Buoying Environmental Burdens in

Environmental law and bankruptcy law are like oil and water. In light of the recent automobile company bankruptcies that led to dozens of plant closures nationwide, many municipalities have recently dealt with this complex, murky area of law. Municipalities and states can protect themselves against resulting real estate wastelands by enacting strong local ordinances and state superlien statutes to leverage power in cleanup negotiations.

BY SARAH SCHENCK

Bankruptcy Floodwaters

Environmental law and bankruptcy law do not make good bedfellows. The goals of each vastly differ, and when forced to compromise, neither party is satisfied. Environmental law seeks to hold entities liable for the costs of environmental cleanup, while bankruptcy law offers companies a "fresh start"[1] and provides a structure through which parties can free themselves of financial problems. When an entity or a potentially responsible party (PRP) that has caused environmental contamination becomes insolvent and cannot pay for cleanup, the tension between the two crescendos.

The American auto industry's recent nationwide plant closures perfectly illustrate the interaction between environmental and bankruptcy laws. In the fall of 2008, the "Big Three" automakers, General Motors, Chrysler, and Ford, turned to Washington for emergency financial assistance. After receiving billions of dollars in federal aid, General Motors and Chrysler both filed for Chapter 11 bankruptcy, while Ford recovered on its own due to a fund it had created prior to the recession.[2]

In the wake of the Chapter 11 proceedings, more than 100 auto manufacturing sites closed across the country,[3] many of which are likely contaminated from manufacturing processes. Chrysler filed for bankruptcy on April 11, 2009, and General Motors filed shortly thereafter on June 1. While the U.S. Bankruptcy Court created a $500 million environmental trust fund specifically for General Motors' environmental investigation and cleanup in 2011,[4] Chrysler was not so lucky. For Chrysler, the court established an "Environmental Reserve," allocating only $15 million for cleanup when it approved the joint liquidation plan proposed by Old Carco (formerly known as Chrysler LLC) and debtors in 2010.[5] The auto manufacturing sites affected by the 2009 bankruptcies will be difficult to sell and redevelop due to contamination associated with auto manufacturing and a lack of available funding.

The Chrysler bankruptcy hit a number of cities hard, including Kenosha, Wis., which faced the prospect of a dead zone in the heart of its city. However, using local ordinances in collaboration with the Wisconsin Department of Natural Resources, Kenosha filed a superlien to leverage power in negotiating favorable terms under which Old Carco Liquidation Trust would liquidate and later abandon the property.

To avoid dozens of valueless and contaminated properties that burden future land use and economic development across the country, cities and states need to develop local ordinances and state superlien statutes that endow them with negotiating power. As shown in the Kenosha case, these tools can provide localities with ammunition to craft favorable deals that benefit the public while ensuring that insolvent companies do not leave municipal wastelands in their wake.

This article starts with a brief overview of bankruptcy law, Chapter 11 reorganization, and the intersection between bankruptcy and environmental law. It continues by outlining the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), examining important case law involving Chapter 11 debtor environmental obligations and circumstances under which environmental claims can be discharged during Chapter 11 reorganization. Finally, it addresses the environmental problems arising from the recent auto industry bankruptcy, analyzes the proceedings in Kenosha, and argues that cities can use local ordinances and state superlien statutes to leverage power in cleanup negotiations.

Bankruptcy Law

Overview

In 1978, Congress enacted the Bankruptcy Code, codified as Title 11 of the U.S. Code, which has since been amended several times. Because each judicial district has a bankruptcy court, bankruptcy cases cannot be filed in a state court.[6] Sometimes in Chapter 11 cases, much of the bankruptcy process is administrative and an appointed trustee oversees the case. Under 11 U.S.C. § 554(a), trustees can abandon burdensome property or

property of inconsequential value to the estate. Abandonment of contaminated property is more complicated, however, because of potential or imminent threats to human and environmental health. Because two of the Big Three filed for Chapter 11 bankruptcy in 2009, this article focuses on Chapter 11 bankruptcy proceedings.

Chapter 11

A failing business that wishes to remain in operation while simultaneously repaying some of its creditors can use Chapter 11 (entitled "Reorganization") to reduce its debt and restructure its business through a court-approved reorganization plan. The plan is usually structured so that the debtor repays a portion of its debts to secured creditors while discharging burdensome obligations and debts to unsecured creditors. A successful plan results in a reduced debt load and a presumably profitable restructured business.[7] Congress described the fundamental features of reorganization as "the thankless task of determining who should share the losses incurred by an unsuccessful business and how the values of the estate should be apportioned among creditors and stockholders."[8]

When a debtor wishes to file for Chapter 11 bankruptcy, it begins by filing a petition with the bankruptcy court in the district of its principal assets.[9] Unless otherwise ordered, the debtor also files four documents: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executor contracts and unexpired leases; and (4) a statement of financial affairs.[10] The timing of petition filing may determine whether an environmental claim is considered dischargeable under bankruptcy. During Chapter 11 proceedings, a debtor can generally discharge any claims within the meaning of 11 U.S.C. § 101(5) that arose *before* the date the court confirmed the reorganization plan.[11] These claims are called prepetition claims; postpetition claims are filed after the company has filed its bankruptcy petition and are not subject to the bankruptcy (i.e., they are fully payable). The decision to argue that a claim arose prepetition or postpetition is largely strategic and fact specific. When remediation conducted by a government agency clearly occurs prepetition, the claim is generally dischargeable under the reorganization plan; conversely, when the remediation indisputably occurs postpetition, the claim is not dischargeable.[12] Prepetition remediation claims tend to be more complicated than postpetition claims because the courts have shown less consistency in their interpretation.

The ability to discharge prepetition claims threatens the vitality of environmental cleanup efforts in bankruptcy. If a business is able to discharge its environmental claims during Chapter 11, local, state, and federal government agencies are left to deal with cleanup efforts, and the costs inevitably fall on the taxpayer instead of the responsible parties.

