution.

A particularly interesting issue arises concerning the bankruptcy discharge of environmental claims that were unmanifested, and undiscovered, but discoverable, at the time that the party responsible for the pollution filed for bankruptcy protection. Should unspecified CERCLA claims related to undiscovered, but discoverable, pre-petition release of hazardous waste be discharged in bankruptcy?

II. BRIEF SUMMARY OF THE *TEXACO* CASE

A 1995 installment of *Texaco, Inc. v. Pennzoil,* Co.,[13] this country's largest civil damages suit[14] and one of the largest corporate bankruptcies in history,[15] answered this question in the affirmative and

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[12] *See id.* § 1112 (describing debtor's right to convert from a chapter 11 to a chapter 7 case).

[13] Texaco, Inc. v. Pennzoil, Co., 729 S.W.2d 768 (Tex. Ct. App. 1987). It should be noted that one corporate bankruptcy can result in multiple lawsuits spanning many years. The Texaco bankruptcy is a particularly good example. *See id.*

[14] Pennzoil sued Texaco for inducing Getty Oil to breach an oral contract to sell Getty to Pennzoil. *See In re* Texaco Inc., 182 B.R. 937, 941 (Bankr. S.D.N.Y. 1995). The case was heard in a Texas state court where the measure of damages for breach of a contract to sell is treble the value of the object to be sold. Given fluctuations in the oil market, the value of Getty's reserves at the time of the breach was $3.5 billion producing a whopping $10.5 billion judgement for Pennzoil. *See id.* To make matters worse, Texas required an appeals bond equal to 125% of the judgement. *See id.* Thus, to appeal, Texaco would have to post a bond of almost $13 billion. *See id.* Bankruptcy, even for a corporation as large as Texaco, was an attractive option.

[15] *See In re* Texaco Inc., 182 B.R. at 941.

demonstrated the significance of that little piece of paper called the Notice of Bankruptcy. In 1987, Texaco filed for Chapter 11, not because of any environmental claims, but because of a $10.5 billion verdict in favor of Pennzoil.[16] A year later, Texaco's pre-petition debts were discharged.[17] Later, claimants who had been given notice of the bankruptcy, but who had not filed any claims against the estate, discovered migrating contaminated water, and sued Texaco in state court.[18] Texaco asserted, as one of its defenses, that any environmental claim against it was discharged in bankruptcy.[19] In the state court action, the claimants filed a motion to strike Texaco's affirmative defense of bankruptcy discharge.[20] Texaco responded by filing, in bankruptcy court, a motion to reopen the bankruptcy case.[21]

Despite the fact that the claimants alleged that their environmental claims were unmanifested and unknown at the time of the debtor's bankruptcy, the court in *Texaco* determined that the claims were filed too late.[22] The bankruptcy court noted that the claimants' failure to detect the environmental contamination did not mean that the claimants *could* not have detected the contamination. "[I]n this case the evidence demonstrates that all of the physical events giving rise to [the claimants'] rights of action, if any, occurred prior to the Confirmation Order and were *capable of detection* by scientific means available to [the claimants] in 1988 . . . ."[23]

The court in *Texaco* held, in effect, that the release of hazardous material alone could be the basis for a claim.[24] The court further held that this claim should have been raised during the debtor's bankruptcy, irrespective of whether the claimants had any actual or constructive

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[16] *See id.*

[17] *See id.*

[18] *See id.* at 942-43.

[19] *See id.*

[20] *See id.* at 943.

[21] *See id.*

[22] *See id.* at 953-54.

[23] *Id.* at 953 (emphasis added).

