

ENVIRONMENTAL CLAIMS AND INSOLVENT
COMPANIES: THE CONTRASTING APPROACHES OF THE
UNITED KINGDOM AND THE UNITED STATES

Blanca Mamutse*

University of Surrey

and

Valerie Fogleman**

University of Cardiff

ABSTRACT

The purposes of insolvency law and environmental law are diametrically opposed. Each regime has been developed with little, if any, consideration of the inevitability of a clash with the other law. Through re-organisation and liquidation, insolvency law pursues the objectives of enabling the debtor to make a fresh start, and maximising returns to creditors through the expeditious distribution of the debtor's assets. The objective of environmental law is to apply the polluter pays principle to ensure that a company or other person who pollutes the environment pays to remediate it instead of the costs being met by taxpayers. Remediating contamination tends to take a long time, with the precise costs not known until the contamination has been remediated. Handling claims for remediating contamination in insolvency proceedings thus has the potential to prolong them, and consequently delay the debtor's fresh start or the distribution of its assets.

This article examines clashes between bankruptcy/insolvency law and environmental law in the United States and the United Kingdom, and the very different approaches adopted by courts in those jurisdictions in an effort to resolve the conflicts between these areas of law. Whilst there is much more case law on environmental claims in bankruptcy proceedings in the United States, the number of insolvent companies that own or occupy land that requires remediation due to their operations is increasing quite rapidly in the United Kingdom. The Scottish Coal case, especially, illustrates the critical consequences for debtors, creditors and the public purse when a company with substantial environmental liabilities enters insolvency proceedings.

The article also examines a new type of proceedings involving insolvent companies and companies with limited assets; claims to remediate contam-

ination against their directors and officers. This situation has already arisen in Ireland and Canada – again with very different approaches in each jurisdiction. The article continues the examination of this relatively new clash between claims for remediating contamination in environmental law against persons related to a company that is insolvent or has limited assets by examining the importance of developing other effective courses to follow in response to the problem of corporate environment liability. These courses include direct parent company liability and the development of directors’ duties.

The article concludes that the reach of the polluter pays principle has had remarkably little effect on bankruptcy/insolvency law to date. The fundamental principle of limited liability in company law has prevailed in many, if not most, cases against the fundamental principle of the polluter pays in environmental law. It is, thus, necessary to develop a more collaborative relationship between environmental, company and insolvency law.

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I. INTRODUCTION

Many countries have enacted liability regimes to remediate land contaminated by historic pollution. None of the regimes could be – or is – truly fair because they necessarily impose retroactive liability on some persons, such as current landowners, who cannot be described as “polluters” in any real sense. In some countries, the designation of these so-called polluters has triggered an elaborate process in which the “polluters” have attempted to avoid or transfer liability and enforcing authorities have attempted to ensure that the costs of remediating the contamination are paid by anyone but the taxpayer.¹

Persons that have been targeted have not only challenged their liability but, depending on the jurisdiction, have brought contribution actions against other potential polluters and made claims against their general liability insurance policies – sometimes with great success even though many policies were issued before the legislation was enacted. Other “polluters” have instituted insolvency proceedings, sometimes attempting to leave their environmental liabilities behind in a re-organization rather than liquidating.

* Blanca Mamutse, Lecturer, University of Surrey School of Law

** Valerie Fogleman, Professor, Cardiff University School of Law.

¹ See, e.g., *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 909 F.2d 1260, 1263 n.2 (9th Cir. 1990) (applying state law to cut off successor corporation’s liability “would result in great expense to the taxpayer, which is contrary to CERCLA’s purposes”).

Governmental authorities have been equally resourceful. If a person identified by them as a polluter has insufficient, or no, funds to pay the costs of remediating contamination, they have sought to impose secondary liability on persons such as directors and officers, lenders, and affiliated – and sometimes unaffiliated – companies. If a polluter institutes insolvency proceedings, they have argued that re-organization does not discharge obligations to remediate contamination, or that the assets in an insolvency estate in a liquidation should pay remedial costs rather than other creditors. Some authorities have even sought to impose liability on directors and officers of an insolvent company when the insolvency estate has insufficient assets to remediate contamination.