Priority Administrative Expenses and Preserving the Estate

The Bankruptcy Code establishes a pecking order that stipulates which creditors get paid by debtors and in what order. These priority rules are located in 11 U.S.C. §§ 503 and 507. A secured creditor holds a claim against the debtor, such as a mortgage or lien, and has the right to take and hold or sell the debtor's property in satisfaction of part or all of its claim. An unsecured creditor, on the other hand, is not guaranteed any payment.[13] While a secured creditor is more likely to be paid in full (or closer to full) because the debtor's property guarantees part or all of its claims, an unsecured creditor is not assured repayment. Instead, an unsecured creditor receives a share of the residual assets once higher priority claims have been repaid.[14] Administrative claims, which can include environmental cleanup expenses, are nestled between secured and unsecured creditor claims.[15] Allowing the majority of available funds to go to environmental cleanup can undermine the entire Chapter 11 reorganization of the business effort. However, failing to give priority to an environmental claim would only allow recovery for pennies on the dollar, undermining the goals of CERCLA, which include making the parties responsible for contamination pay for cleanup efforts. Despite the delicate balancing act of this pas de deux, Congress has let the show play on in the courts.[16]

Courts have generally interpreted sections 503 and 507 to give priority to Environmental Protection Agency (EPA) cleanup actions of hazardous waste.[17] According to 11 U.S.C. § 503(b)(1)(A) (allowance of administrative expenses), an administrative priority includes "the actual, necessary costs and expenses of preserving the estate." Courts have construed this clause to include expenses incurred "to remove the threat posed by such substances [that] are necessary to preserve the estate."[18] The EPA is entitled to administrative expense priority for cleanup costs incurred between the filing of a bankruptcy petition and the court confirmation of the reorganization plan, while unsecured creditors do not receive a penny until the cleanup costs are paid in full.[19] Moreover, courts have determined that administrative priority expenses can include response costs incurred postpetition based on conduct that occurred prepetition when they would prevent conditions that posed an imminent threat to public health or safety.[20] Costs incurred prepetition, however, do not have administrative expense priority and are dischargeable. The one exception to this rule exists when an environmental agency holds a lien to secure its expenses. In these cases, expenses are treated like a secured claim and said agency receives the value of its lien during Chapter 11.[21]

A successful Chapter 11 plan results in a reduced debt load and a presumably profitable restructured business. Congress described the fundamental features of reorganization as "the thankless task of determining who should share the losses incurred by an unsuccessful business and how the values of the estate should be apportioned among creditors and stockholders."

Administrative expense priority under § 503(b)(1)(A) is also given to expenses incurred to "preserve the estate" in accordance with state law under 28 U.S.C. § 959(b). This section provides that "a trustee, receiver, or manager…shall manage and operate the

property…according to the requirements of the valid laws of the state." Conversely, courts have shown a good deal of discrepancy in how they construe the statute. For example, the District Court for the Northern District of Texas limited its holding in *In re National Gypsum Co*. to costs necessary to avoid "imminent and identifiable harm to the environment and public health."[22] However, the court disagreed with this limitation in *In re American Coastal Energy Inc.*, holding that the court does not need to determine whether the contamination imposes actual and imminent threats; rather, the court must determine whether the debtor is in violation of state law designed to protect human health and safety.[23] Courts have relied on public policy considerations in awarding administrative expense priority to the EPA, which favor allowing the EPA to clean up sites that may pose a threat to public health and safety.[24]

CERCLA

Overview

Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address environmental issues related to contaminated and hazardous waste sites. The policy goals include attributing liability to those responsible for environmental contamination and allowing the EPA to recover cleanup costs.[25] Since its original enactment in 1980, CERCLA has been amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, and the Small Business Liability Relief and Brownfields Revitalization Act of 2002.[26] These amendments increased available funds for assessment and cleanup and clarified liability protection provided by CERCLA.[27]

Notwithstanding several exceptions, CERCLA imposes liability on four categories of PRPs: (1) the present owner and operator of a facility where hazardous substances have been released; (2) any person[28] who owned or operated the facility at the time hazardous substances were disposed of; (3) any person who arranged for disposal or treatment of the hazardous substance; and (4) any person that transported hazardous substances to a disposal or treatment facility. These parties are responsible for "all costs of removal or remedial action incurred by the United States government or a state."[29] CERCLA thus enables federal and state environmental agencies to recover costs incurred for investigations and cleanup related to contaminated properties. CERCLA not only allows the EPA to recover costs it incurs when assessing and responding to a release of hazardous substances, it also allows the EPA to compel PRPs to remediate contaminated sites.[30]

Defenses to liability include an act of god, an act of war, and an act or omission of a third party (known as the "innocent landowner defense"). The most litigated of the three is the innocent landowner defense. To qualify as an innocent landowner, the defendant must establish that he exercised due care regarding the hazardous substance and that he took precautions against foreseeable acts or omissions of third parties.[31] In addition, the statute protects the "bona fide prospective purchaser" from liability when the purchaser acquires the facility after all disposal of hazardous substances has occurred, the person made all appropriate inquiries regarding the purchased property, and the person exercised due care upon discovering hazardous substances at the facility.[32]

Case Law

The courts have largely shaped the scope of environmental claims under bankruptcy law, including which expenses are prioritized and which claims can be discharged. Environmental agencies argue that the debtor's liability for cleanup costs that agencies incur does not arise until after the Chapter 11 reorganization plan has been confirmed, thus preventing environmental claims from being discharged. In other words, if environmental claims are considered postpetition or postreorganization, they have the ability to survive the bankruptcy proceedings and attach to the reorganized business or entity without being discharged. Debtors, however, contend that "claim" should be read broadly "to ensure that all 'legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.'"[33] If the courts followed this latter line of reasoning, liability connected with prepetition contamination would be discharged in the debtor's plan of reorganization.[34]

Some of the key issues courts have grappled with in determining how to reconcile environmental issues plaguing bankruptcy proceedings and that may surface in litigation related to bankrupt auto manufacturing sites include: (1) whether environmental claims are exempted from automatic stay during bankruptcy proceedings; (2) which environmental laws a business must comply with under operational obligations and abandonment; and (3) whether the environmental claim is considered a "claim" within the meaning of the Bankruptcy Code.