[24] *See id.* at 951-52.

knowledge of the release of hazardous materials.[25]

> [O]n the facts in this case there can be no doubt that [the claimants'] claims . . . are well within the broad statutory definition of "claim" . . . . [The claimants'] claims were neither contingent nor unmatured as of the Bar Date, and even if unknown to [the claimants] at that time, their claims were *unquestionably capable of detection*.[26]

In short, the debtor received a discharge from any responsibility for hazardous materials that were released prior to the bankruptcy petition. The key to this conclusion is that the capability of the claimants to detect contamination (i.e., that the claim was discoverable by reasonable scientific procedures) gave rise to the claimants' obligation to file. Failure to file a discoverable, but undiscovered, environmental claim results in the discharge of that claim just as it would result in the discharge of an undiscovered but discoverable non-environmental claim.[27]

The ruling in *Texaco* went even further, however, in undercutting environmental protection by stating that the debtor was not required to identify the claimants as potential creditors holding an environmental claim.[28] When Texaco sent its Notice of Bankruptcy to the claimants, the debtor failed to list the claimants as creditors.[29] The court held that the notice was not defective.[30]

> [E]ven assuming that [the debtor] knew there was a possibility of a claim by [the claimants], [the debtor] was not required to give actual notice to creditors 'with merely

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[25] *See id.* at 952-57.

[26] *Id.* at 954 (emphasis added).

[27] *See id.* at 956-57.

[28] See *id.* at 955-57.

[29] *See id.*

[30] *See id.* at 957.

> conceivable, conjectural or speculative claims.' *A fortiori*, [the debtor] had no Constitutional duty to give [the claimants] some unique, special notice tailored to environmental claims.[31]

At most, the debtor was required to tell the claimants by mail or publication that the debtor was filing for bankruptcy, with no other specifics about the possible claims.[32] The court seemed to bend over backwards to uphold the validity of the Notice of Bankruptcy; the court reasoned that even if the debtor's failure to list the claimants as creditors was some violation of bankruptcy law, the discharge was proper where the claimants actually received the Notice of Bankruptcy:

> Moreover, even if it could be said that [the debtor] violated section 521 and Rule 1007 by failing to schedule [the claimants] as creditors, [the claimants] have cited no authority to support their argument that such failure should bar [the debtor's] discharge, particularly since [the claimants] did receive *actual notice by mail* or, in the case of the Sanders, *constructive notice by publication.*[33]

Furthermore, in spite of the fact that the debtor had knowledge of the environmental problem,[34] the court held that the failure to mention the

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[31] *Id.* (quoting Charter Crude Oil Co. v. Petroleos Mexicanos, 125 B.R. 650, 656 (Bankr. M.D. Fla. 1991)).

[32] *See id.* at 955.

[33] *Id.* at 957 (emphasis added).

[34] The court stated:

> This is not to say that the apparent migration from the pits did not constitute an environmental 'problem,' or that Texaco was unaware of the problem. Texaco forwarded the Woodward Clyde report to the Louisiana Department of Environmental Quality ('DEQ') in December 1986, communicated thereafter on an ongoing basis with officials of the DEQ and has been implementing a program of remediation approved by the

"environmental problem" in the disclosure statement did not constitute defective notice.[35] Therefore, the claimants received the notice and knew that the debtor was filing for bankruptcy, but had no reason to believe that there was an environmental problem or claim. In effect, the court in *Texaco* placed the burden on all future recipients of any notice of bankruptcy to discover and declare any potential environmental claims prior to the bankruptcy discharge deadline, or face the loss of any such claim forever. This ruling needs to be evaluated in light of the recent Seventh Circuit decision in *AM International Inc. v. Datacard Corp.*[36]

III. BRIEF SUMMARY OF THE *AM INTERNATIONAL* CASE

"For nearly 25 years, AM International ("AMI") spilled hazardous chemicals at an industrial site in Holmesville, Ohio."[37] From 1959 to 1981, AMI owned a manufacturing facility with two divisions. One of the divisions used above-ground tanks to hold a solvent to clean copy machines. The tanks were used to mix the ingredients for the solvent. There was at least one major spill of "a couple of thousand gallons" prior to 1980.[38]

In November 1981, the debtor sold the property and one of the divisions to DBS ("Buyer #1").[39] The debtor gave a written warranty that the property was in compliance with all laws.[40] There is no evidence, however, that Buyer #1 performed an environmental audit or other environmental examination of the property, nor is there evidence that Buyer #1 had any reason to believe such an examination to be necessary.[41] The debtor leased

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DEQ since 1988 or 1989.
Id. at 956 n.6.