This article examines the elaborate procedures involving environmental claims against insolvent companies and the attitude of courts in deciding claims concerning them. The article focuses on the United Kingdom,² doing so by contrasting systems in other jurisdictions and analyzing them with the legislation and approach taken by courts in the United Kingdom. The article begins by briefly examining the polluter pays principle and problems in its application in regimes to remediate contamination from historic pollution. Next, the article examines the main regime to remediate contamination from historic pollution in the United States, the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”), in order to compare it with the main regime in the United Kingdom; Part 2A of the Environmental Protection Act 1990 (“EPA 1990”).³ The purpose is to show how “polluters” have been designated in the regimes to remediate contaminated land from historic pollution and how differences in the liability systems in these regimes have affected approaches to environmental claims in insolvency proceedings, as well as illustrating the different approaches themselves. In the United States, the collision between the regime to remediate contamination from historic incidents and bankruptcy law, neither of which was drafted to accommodate the other, began about 30 years ago and is highly developed. In the United Kingdom, the collision between environmental and insolvency law is much more recent and involves only a handful of cases. The number of cases is, however, steadily increasing.

² Due to the increasing devolution of environmental law in the United Kingdom, this article discusses primarily English law. References to the law of Wales, Scotland and Northern Ireland are made as appropriate.

³ Part 2A is in force in England, Wales and Scotland. It has not been brought into force in Northern Ireland. *See* Waste and Contaminated Land (Northern Ireland) Order 1997, S.R. 1997/2778, part III (not in force). The statutory guidance to Part 2A differs between England, Scotland and Wales. Department for Environment, Food and Rural Affairs, Environmental Protection Act 1990: Part 2A; Contaminated Land Statutory Guidance (Apr. 2012) (England); Natural Scotland, Scottish Executive, Environmental Protection Act 1990: Part IIA Contaminated Land; Statutory Guidance: Edition 2 (Paper SE/2006/44, May 2006); Welsh Government, Guidance Document, Contaminated Land Statutory Guidance – 2012 (WG19243).

The article then turns to proceedings under environmental, not insolvency, law to analyze the approaches of courts in Ireland, and to a lesser extent Canada, in applying the polluter pays principle in respect of directors and officers of companies that are insolvent or cannot otherwise pay to remediate contamination caused by them. In considering the potential expansion of liability for environmental harm, the article discusses English law to examine parent company liability and the impact of the incorporation of environmental concerns into directors' statutory duties. The article concludes by suggesting issues to consider in dealing with future environmental claims involving insolvent companies in the United Kingdom in view of the increasing number of such claims.

II. THE POLLUTER PAYS PRINCIPLE AND ITS APPLICATION TO THE REMEDIATION OF CONTAMINATION FROM HISTORIC POLLUTION

In the late 1960s, many governments realized that traditional legislation to protect human health was no longer adequate in the face of increasingly severe pollution incidents such as the *Torrey Canyon* and the Santa Barbara oil spills and the increasingly rapid deterioration of air and water quality. The governments reacted by enacting legislation to protect the environment as well as human health.⁴ Although legislation to protect the environment was focused, not on protection of the environment for its own sake, but on its effect on human health,⁵ it nevertheless resulted in a massive volume of new legislation.

The new environmental legislation introduced regulatory regimes to control air and water pollution and to manage the handling and disposal of waste. The regimes were much more stringent than previous legislation, with associated increased costs to businesses that were required to purchase and operate technologically advanced equipment to reduce emissions of pollutants and to pay increased costs of disposing of waste in landfills that were engineered to be more secure than previous disposal methods, many of which had simply been unlined pits and lagoons.

⁴ See *R. v. Carrick Dist. Council, ex parte Shelley*, [1996] ENVTL. L. REV. 273, 279, [1996] J.P.L. 857 (Q.B.D.).

⁵ Such legislation includes the Clean Water Act and the Clean Air Act in the USA. In the UK, it includes the EPA 1990. See, e.g., Lisa Heinzerling, *Reductionist Regulatory Reform*, 8 FORDHAM ENVTL. L. REV. 459, 490-91 (1997) ("laws regulating the pollution of air, water, and the land – have the dual purpose of protecting human health and the environment. In most cases . . . these laws will take the protection of human health as their first concern . . . natural resource protection will often end up as a kind of tag-along value, icing on the cake of a regulation otherwise justified by the benefits of improving human health"); Adam I. Davis, *Ecosystem Services and the Value of Land*, 20 DUKE ENVTL. L. & POL'Y F. 339, 344-45 (2010) (major federal environmental laws in United States since 1970s include goal of minimising effect of industrial pollution on human health).