Automatic Stay

An automatic stay provides debtors with a grace period in which creditors cannot pursue any debt or claim that arose prepetition on any judgments, collection activities, foreclosures, or repossessions.[35] However, the automatic stay provides for a few exemptions. Under 11 U.S.C. § 362(b)(4), a "governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment," are exempt from automatic stay.[36]

Courts have distinguished between an order for payment of cleanup costs (that is generally dischargeable) and costs arising from the government's exercise of state police powers in its "role as protector of the public health and welfare"[37] (which are not necessarily dischargeable). In general, courts have not limited the police power exemption to imminent and identifiable harm to human health. The Ninth Circuit has held that the exemption applies when there have been past violations, but has never limited it to "urgent need or the prevention of ongoing or future harm."[38] The Third Circuit has similarly construed the statute broadly,[39] and the Eighth Circuit has agreed with the Fifth Circuit that § 362(b)(4) "does not limit the exercise of police or regulatory powers to instances where there can be shown imminent and identifiable harm or urgent public necessity."[40]

The EPA's ability to compel a party to clean up a waste site coupled with administrative expense priority allows CERCLA to be effective during bankruptcy. While the EPA's police power may block the successful reorganization of a company under Chapter 11, it ensures that the clean up of contamination caused by a private entity is not done at the expense of the public at a federal or state level.

Operational Obligations and Abandonment

If a debtor wishes to operate its business while reorganizing under Chapter 11, it must comply with legal obligations under state

environmental laws. Title 28 U.S.C. § 959(b) requires that

> a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Though the statute only specifically addresses state law, courts have interpreted § 959(b) to also include local ordinances and permit regulations to satisfy environmental compliance obligations.[41]

Moreover, a bankruptcy trustee cannot simply abandon a property if it poses a risk to public health or safety. In *Midlantic National Bank v. New Jersey Department of Environmental Protection*, the Supreme Court looked at the question of whether trustees in bankruptcy can abandon property in contravention of laws designed to protect public health and safety. In this case, waste oil processor Quanta Resources Corporation (Quanta) filed a petition for reorganization under Chapter 11 and later converted its action to a liquidation proceeding under Chapter 7. An investigation of its New York facility revealed more than 70,000 gallons of polychlorinated biphenyl–contaminated oil in "deteriorating and leaking containers."[42] When Quanta notified its creditors and the Bankruptcy Court for the District of New Jersey of its intention to abandon the property pursuant to 11 U.S.C. § 554(a),[43] the City and State of New York objected, stating that "abandonment would threaten the public's health and safety and would violate state and federal environmental law." Upon concluding that Congress did not intend for bankruptcy law to abrogate state and local laws and considering the goals of federal environmental law, the Supreme Court held that "a bankruptcy trustee may not abandon property in contravention of state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."[44]

A majority of courts have interpreted the *Midlantic* decision narrowly, allowing trustees to abandon contaminated property unless it poses imminent and identifiable harm to human or environmental health. Only a minority of courts have interpreted the ruling broadly, requiring trustees to bring the property into compliance with all state and federal environmental regulations before they can abandon the property.[45] While the minority interpretation better serves the goals of CERCLA, the interests of communities, and land use policies, the majority interpretation is arguably a better compromise of the incongruent goals of bankruptcy and environmental law because it allows companies a chance to successfully reorganize unless contamination threatens human health and the environment.

Environmental Claims: When Can They Be Discharged?

In 1985, the Supreme Court addressed the issue of whether an environmental cleanup obligation is considered a claim during bankruptcy proceedings and whether the obligation is dischargeable. In this case, the State of Ohio sued William Kovacs, the chief executive officer and stockholder of Chem-Dyne Corp. The state had obtained an injunction ordering Kovacs to clean up an industrial and hazardous waste disposal site in Hamilton, Ohio.[46] When Kovacs failed to clean up the site, Ohio appointed a receiver to take possession of Kovacs' assets in order to begin. Kovacs then filed a petition for reorganization under Chapter 11 bankruptcy, but later converted it to a liquidation bankruptcy under Chapter 7.[47]

With the exception of a handful of types of debt that are exempt under 11 U.S.C. § 523(a), debtors can discharge all debts that arose *before* bankruptcy during bankruptcy proceedings.[48] Ohio did not argue that Kovacs' obligation to clean up the site fell within one of the exceptions under § 523; rather, it argued that Kovacs' obligation to clean up the site arose under state law and was not a debt (or "liability on a claim") within the meaning of 11 U.S.C. § 101(5). Under 11 U.S.C. § 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 of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Ohio argued that its injunction was not a claim within the meaning of § 101(5) because the breach did not give rise to "payment" within the meaning of § 101(5)(B) and Kovacs' breach of the state statute was not an ordinary contractual breach. The court did not find Ohio's arguments compelling and held that a debtor's obligation to comply with a state court injunction requiring it to clean up hazardous waste was a claim within the meaning of 11 U.S.C. § 101(5) and was thus dischargeable pursuant to the Bankruptcy Code.[49] Moreover, because the state appointed a receiver to execute cleanup of the site, the order was for payment of cleanup, not an order to make the debtor clean up the site.

The court, however, largely based its decision on the unusual circumstances of the receivership and did not resolve the broader issue of whether environmental claims would be dischargeable in situations involving contamination that posed a threat to human health or the environment. Lower courts have since analyzed this issue and generally found that injunctions ordered to protect public health and the environment are not dischargeable when the statute in question *only* requires performance, not payment for performance.[50]

Auto Manufacturing Sites

Background

Starting in 2006, the Big Three began to shed more than 100,000 jobs and close factories nationwide. Despite these efforts, the automakers could not keep pace with the declining market for new cars and trucks. With rising oil prices beginning in 2001 and the onset of the economic slowdown in late 2007, the Big Three's fortunes took a dive. As gas prices soared in 2008 and sales continued to plummet, the automakers "burned through their cash reserves at alarming rates."[51]

According to the Center for Automotive Research, a nonprofit organization that performs economic and systems modeling research, 447 automaker and automaker-captive plants have been in operation in the United States, and 267 have closed since 1979. Of those that closed, 112 plants (42 percent) shut their doors between 2004 and 2010, the majority (65 percent) of which were located in Michigan, Ohio, and Indiana. To repurpose these sites, owners and cities must overcome significant barriers, including "[r]ezoning,

building demolition, slab removal, environmental remediation, and purchase price negotiation." The center found that 72 percent of closed plants "were one of the top three employers in the community when [the sites] closed" and that "counties with less economic activity have lower rates of repurposing former auto manufacturing facilities."[52] Bankruptcy issues complicate the process, leaving cities already struggling with unemployment and decreasing populations strapped for resources as well.