[35] *See id.* at 956-57.

[36] 146 B.R. 391 (Bankr. N.D. Ill 1992), *aff'd in part,* 106 F.3d 1342 (7th Cir. 1997).

[37] *AM Int'l,* 106 F.3d at 1345.

[38] *AM Int'l,* 146 B.R. at 396.

[39] *See id.*

[40] *See id.*

[41] *See id.* at 397.

back that portion of the property that housed the tanks and the other division, and continued operating on the premises. Some employees of the debtor went to work for Buyer #1.[42] From 1981 to 1985, both the debtor and Buyer #1 conducted maintenance on the property.[43]

In 1982, the debtor filed for Chapter 11 protection in Illinois.[44] The debtor sent a notice of bankruptcy to Buyer #1, and Buyer #1 filed a proof of claim.[45] The debtor filed objections to Buyer #1's claims.[46] In 1984, Buyer #1 and the debtor entered into a settlement agreement.[47] Each party released all claims against the other party, however, there was no specific mention of any environmental claims.[48] Later that year, the debtor's confirmation order was signed. In 1985, the debtor ceased doing business and left the property.[49]

In 1986, Datacard ("Buyer #2") conducted an environmental audit as part of its due diligence prior to purchasing the site from Buyer #1.[50] Buyer #2 discovered environmental contamination.[51] Buyer #2 notified Ohio EPA and the debtor of the contamination.[52] In August 1986, Buyer #2 proceeded with the purchase from Buyer #1 for $50 million. In accordance with CERCLA, Buyer #2 then undertook a voluntary cleanup of the site, ultimately expending some $150,000 and planning to recover those costs from the responsible parties.[53]

In 1987, Buyer #2 sent a letter to the debtor regarding the cleanup costs. The letter was designed to trigger the sixty day notice required under

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[42] *See id.*

[43] *See id.* at 396.

[44] *See id.*

[45] *See id.*

[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See id.* at 397.

[50] *See id.*

[51] *See id.*

[52] *See id.*

[53] *See id.*

the Resource Conservation and Recovery Act ("RCRA"),[54] the Federal Water Pollution Control Act ("FWPCA"),[55] and CERCLA.[56] In response to the letter, the debtor filed a lawsuit in federal court, demanding an injunction and declaratory relief against Buyer #1 and Buyer #2, alleging that the cleanup costs had been discharged in bankruptcy. Buyer #2 filed counterclaims against the debtor for damages under CERCLA, RCRA, and state common law.[57]

The debtor filed a motion for partial summary judgment, which the court granted in part, on the Buyers' counterclaims for nuisance, negligence, trespass, and strict liability.[58] While considering the motion, the lower court in *AM International* examined the Seventh Circuit's holding in *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.* ("*Chicago I*")[59] that foreseeability is an important factor for discharging claims.[60] Specifically, the lower court in *AM International* noted *Chicago I* for the proposition 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, and when this potential claimant has, in fact, conducted tests with regard to this contamination problem, then this potential claimant has, at least, a contingent CERCLA claim . . . ."[61]

The lower court in *AM International* focused on tying the CERCLA claim to the polluter, stating that "a CERCLA claim does not arise for purpose of

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[54] *See* 42 U.S.C. § 6972 (1994).

[55] *See* 33 U.S.C. § 1365 (1994).

[56] *See* 42 U.S.C. § 9607 (1994).

[57] *See* AM Int'l, Inc. v. Datacard Corp., 146 B.R. 391, 397-98 (Bankr. N.D. Ill. 1992).

[58] *See id.* at 394.

[59] 974 F.2d 775 (7th Cir. 1992) [hereinafter *Chicago I*].