As governments introduced the new controls, they became concerned that some countries would establish themselves as “pollution havens,” that is, intentionally keeping their environmental legislation lax in order to entice businesses to locate in them due to lower capital and operating costs. In 1972, the Organization for Economic Co-operation and Development (“OECD”), whose members included the most developed countries that were introducing the new legislation, recommended that they adopt the polluter pays principle.⁶ The principle is an economic mechanism designed to adopt a harmonized approach to internalize environmental costs into businesses that cause pollution. The internalized costs include the costs of measures taken by businesses to prevent and control pollution from its activities and related administrative costs of regulatory authorities.⁷ Businesses may then include the costs in the price of their goods in the knowledge that their competitors are subject to the same controls and are, thus, also likely to increase the price of their goods. Governments recognized that some business would be unable to afford the new technologically advanced equipment and would have to close. They, therefore, made exceptions to the polluter pays principle to avoid socio-economic problems from the loss of jobs and other hardship. These exceptions, which included government subsidies, were to be used only in “exceptional circumstances.”⁸

The adoption of the polluter pays principle by OECD countries was rapid.⁹ By the mid-1970s, the principle was being referred to as a reason for enactment of the continuing stream of more stringent and extensive environmental legislation instead of being referred to only as a means to internalize costs resulting from it. The polluter pays principle had become an integral part of environmental legislation and came to be cited almost like a mantra as if its meaning is self-evident.

Meanwhile, a new problem had surfaced; contamination from past pollution that continues to cause risks to human health and the environment. Perhaps the most notorious example is Love Canal in the United States, where a school and houses had been built in the 1950s next to a known hazardous waste dump. The dump, which was about 1,000 meters long, 25 meters wide, and three to five meters deep and located in impermeable clay, contained approximately 25,000 tons of over 200 chemicals.¹⁰

⁶ OECD, Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies (C (72)128, 1972).

⁷ See NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 27 (2002).

⁸ OECD, Recommendation of the Council on the Implementation of the Polluter-Pays Principle. (C (74)223, 1974).

⁹ See OECD, Joint Working Party on Trade and Environment, The Polluter-Pays Principle as It Relates to International Trade, 10 (COM/ENV/TD (2001)44/final, Dec. 23, 2002).

¹⁰ See VALERIE FOGLEMAN, ENVIRONMENTAL LIABILITIES AND INSURANCE IN ENGLAND AND THE UNITED STATES 745 (2005) (school was built 26 metres north of its planned location, surrounded by subsurface drain due to concerns that waste would cause odours and damage school’s concrete foundations).

Heavy rain in the mid to late 1970s caused chemicals in the dump to break through the near surface, spilling over in a bathtub-like effect. Black sludge entered basements in the houses, and drums exploded onto the surface.¹¹ Widespread publicity ensued across the United States about Love Canal and the risks from it and other contaminated sites.¹²

In December 1980, the U.S. Government, motivated by Love Canal and similar sites, enacted CERCLA.¹³ The legislation established the Superfund program, which was to be led by the U.S. Environmental Protection Agency (“EPA”) to remediate abandoned and unregulated sites containing hazardous waste. Legislation already existed to remediate contamination, including the Resource Conservation and Recovery Act (“RCRA”) and the Clean Water Act. RCRA authorized the EPA to require persons responsible for non-hazardous and hazardous waste that “may present an imminent and substantial endangerment to health or the environment” to remediate it.¹⁴ The main purpose of RCRA, however, was to control the handling of waste from its cradle to its grave, including technical and financial measures concerning treatment, storage and disposal facilities; it was not designed to remediate waste that was already in the grave.

Countries, such as the United Kingdom, in which there had not been widespread publicity concerning problems from former waste sites, also began to consider whether “Love Canals” existed in their territory¹⁵ and whether they should enact specific legislation to remediate contamination from historic pollution.¹⁶ Like the United States, the United Kingdom already had legislation to remediate contamination, including the statutory nuisance regime¹⁷ and the Water Resources Act 1991.¹⁸ As in the United

¹¹ *Id.* at 741-48. Love Canal was not the only area affected by past pollution that experienced problems in the 1970s. In 1978, authorities in Lekkerkerk, in the Netherlands, discovered a dump containing about 1,600 leaking drums of hazardous waste under a housing estate built on former marshland in the early 1970s.

¹² The number of television, radio and newspaper accounts was massive. The New York Times, alone, printed 180 reports about Love Canal between 1978 and 1987. Other contaminated sites that received national publicity, and generated concerns by the U.S. Congress, included the Valley of the Drums, a 13-acre dump and drum recycling site in a valley in Bullitt County, Kentucky, that contained between 20,000 and 30,000 leaking unlabelled drums of hazardous waste.

¹³ Pub. L. No. 96-510, 94 Stat. 2767 (1980), codified at 42 U.S.C. §§ 9601 *et seq.* (2012).

¹⁴ 42 U.S.C. § 6973(a) (2012).