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Case Study: Kenosha Chrysler

Background

The long history of auto manufacturing in Kenosha, Wis., began in 1902, with the production of 1,500 Ramblers.[53] The City of Kenosha dealt with its first decommissioned auto manufacturing site in the late 1980s by cleaning up and redeveloping the former American Motor Corporation Kenosha Harbor site. Now "Kenosha Harbor Park," the site includes one-quarter mile of lakefront with courtyards, public seating areas, and a recreation trail that connects the park to a 250-boat marina.[54]

The former Chrysler Kenosha Engine Plant (the site), which became another industrial casualty when Chrysler declared bankruptcy in 2009, occupies 107 acres of land in the heart of the city and is within a half mile of 3,700 residential-related properties and eight schools. The engine plant began production in 1917 under Nash Motors, which later became American Motors Corp (AMC), and continued producing engines until 2009. Chrysler Corporation bought AMC in 1988 and then merged with Germany's Daimler-Benz in 1998 to form DaimlerChrysler AG. Though Chrysler Corporation conducted a number of investigative and cleanup actions of the site before declaring bankruptcy, there has not been a comprehensive investigation of the entire property since the 1990s. Presently, known contaminants include petroleum, chlorinated solvents, including trichloroethene, benzene and toluene, hydraulic fluid, and metals.[55]

On April 30, 2009, Old Carco LLC (formerly known as Chrysler LLC) and 24 of its affiliated debtors filed voluntary petitions under Chapter 11 of the Bankruptcy Code. After the bankruptcy proceedings finalized in May 2010, Old Carco Liquidation Trust (the trust) became the successor in interest to Old Carco LLC ("Old Carco") and its affiliated debtors and debtors in possession under Chapter 11. The trust was established to liquidate the debtors' assets that had been transferred to the trust and to implement the plan of liquidation.[56] As owner of the site, the trust is a responsible party under Wisconsin Statute § 292[57] and 42 U.S.C. § 9607(a). The Wisconsin Department of Natural Resources (WDNR), along with the Wisconsin Department of Justice, the EPA, and the city, has worked on cost-recovery efforts through bankruptcy. The WDNR filed a proof of claim of $36 million for the plant in October 2009.[58] Through the bankruptcy reorganization plan, $10 million of the total $15 million made available through the federal Troubled Asset Relief Program funds created for Chrysler will be available to resolve the environmental problems in Kenosha.[59] Because the trust, Kenosha and the various government agencies collaborated to address the contamination, the parties never litigated the issues discussed earlier in this article.

Local Ordinances

When the trust began work on the Kenosha site, it failed to apply for and secure the necessary permits required by city ordinances.[60] Upon discovering "massive piles of contaminated dirt" on the site, the city issued a cease and desist order, followed by a court injunction request in Kenosha County that required the trust to halt work. As a result, the trust canceled plans for its auction to sell equipment and allow companies to recover scrap metal from the site. Auctions of this nature help debtors generate funds to pay off some of their creditors.

Wisconsin Assistant Attorney General Mark Bromley said that the state and city were concerned that the trust would be able to abandon the property after selling the equipment and materials before a cleanup arrangement was made.[61] According to Arthur Harrington, an attorney for the City of Kenosha in the case, the trust, having first ignored the permits required by local ordinances, soon realized that its ability to run the auction would not be certain unless it met with the city and negotiated a deal.[62] Two ordinances gave the city and state leveraging power in its dealing with the trust: Chapter 13 salvage ordinances and Chapter 9 razing ordinances. Both require permits to engage in the respective activities, accompanied by fees to be established by the Kenosha Common Council.[63]

The resulting deal requires the trust to fulfill certain obligations before walking away from the property.[64] The deal also allows the city to monitor compliance during salvage and demolition. The demolition of buildings down to ground-level slabs and the repair and continued operation of groundwater recovery systems will come at no cost to the City of Kenosha. Finally, the pending litigation between Kenosha and the trust was dismissed and property liens worth $400 million were freed. The trust has agreed to pay $10 million of the Environmental Reserve Cash to an escrow account to assist in cleanup operations, and Kenosha will have the option of taking title to the property.[65] Overall, the resulting deal was highly favorable to the City of Kenosha and the government agencies that would have otherwise had to expend time and resources on cleanup and recovering costs from PRPs.

Superliens

A critical tool that led to a favorable outcome for the City of Kenosha was the WDNR's ability to file a superior lien, or "superlien,"[66] against the property. A lien is a "legal right or interest that a creditor has in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied"[67] and is typically prioritized by the date it is are recorded. Superliens, however, "claim a higher priority than they would ordinarily obtain under the laws governing security interests."[68] When a state places a superlien on a debtor's property, the state effectively becomes a secured creditor.[69] In the case of state environmental superliens, the state's lien for cleanup cost recovery takes precedence over all other liens (with potential exceptions), regardless of order recorded.[70] When an environmental

agency obtains a lien to secure its prepetition expenses, its later claim to recover prepetition costs is treated like a secured claim, and the agency is able to get the value of its lien in bankruptcy.[71] Environmental superliens help states maintain financial stability in the face of the financial burdens associated with CERCLA and individual state programs.[72] Eight states have superlien provisions: Connecticut, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, Pennsylvania, and Wisconsin.[73] Arkansas and Tennessee previously had environmental superliens, but have since removed their priority status from the statutes.[74] Montana's superlien statute only applies to former mining facilities.[75]