[60] *See id.* at 785.

[61] *AM Int'l*, 146 B.R. at 394 (quoting *Chicago I*, 974 F.2d at 784) (emphasis added).

dischargeability under bankruptcy law upon the mere release or threatened release of hazardous substances."[62]

From these propositions, the lower court in *AM International* developed what appears to be a sliding scale standard: "[I]f information before the potential CERCLA claimant had indicated that response costs were imminent, the case for dischargeability becomes greater."[63] The court's test for discharging cleanup costs was whether "the potential CERCLA claimant has 'sufficient information to give rise to a claim or contingent CERCLA claim' before the consummation date of the bankruptcy."[64] On that basis, the court found that questions of fact existed regarding whether Buyer #2 had sufficient information to give rise to a claim *before* the debtor's bankruptcy.[65] Thus, the lower court denied summary judgment on the CERCLA count of the Buyers' counterclaim.[66]

Six years into the Illinois case, AMI filed for Chapter 11 protection again, this time in Delaware.[67] The Delaware Bankruptcy Court lifted the automatic stay of the Illinois case, and as a result there was a three day trial in Illinois.[68]

After the trial, the debtor filed a post-trial brief requesting the claims be disallowed, based on Bankruptcy Code section 502(e)(1)(B), which disallows claims for reimbursement asserted by a co-liable party where the claim is contingent.[69] The Illinois court held that "the Delaware Bankruptcy Court has exclusive jurisdiction over and should consider the allowance or disallowance of Data Card's [sic] claims pursuant to Bankruptcy Code § 502(e)."[70] The court further found that the debtor waived the affirmative

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[62] *Id.* (citing *Chicago I*, 974 F.2d at 784-85).

[63] *AM Int'l*, 146 B.R. at 394.

[64] *Id.* (quoting *Chicago I*, 974 F.2d at 787).

[65] *See id.*

[66] *See id.*

[67] *See* AM Int'l, Inc. v. Datacard Corp., 167 B.R. 110 (Bankr. N.D. Ill. 1994).

[68] *See id.*

[69] *See* 11 U.S.C. § 502 (1994).

[70] *AM Int'l*, 167 B.R. at 113.

defense of disallowance by failing to raise it before or during the trial.[71] Ultimately, the Illinois court entered judgment for Buyer #2, finding that Buyer #2's claim had not been discharged and that Buyer #2 was entitled to future cleanup costs.[72]

The debtor filed an appeal to the Seventh Circuit challenging the application of the "tie the debtor to the release" standard of claim accrual.[73] Using a clear error standard of review, the Seventh Circuit ruled that the "district court's factual finding that DBS did not have sufficient information to tie AMI to environmental contamination before AMI's bankruptcy was confirmed was not clearly erroneous."[74] The Seventh Circuit upheld the lower court's decision, stating that the "district court's conclusion that Datacard's CERCLA claims had not been discharged was not an abuse of discretion."[75] The court neglected to mention, however, that at the time of AMI's first bankruptcy filing, of which Buyer #1 had notice, the contamination, and thus the claim, were clearly discoverable through readily available scientific means, as was demonstrated when Buyer #2 conducted its environmental audit of the site.[76]

IV. ANALYSIS OF THE ACCRUAL ISSUE

In both *Texaco* and *AM International*: (1) the contamination occurred prior to filing for bankruptcy protection; (2) the contamination could have been discovered by available testing methods; and, (3) the contamination was

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[71] *See id.*

[72] *See id.*

[73] *See* AM Int'l, Inc. v. Datacard Corp., 106 F.3d 1342 (7th Cir. 1997).

[74] *Id.* at 1348.

[75] *Id.*

[76] *See* AM Int'l, Inc. v. Datacard Corp., 146 B.R. 391, 397 (Bankr. N.D. Ill. 1992).

unknown to the claimants[77] prior to the discharge date.[78] However, in *Texaco*, the cleanup costs were discharged, while in *AM International*, the cleanup costs were not discharged.[79] The inconsistent rulings in *Texaco* and *AM International* underscore the tension between the public policy goal of bankruptcy law of granting discharged debtors a "fresh start" and the public policy of environmental law of promoting hazardous waste disposal and imposing cleanup costs on the parties responsible for the contamination.