Debtors and creditors could challenge the constitutionality of a state superlien statute by arguing that it conflicts with the objectives set forth in the Bankruptcy Act; namely, state superlien statutes hinder the debtor's ability to achieve a fresh start and equitably distribute assets.[76] Debtors could thus argue that the federal Bankruptcy Act preempts conflicting state superlien statutes. However, state superlien statutes are "designed to operate within the framework of the Bankruptcy Act" because they simply designate the state as a prioritized lienholder.[77] Thus, a state has the fiscal ability to perform its police function, and courts "may be less inclined to hold that the Bankruptcy Act preempts a critical police function" that benefits public health and safety and may be crucial to effective cleanups.[78] Within the framework of CERCLA, 42 U.S.C. § 9607(l), (m) and (r) allow the federal government to impose a lien on contaminated property, vessels, and facilities to recover costs it has spent on cleanup. Unlike state liens, federal liens do not take priority over liens that predate them.[79] Whereas the CERCLA lien statutes provide a floor for environmental protection, the state superlien statutes provide a ceiling for "higher environmental quality and lower net government expenditures on environmental cleanups,"[80] making the two laws congruent.

The Land Recycling Law, Wisconsin Act 456, authorizes WDNR to place a superior lien on property to recover response action expenses it incurs.[81] Wisconsin Statute § 292.81(3)[82] ("superior lien statute") authorizes this lien to take precedence over all others, with the exception of residential property and federal tax liens. For example, valid prior liens (such as a mortgage) would still have priority over the superior lien in residential property situations.[83] If the WDNR intends to place a superior lien on a property, it first notifies the owners and mortgagees. This should be sent before the department incurs any investigative or cleanup action expenses.

In the Kenosha case, the Confirmed Plan of Reorganization stipulated that

> [p]ending any sale, transfer or abandonment of the Kenosha Property in Wisconsin, the Liquidation Trust must comply with all applicable environmental, safety and health laws with regard to the Property (including any off-site discharges), and the state reserves the right to take regulatory enforcement action against the Liquidation Trust, including, but not limited to, civil judicial or civil administrative actions for injunctive relief for any violations of the environmental laws on the Property from and after the Confirmation Date.[84]

In essence, the parties agreed that the trust would comply with all environmental and health laws and allowed the state to take action against the trust if it failed to do so. The WDNR did in fact send notice of intent to incur expenses and file a superior lien on March 11, 2011, and again on July 7, 2011, when the trust failed to initiate any of the necessary response actions under Wisconsin Statute § 292.

In the Notice of Presentment of Stipulation and Agreed Order by and between Old Carco Liquidation, the State of Wisconsin, the City of Kenosha, the United States, and the First Lien Agent, the State of Wisconsin alleged that it was "both entitled to assert, and intends to assert, a superior lien against the Kenosha Engine Plant pursuant to Chapter 292…to secure the payment of the costs incurred by the WDNR in performing response actions with respect to environmental contamination at the Kenosha Engine Plant and off site."[85] Though the WDNR never actually filed a superior lien, its ability to do so gave the city and the affiliated agencies leverage in their negotiations with the trust.[86]

Negotiating a favorable deal was likened to herding cats.[87] The local razing and demolition ordinances and the state's superior lien statute were instrumental to the ultimately favorable terms for Kenosha and the government agencies. These laws prevented the trust from otherwise abandoning a contaminated site that likely would have burdened Kenosha with a dead zone for decades.

The success of the final deal demonstrates the importance of, and strategic advantage offered by, strong local ordinances and state superlien statutes in negotiations involving insolvent companies and contaminated properties. Cities and states facing the threat of abandoned contaminated properties can protect themselves by enacting tight razing and demolition ordinances and state superlien statutes. As more manufacturing sites close in the United States and go overseas, these laws will influence the successful and timely cleanup of contaminated properties that obstruct economic development, future land use, and healthy environments.

Conclusion

The damage bankruptcy can leave in its wake mirrors that of flood devastation: property is rearranged, lost, and often abandoned. To prevent environmental claims from drowning in bankruptcy floodwaters and later molding from disuse, cities and states must create lifelines to ensure the future livelihood of contaminated properties affected by bankruptcy. With the plethora of former auto manufacturing plants mottling the country, cities and states will be in a better position to redevelop such properties if they have local ordinances and state superlien statutes that allow them to effectuate favorable deals with the entities appointed to manage the properties. ⊙

Sarah Schenck is a joint degree student at the University of Minnesota Law School and School of Public Health studying enviornmental and energy law and environmental health. The author would like to thank Art Harrington, Beth Schenck, and Mary Basson. This article first appeared in 45 Urb. Law 449 (2013).

Endnotes

[1]S. Rep. No. 989, 95th Cong., 2d Sess. 7 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5792 ("The Committee feels that the policy of the bankruptcy law is to provide a fresh start.").

[2]*Automotive Industry Crisis*, N.Y. Times, topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/auto_industry/

index.html (last updated May 25, 2011).

[3]Valerie S. Brugeman, Kim Hill, and Joshua Cregger, *Repurposing Former Automotive Manufacturing Sites,* Center for Automotive Research, Nov. 2011, at 81, www.dol.gov/autocommunities/Repurposing/RepurposedFacilities.pdf (last visited Mar. 29, 2012).

[4]*About Us*, RACER Trust, racertrust.org/About_RACER/About_Us (last visited Mar. 30, 2012).

[5]In re: Old Carco, LLC., et al., No. 1:09BK50002, 2010 WL 5798397, at 32 (Bankr. S.D.N.Y. Jan. 22, 2010).

[6]*Bankruptcy*, U.S. Courts, www.uscourts.gov/FederalCourts/Bankruptcy.aspx (last visited Apr. 27, 2012).

[7]Bankruptcy Basics 5-7, U.S. Courts (3d ed. 2011), www.uscourts.gov/Viewer.aspx?doc=/uscourts/FederalCourts/BankruptcyResources/bankbasics2011.pdf.

[8]S. Rep. No. 989, 95th Cong., 2d Sess. 7 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5796.

[9]Bankruptcy Basics, *supra* note 7, at 29.

[10]Fed. R. Bankr. P. 1007(b).

[11]Andrew N. Davis and Cynthia C. Retallick, *Conflicting Goals of Environmental Law and Bankruptcy Demand Innovative Business Strategies*, Managing Environmental Liabilities in Bankruptcy 20 (Aspatore ed., 2010). "The term '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." 11 U.S.C. § 101(5).

[12]Mary J. Koks and Tim Million, *Environmental Issues in Bankruptcy*, 40 Tex. Envtl. L. J. 43, 53 (2010).

[13]Bankruptcy Basics, *supra* note 7, at 75-76.

[14]Scott E. Blair, Note, *Toxic Assets: The EPA's Settlement of CERCLA Claims in Bankruptcy*, 86 N.Y.U. L. Rev. 1941, 1951 (2011).

[15]11 U.S.C. § 503(b)(1)(A).

[16]Ingrid M. Hillinger and Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 Am. Bankr. Inst. L. Rev. 331, 390 (2004).

[17]Blair, *supra* note 14, at 1951-52.

[18]*In re* Chateaugay Corp., 944 F.2d 997, 1009 (2d Cir. 1991); *see In re* Wall Tube and Metal Products Co., 831 F.2d 118, 123-24 (6th Cir. 1987) (holding that environmental costs were entitled to administrative expense priority because expenses were "actual and necessary" to preserve the estate in compliance with state law and to protect the public's health and safety); *In re* Peerless Plating Co., 70 B.R. 943, 948-49 (Bankr. W.D.Mich. 1987) (finding that the trustee could not abandon contaminated property in violation of CERCLA, thus creating an implicit duty on the trustee's part to use the estate's "unencumbered assets" to clean up the site in compliance with CERCLA).

[19]Blair, *supra* note 14, at 1952.

[20]*See In re* Chateaugay Corp., 944 F.2d 997, 1009 (2d Cir. 1991); *see also In re* Stevens, 68 B.R. 774, 783 (Bankr. D. Me. 1987).

[21]E-mail from Ingrid Hillinger, Professor of Law, Boston Coll. Law Sch., to author (Apr. 30, 2012, 4:58AM CST) (on file with author).

[22]139 B.R. 397 (N.D. Tex. 1992).

[23]399 B.R. 805, 812-13 (Bankr. S.D.Tex. 2009) ("[T]he fact that the debtor does not intend to operate the property does not diminish its duty under § 959 to manage the property in accordance with state law. A debtor's obligation to expend funds to bring the estate into compliance with a state health and safety law is not contingent upon whether the obligation arose before or after the bankruptcy filing.").

[24]Blair, *supra* note 14, at 1952-53.

[25]*Basic Information*, U.S. EPA, www.epa.gov/superfund/about.htm (last visited Apr. 6, 2012); Laurence S. Kirsch and Geraldine E. Edens, Environmental Aspects of Real Estate and Commercial Transactions 5 (James B. Witkin ed., 3d ed. 2004).

[26]Laurence S. Kirsch & Geraldine E. Edens, Environmental Aspects of Real Estate and Commercial Transactions 4 (James B. Witkin ed., 3d ed. 2004).

[27]*SARA Overview*, U.S. EPA, www.epa.gov/superfund/policy/sara.htm (last visited Apr. 6, 2012); *Brownfields and Land Revitalization: Laws & Statutes*, U.S. EPA, www.epa.gov/brownfields/laws/index.htm (last visited Apr. 6, 2012).

[28]"The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21).

[29]42 U.S.C. § 9607(a).

[30]Kirsch and Edens, *supra* note 25, at 4.

[31]42 U.S.C. § 9607(b).

[32]42 U.S.C. § 9601(40). *See* 42 U.S.C. § 9607(q)(1)(C).

[33]Stanley M. Spracker and James D. Barnette, *The Treatment of Environmental Matters in Bankruptcy Cases*, 11 Bankr. Dev. J. 85, 89-90 (1994-1995) (quoting H.R. Rep. No. 595, at 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6266).

[34]*Id.*

[35]*Reorganization Under the Bankruptcy Code*, U.S. Courts, www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter11.aspx (last visited Apr. 14, 2012).

[36]11 U.S.C. § 362(4)(b).

[37]*Penn Terra Ltd. v. Dep't of Envtl. Res.,* 733 F.2d 267, 272 (3d Cir. 1984).

[38]*California ex rel. Brown v. Villalobos,* 453 B.R. 404, 411 (D. Nev. 2011).

[39]*See Penn Terra Ltd. v. Dep't of Envtl. Res.,* 733 F.2d 267, 273 (3d Cir. 1984); *In re* Nortel Networks, Inc., 669 F.3d 128, 140 (3d Cir. 2011).

[40]*In re* Commonwealth Companies, Inc., 913 F.2d 518, 522 (1990) (quoting *In re* Commonwealth Oil Refining Co., Inc., 805 F.2d 1175, 1184 (5th Cir. 1986)).

[41]Koks and Million, *supra* note 12, at 55 (citing Ahern Lawrence R. III and Darlene T. Marsh, Environmental Obligations in Bankruptcy § 8:36 (Scott M. Ratcliffe and Elaine Keller-Petryk eds., 2009)).

[42]474 U.S. 494, 496-97 (1986).

[43]"After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a).

[44]*Midlantic*, 474 U.S. at 494-98.

[45]Koks & Million, *supra* note 12, at 60-62. *See In re* Peerless Plating Co., 70 B.R. 943; *In re* Wall Tube & Metal Products Co. 831 F.2d 118, 122 (holding that trustee Wall Tube could not abandon the estate "in contravention of the State's environmental law.").

[46]Ohio v. Kovacs, 469 U.S. at 274-76 (1985).

[47]*Id.* at n.1

[48]11 U.S.C. § 727(b) ("Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case….").

[49]*Ohio v. Kovacs,* 469 U.S. at 274-79.

[50]Davis and Retallick, *supra* note 11, at 22. For example, the Third Circuit Court of Appeals has held that a state's attempt to force a debtor to clean up contamination that poses an ongoing hazard is not a claim within the meaning of the Bankruptcy Code. *In re* Torwico Electronics, Inc., 8 F.3d 146, 151 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994). Similarly, the Second Circuit Court of Appeals has held that an EPA clean up order that terminates or ameliorates pollution is not a claim subject to discharge during bankruptcy. *In re* Chateaugay Corp., 944 F.2d 997, 1008 (2d Cir. 1991) ("[A]ny order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a 'claim.'").