A. *Accrual Occurs at the Time of Release*

In *Texaco*, the cleanup claim accrued at the time of the release or threatened release of the hazardous materials. Several courts support this interpretation, including the bankruptcy court in the infamous case *In Re Chateaugay Corp.*[80] which stated that "response costs incurred by the [EPA] under [CERCLA] are pre-petition 'claims,' dischargeable in bankruptcy, regardless of when such costs were incurred, as long as they concern a release or threatened release of hazardous substance that occurred before the debtor filed its Chapter 11 petition."[81] The court further reasoned:

> The question, then, is whether claims which are neither contingent nor unmatured, but which are unknown to the claimants were intended by Congress to be covered by the statutory definition of 'claim' so as to be barred by the discharge. The decisions leave no doubt that environmental claims, . . . even if unknown, are within the statutory

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[77] In *AM Int'l*, Buyer #2 was unaware of the contamination prior to Debtor's bankruptcy. In fact, Buyer #2 had no connection to the property at the time of Debtor's bankruptcy. *See id.* at 396.

[78] *See* discussion *supra* Parts II-III.

[79] *See* discussion *supra* Parts II-III.

[80] 944 F.2d 997 (2d Cir. 1991).

[81] *Id.* at 999.

definition of dischargeable 'claims.'[82]

In *Texaco*, the court's emphasis on scientific detectability was based on the claimant's assertion that the unmanifested and unknown claims of Dalkon Shield users or workers exposed to asbestos particles were analogous to unknown CERCLA claims.[83] The court disagreed and found that mass tort claims were materially different from CERCLA claims in that mass tort claims were incapable of detection because the damage had not yet occurred so as to give rise to a cause of action.[84] By contrast, in CERCLA claims, the damage occurred at the time of release of the hazardous materials.[85]

Even the court in *Texaco* noted that "in some circumstances it may indeed be unfair, and impermissible, to apply the discharge provisions of the Bankruptcy Code where a claimant would thereby be barred from asserting otherwise valid claims which . . . through no fault of the claimant, could not be asserted prior to confirmation."[86] It seems unfair for the court to require a claimant to identify a bankruptcy claim that the claimant has no reason to know exists. Hypothetically, under the mere release standard, a polluter with full knowledge of a potential environmental claim could fail to provide full information to potential claimants, or perhaps even conceal the release of hazardous waste from a claimant, declare bankruptcy and be released from all liability for cleanup costs. Whether a court in such a situation would rule that the contamination was discoverable with due diligence, and thus discharge the bankruptcy claim, remains to be seen.

B. *Accrual Occurs When a Connection Between the Debtor and the Contamination is Found*

In order to avoid what we might call "no-fault-of-the-claimant"

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[82] *Id.* at 998.

[83] *See In re* Texaco, Inc., 182 B.R. 937, 953 (Bankr. S.D.N.Y. 1995).

[84] *See id.* at 953-54.

[85] *See id.*

[86] *Id.* at 950.

unfairness, the Seventh Circuit in *AM International* upheld the finding that there was insufficient evidence to "tie" the debtor to the environmental contamination, and concluded that the claim was not discharged.[87] The Seventh Circuit based its decision on the *Chicago I*[88] and *Chicago II*[89] decisions.[90] The *AM International* court examined the reasoning of the *Chicago I* court that, because the claimant had knowledge of contamination and could "tie the bankruptcy debtor to a known release" before the cutoff date for filing a claim, the late-filed claim was discharged.[91] The Seventh Circuit also noted *Chicago II's* holding that even if the claimant had no subjective knowledge of the contamination, claims filed after the bankruptcy bar date were discharged because the claimant *should* have known of the contamination at the notorious Superfund site.[92] Thus, according to the *Chicago I* and *II* decisions, if a claimant either knows or should know of the contamination before the claim deadline, then the claim is discharged.