[51]*Automotive Industry Crisis*, *supra* note 2.

[52]Valerie S. Brugeman, Kim Hill, and Joshua Cregger, Repurposing Former Automotive Manufacturing Sites, Center for Automotive Research, Nov. 2011, at 6, 81, www.dol.gov/autocommunities/Repurposing/RepurposedFacilities.pdf (last visited Mar. 29, 2012).

[53]*Automobile Culture*, Wisconsin Historical Society, www.wisconsinhistory.org/turningpoints/tp-042/?action=more_essay (last visited Mar. 29, 2012).

[54]Kenosha Harbor Redevelopment, Wisconsin Department of Natural Resources, Nov. 2006, *available at* dnr.wi.gov/files/PDF/pubs/rr/RR762.pdf (last visited Mar. 29, 2012).

[55]*Kenosha Engine Plant Investigation and Cleanup*, Wisconsin Department of Natural Resources, dnr.wi.gov/topic/Brownfields/kep.html (last visited Mar. 29, 2012).

[56]Stipulation and Agreed Order by and Between Old Carco Liquidation Trust, the State of Wisconsin, the City of Kenosha, Wisconsin, the United States of America and the First Lien Agent Resolving Disputes Related to the Debtors' Former Kenosha Engine Plant and Certain Related Real Property, In re Old Carco LLC et al., No.09-50002 (Bankr. S.D.N.Y. Oct. 20, 2011) [hereinafter Stipulation and Agreed Order].

[57]*See* Wis. Stat. § 292.35(e)(2011), docs.legis.wisconsin.gov/statutes/statutes/292.pdf ("'Responsible party' means a generator, an owner or operator, a transporter of a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance.").

[58]*Kenosha Engine Plant Investigation and Cleanup*, *supra* note 55.

[59]*Wisconsin Attorney General J.B. Van Hollen and DNR Secretary Cathy Stepp to Join Local and Federal Officials in Announcing the Redevelopment and Remediation of Former Chrysler Engine Plant Site in Kenosha*, Wis. Dep't of Justice (Oct. 19, 2011).

[60]Telephone Interview with Arthur Harrington, Shareholder and Chair of Environmental and Energy Law Practice Group, Godfrey & Kahn S.C. (Apr. 3, 2012).

[61]Sean Ryan, *August Meeting Key to Sale of Chrysler Site*, The Business Journal, Oct. 21, 2011, *available at* www.bizjournals.com/milwaukee/print-edition/2011/10/21/august-meeting-key-to-sale-of.html?page=all (last visited Apr. 20, 2012).

[62]Telephone Interview with Arthur Harrington, *supra* note 60.

[63]Code of General Ordinances, 2012—Kenosha, Wisconsin, www.kenosha.org/departments/court/ordinances/2012GeneralOrds.pdf.

[64]Stipulation and Agreed Order, *supra* note 56; *See generally*, Jon Olson, *Officials celebrate Chrysler site agreement*, Kenosha News, Oct. 20, 2012, www.kenoshanews.com/home/officials_celebrate_chrysler_site_agreement_256534332.html (last visited Apr. 21, 2012).

[65]Stipulation and Agreed Order, *supra* note 56, at 10-29.

[66]For the purpose of this article, "superliens" and "superior liens" are synonymous.

[67]Black's Law Dictionary 1006 (9th ed. 2009).

[68]Environmental Law Institute, *Analysis of State Superfund Programs: 50-State Study 36, 2001 Update* (2002).

[69]Steven R. Selsberg, *Priority Lien Statutes: The States' Answer to Bankrupt Hazardous Waste Generators*, 31 Wash. U. J. Urb. & Contemp. L. 373, 375 (1987).

[70]Environmental Law Institute, *Analysis of State Superfund Programs: 50-State Study 36, 2001 Update* (2002).

[71]E-mail from Ingrid Hillinger, *supra* note 21.

[72]Selsberg, *supra* note 69, at 379.

[73]*See* Conn. Gen. Stat. Ann. § 22a-452a (2012); La. Rev. Stat. Ann. § 30:2281 (2011); Me. Rev. Stat. Ann. tit. 38, § 1371 (West 2011); Mass. Gen. Laws. Ann. ch. 21E, § 13 (West 2011); Mich. Comp. Laws. Ann. § 324.20138 (West 2012); N.H. Rev. Stat. Ann. § 147-B:10-b; N.J. Stat. Ann. § 58:10-23.11f (West 2012); 32 Pa. Cons. Stats. Ann. § 5116 (West 2012); Wis. Stat. Ann. § 292.81 (West 2011). (There is a good deal of variation in the state superlien statutes. Some statutes provide a residential property exemption; some extend "superpriority" standing based on prerequisites; some are retroactive. For a comparison of variation in state superlien provisions that existed as of 2002, *see* Jonathan Remy Nash, *Environmental Superliens and the Problem of Mortgage-Backed Securitization*, 59 Wash. & Lee L. Rev. 127, 152-58 (2002).)

[74]Nash at 130 n.13 (quoting Robert S. Bozarth, *Environmental Liens and Title Insurance*, 23 U. Rich. L. Rev. 305, 324 (1989)); *See* Ark. Code Ann. § 8-7-516 (2011); Tenn. Code Ann. § 68-212-209 (2012).

[75]Mont. Code Ann. § 82-4-239 (2011).

[76]Selsberg, *supra* note 69, at 390. Other constitutionality issues include potential violations of the Takings Clause and Contracts Clause (U.S. Const. art. I, § 10). *See* Kessler v. Tarrats, 466 A.2d 581 (N.J. Super. Ct. Ch. Div. 1983), *aff'd*, 476 A.2d 326 (N.J. Super. App. Div. 1984) (upholding constitutionality of superlien statute and rejecting claimant's Takings Clause and Contracts Clause arguments).

[77]Selsberg, *supra* note 69, at 390.

[78]*Id.* at n. 128.