The Seventh Circuit distinguished the *AM International* claimants from the *Chicago I and II* claimants noting that in *AM International* there "had been no visible signs of contamination, no soil testing, no EPA involvement, and no publicized spills at the . . . site."[93] The claimants "did not have sufficient information to tie [the debtor] to environmental contamination before [the debtor's] bankruptcy;"[94] therefore, the claim had

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[87] *See* AM Int'l, Inc. v. Datacard Corp., 106 F.3d 1342, 1347-48 (7th Cir. 1997).

[88] 974 F.2d 775 (7th Cir. 1992).

[89] Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. Union Pac. R.R., 3 F.3d 200 (7th Cir. 1993) [hereinafter *Chicago II*].

[90] *See AM Int'l*, 106 F.3d at 1347-48.

[91] *See id.* at 1347 (quoting *Chicago I*, 974 F.2d 775, 786 (7th Cir. 1992)).

[92] *See id.* at 1347-48 (citing *Chicago II*, 3 F.3d at 203-07).

[93] *Id.* at 1348.

[94] *Id.*

not been discharged.[95]

C. *Accrual and the "Fair Contemplation" of the Parties*

Other courts have focused less on the connection between the pollution and the polluter and have focused more on the foreseeability of the claims. Some courts have adopted the "fairly contemplated" standard.[96] In *In re National Gypsum Co.*,[97] the court held that all liability arising from pre-petition conduct at the relevant contaminated sites not yet listed by the EPA, but *fairly within the contemplation of the parties*, was discharged.[98] Specifically, all claims that were within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created, would be discharged.[99] All claims that were not contemplated would

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[95] Of course, what the court overlooks is the fact that *had* the claimant looked, it would have found the contamination and would have been able to tie the debtor to the spill. Whether the claimant should be expected to look for a problem is the real issue, and one sidestepped by the Seventh Circuit.

[96] *Texaco's* application of the mere release accrual test and *AM International's* application of the "tie debtor to the release" accrual test subtly spurned the "fairly contemplated" test. *In re* National Gypsum Co., 139 B.R. 397 (Bankr. N.D. Tex 1992), introduced the "fairly contemplated" test, and other courts soon followed. *See, e.g., In re* Buttes, 182 B.R. 493, 494 (Bankr. S.D. Tex. 1994) (affirming the fairly contemplated test and stating that *National Gypsum* "requires that the parties fairly contemplated the environmental hazard and necessary cleanup expenses at the time of the debtor's bankruptcy for it to be a claim in the bankruptcy proceeding."); *In re* Goodwin, 163 B.R. 825, 830 (Bankr. D. Idaho 1993) (questioning *Chateaugay's* reasoning and affirming *National Gypsum's* holding that "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 the release or threat of a release that could have been 'fairly' contemplated by the parties; and those that could not have been 'fairly' contemplated by the parties." (quoting *National Gypsum*, 139 B.R. at 407-08)); *see also* Mesiti v. Microdot, Inc., 156 B.R. 113 (Bankr. D.N.H. 1993) (applying the reasonably foreseeable test where the claimant had no idea of claim until after reorganization order was issued).

[97] 139 B.R. 397 (Bankr. N.D. Tex 1992).

[98] *See id.* at 415.

[99] *See id.*

not be discharged. Factors considered included:

> (1) Knowledge of the parties of the site in which a PRP [potentially responsible party] may be liable;
> (2) National Priority Listing;
> (3) EPA notification to the debtor of PRP liability;
> (4) commencement of investigation and cleanup activities; and
> (5) incurrence of cleanup costs.[100]

Numerous courts have wrestled with the accrual of claim issue, resulting in a variety of tests, including the *Texaco* "mere release" test, the *AM International* "tie the debtor to the release" test, and the *National Gypsum* "fairly contemplated" test.[101] The accrual issue is further complicated by a subsequent buyer who had no interest in the property at the time of the bankruptcy and, therefore, did not receive from the debtor any notice of the bankruptcy. How can a cleanup cost claim accrue against a claimant who, in terms of interest in the property, did not exist at the time of the bankruptcy?