[79]Jonathan Remy Nash, *The Illusion of Devolution in Environmental Law*, 38 Urb. Law. 1003, 1008 (2006).

[80]Nash, *supra* note 73, at 162.

[81]*DNR's Superior Lien Authority*, Department of Natural Resources, www.dnr.state.wi.us/org/aw/rr/archives/pubs/RR507.pdf.

[82]"Any expenditures made by the department under s. 292.11 ["Hazardous substance spills"] or 292.31(1) ["Environmental repair database; analysis"], (3) ["Environmental repair"] or (7) ["Implementing the Federal Superfund Act"] shall constitute a lien upon the property for which expenses are incurred if the department files the

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American—including his ancestors, background, religion, family, and earlier political campaigns—*The Real Romney* should be of compelling interest, read now in detachment from the heat of 2012 campaign.

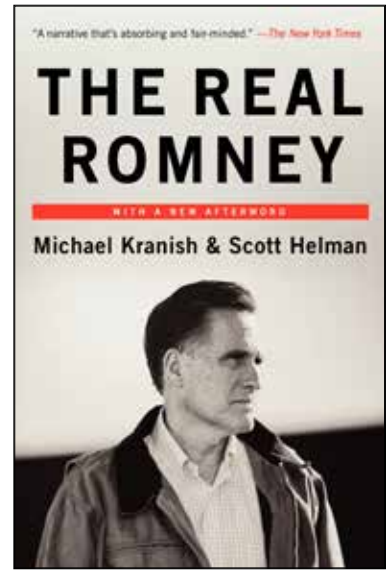
Boston Globe journalists Michael Kranish and Scott Helman are thorough and objective in discussing Mitt Romney's life and the many influences that formed the man, as well as his strengths and weaknesses, and accomplishments and failures. As a result of his strong and mature character, Romney became a leader in his Mormon church—the Church of Jesus Christ of Latter-day Saints—at an early age. After his first year in college, the church required him to participate in a 2½ year mission to France. His efforts to convert French Catholics to Mormonism were not particularly successful, and he was seriously injured in an automobile accident caused by a French priest driving a Mercedes. Though pronounced dead by a police officer on the scene, Romney quickly recovered.

Two years before he went to France, at age 18, Romney proposed to the 16-year-old Ann Davies. Ann's father, a successful businessman, rejected organized religion and did not favor his daughter's marrying a Mormon. Nevertheless, as a result of Mitt's persuasiveness, Ann converted to Mormonism, as eventually did all three of her siblings. All were baptized by Mitt's father, George, and Mitt married Ann shortly after returning from his mission to France.

Mitt had much in common with his father. Strikingly similar in appearance, they were remarkably close, and their lives followed similar paths. From an early age, Mitt could converse with his father on political matters, and he served his father in his three successful campaigns for governor of Michigan. Mitt was elected governor of Massachusetts at the same age, 55, that his father had first been elected governor of Michigan. Both unsuccessfully sought the presidency. Both were persistent in pursuit of their wives against tough obstacles, and remained loyal and devoted throughout their marriages. George tried to bring Lenore a single rose every day of their marriage; Mitt put his career on hold in order to serve his first priority, Ann, when she was struck by multiple sclerosis. Both men were tremendously successful in business, George as president of American Motors, and Mitt as owner of Bain Capital, a private investment firm. Both were keenly analytical in reaching decisions and forceful in implementing them, but frequently insensitive to others because of their self-confidence and stubbornness.

On the other hand, George and Mitt Romney's educations were entirely different. In part because his family was not wealthy, George did not complete college. Mitt, growing up in comfortable circumstances, earned a joint juris doctor and masters in business administration.

The Real Romney discusses many other interesting and lesser known aspects of Mitt Romney's life, delving extensively into his career at Bain and in politics, including, of course, the 2012 presidential campaign. It was published, however, before the 2012 election. ⊙



John C. Holmes was an administrative law judge with the U.S. Department of Labor for more than 25 years, and he retired as chief ALJ at the Department of Interior in 2004. He currently works part-time as an arbitrator and consultant; enjoys golf, travel, and bridge; and can be reached at jholmesalj@aol.com.

Legal History Blog

The Legal History Blog (legalhistoryblog.blogspot.com) features a "Sunday Book Review Round-up" each week, which links to book reviews in other publications. On Aug. 18, 2013, it linked to the book reviews in the August issue of *The Federal Lawyer*, and it plans to link to the book reviews in future issues of *The Federal Lawyer*.

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lien with the register of deeds in the county in which the property is located. A lien under this section *shall be superior to all other liens that are or have been filed against the property*, except that if the property is residential property, as defined in s. 895.52(1)(i), the lien may not affect any valid prior lien on that residential property." Wis. Stat. § 292.81 (2011) (emphasis added).

[83]*DNR's Superior Lien Authority*, *supra* note 81.

[84]Stipulation and Agreed Order, *supra* note 56, at 6. Letter from Mark F. Giesfeldt, Director of Bureau for Remediation and Redevelopment Wisconsin Department of Natural Resources to Old Carco Liquidation Trust, Jones Day, and JP Morgan Chase Bank (Mar. 11, 2011); Letter from Mark F. Giesfeldt, Director of Bureau for Remediation and Redevelopment Wisconsin Department of Natural Resources to Old Carco Liquidation Trust, Jones Day, and Simpson Thacher & Bartlett LLP; Email from Jeffrey B. Ellman, Partner at Jones Day, to Sean H. Lane, U.S. Bankruptcy Judge for the Southern District of New York (Apr. 19, 2010, 2:35 PM) (providing revised language to which parties agreed).

[85]Stipulation and Agreed Order, *supra* note 56, at 7.

[86]Telephone Interview with Arthur Harrington, Shareholder and Chair of Environmental and Energy Law Practice Group, Godfrey & Kahn S.C. (Apr. 3, 2012).

[87]Jon Olson, *Officials celebrate Chrysler site agreement*, Kenosha News, Oct. 20, 2012, www.kenoshanews.com/home/officials_celebrate_chrysler_site_agreement_256534332.html (last visited Apr. 21, 2012) (quoting Arthur Harrington).