In *AM International*, Buyer #1 received notice of the debtor's first bankruptcy and filed a proof of claim.[102] The debtor argued that there were multiple opportunities for Buyer #1 to be aware of the release of hazardous materials, including joint maintenance of the property prior to the debtor's first bankruptcy and the employment of former employees of the debtor. [103] However, Buyer #1 settled its claim and executed a release.[104]

Buyer #1's settlement of all claims, in effect, resulted in a situation where Buyer #2 possessed more rights to cleanup costs than Buyer #1. According to the Seventh Circuit in *AM International*, an innocent landowner

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[100] *Id.*

[101] *See* discussion *supra* Parts IV.A., C.

[102] *See* AM Int'l, Inc. v. Datacard Corp., 146 B.R. 391, 396 (Bankr. N.D. Ill. 1992).

[103] *See id.*

[104] *See id.*

can file a CERCLA lawsuit directly against a third party for spilling waste.[105] The Seventh Circuit reasoned:

> Datacard did not take part in the manufacture of Blankrola. Instead, Datacard—like a party forced to cleanup contamination on its property due to a third party's spill—faces liability merely due to its status as landowner. As a result, Datacard qualifies under Akzo's exception and can directly pursue its response costs under § 107(a)(4)(B).[106]

However, the Seventh Circuit also noted that Datacard "presumably paid less for DBS because it knew it was buying into an expensive cleanup."[107] Datacard knowingly purchased contaminated land and factored the price of the cleanup into its decision to buy the contaminated property.[108] "Despite the [hazardous material] find, Datacard went ahead with the purchase, figuring it had a good shot at recovering its cleanup costs from AMI and that the cleanup would only run about $350,000—small change in comparison to the $52 million it was shelling out to buy DBS."[109]

Assuming Datacard got a discount in the sale price, Datacard received a windfall by paying less for the property and collecting additional money from the debtor. Moreover, the Seventh Circuit did not address the issue raised in the Magistrate's Report in the lower court, which stated:

> AMI is correct in arguing that the proposition that Data Card's [sic] argument cannot be squared with the Bankruptcy Code. A debtor that provides notice to all parties who may have claims against the debtor relating to a piece of property cannot lose the benefit of its discharge because another party

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[105] *See* 106 F.3d 1342, 1347 (7th Cir. 1997).

[106] *Id.* (citing Akzo Coating, Inc. v. Aigner Corp., 30 F.3d 761 (7th Cir. 1994).

[107] *Id.* at 1346.

[108] *See id.*

[109] *Id.*

> acquires title to the property at some future date. The efficacy of the debtor's discharge would then be subject to subsequent conveyances of the property over which the debtor has no control. This scheme would end-run around the policies which provide for a "fresh start" to the debtor. Thus, it is inappropriate for Data Card [sic] to contend that the motion for summary judgment should be denied because Data Card [sic] was never given notice.[110]

V. CONCLUSION

The presence of at least three different accrual tests underscores the unresolved conflict between bankruptcy law and environmental law. Not only does the conflict between environmental public policy and bankruptcy public policy remain unsettled, but also the fundamental issue of accrual timing remains without definitive resolution. Clearly, depending on which of the accrual tests a court adopts, the obligations of a claimant holding undiscovered, but discoverable, environmental claims against the debtor will differ. It is intolerable that the rights one has against a debtor may depend on mere chance, on the jurisdiction in which one resides. However, as the law stands now, one claimant might lose claims because of a failure to look for something that she has no reason to believe exists while a neighbor one state away would not. Such a situation serves the goals of neither bankruptcy nor environmental law.

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[110] *AM Int'l*, 146 B.R. at 403.