¹⁵ See Select Committee on Science and Technology, Hazardous Waste Disposal, Report, 1980-1, H.L. 273-II, 63, § 6 (memorandum by Department of Environment: “existence of a Love Canal in the UK cannot . . . be denied categorically. However, the UK is a small country and the chances of substantial indiscriminate dumping having occurred seem likely to be small”).

¹⁶ The United Kingdom subsequently introduced a provision in the EPA 1990 to require waste regulation authorities to inspect their areas to detect threats to human health and the environment from closed landfills and to remedy any contamination that caused such a threat. The provision was eventually repealed, never having been brought into force. Environmental Protection Act 1990, c. 43, § 61 (repealed) (U.K.) (hereinafter EPA 1990).

¹⁷ EPA 1990, pt. III.

States, however, the legislation was not designed to remediate contamination from past pollution, with the result that its effect was “patchy.”¹⁹

Throughout the late 1980s and the 1990s, the role of the polluter pays principle was slowly being extended from its roots as an economics principle in international trade to internalization of costs from the remediation of contamination.²⁰ As it was extended, variations in the principle emerged, with broad differences in its scope²¹ and degree²² in different jurisdictions. Major differences involved the identity of the persons who would be “polluters”. The OECD has not addressed this issue, even in the context of legislative controls on future pollution.²³ The European Union subsequently identified the “polluter” on economic principles by stating that the point at which the fewest economic operators exist should be selected, with the “polluter” to be the person or persons at that point.²⁴ This approach is not, however, especially relevant to liability for the remediation of contamination from historic pollution. The principle adapts badly to legislation that imposes liability because it is too late to pass on costs incurred in remediating contamination in the price of goods when competitors may not have to incur such costs. The persons who pay the cost of remediating pollution in retroactive liability regimes are probably current shareholders of companies named as polluters.²⁵

¹⁸ Water Resources Act 1991, c. 57 (Eng. & Wales).

¹⁹ Environment Committee, *Contaminated Land* (HC 1989-90, 170-I) ¶ 8.

²⁰ See DE SADELEER, *supra* note 7, at 33-34; see also Sanford E. Gaines, *The Polluter-Pays Principle: From Economic Equity to Environmental Ethos*, 26 TEX. INT’L L.J. 463, 484-85 (1991) (principle was moving cautiously “fairly far toward a liability conception of what polluters should pay”).

²¹ See Boris N. Mamlyuk, *Analyzing the Polluter Pays Principle Through Law and Economics*, 18 SE. ENVTL. L.J. 39, 44-46 (2009).

²² See Frank Biermann, Frédéric Böhm, Rainer Brohm, Susanne Dröge & Harald Trabold, *The Polluter Pays Principle under WTO Law: The Case of National Energy Policy Instruments* (Environmental Research of Federal Ministry of the Environment, Nature Conservation and Nuclear Safety, Research Report 201 19 107, UBA-FB 000555/e, Dec. 2003), 5-6 (referring to polluter pays principle in Germany as one of three basic principles for environmental policy and commenting on wide variation in its implementation, with most OECD countries applying “weak” principle whilst only a few countries, such as Germany and Denmark, apply “strong” principle (including environmental taxes); also noting that most developing countries have not adopted the principle due to adverse economic conditions).

²³ See DE SADELEER, *supra* note 7, at 38.

²⁴ Council Recommendation of 3 March 1975 regarding cost allocation matters and action by public authorities on environmental matters, 75/436/Euratom, 1975 O.J. (L 194), 1, 2, Annex, § 3; see also DE SADELEER, *supra* note 7, at 54-55 (channelling liability responds to polluter pays principle’s redistributive and preventive functions).

²⁵ See Don Fullerton & Seng-Su Tsang, *Environmental Costs Paid by the Polluter or the Beneficiary? The Case of CERCLA and Superfund 4* (National Bureau of Economic Research, NBER Working Paper No. 4418, Aug. 1993) (“CERCLA liability is established on the commonly held principles that polluters pay for pollution. However, because this liability is retroactive, it is probably borne by current shareholders”).

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There is an argument that equity demands that past polluters pay such costs. While this may well be – and probably is – correct for companies that were aware that their activities were causing harm to human health and the environment when they carried them out, it would have been impossible for companies to dispose of waste according to today’s technical standards because the technology did not exist at that time. Further, an argument that the true costs of production were in effect subsidized by the public is simply wrong; the public benefited from the lower prices of the goods being produced.

III. REGIMES TO REMEDIATE CONTAMINATION FROM HISTORIC POLLUTION

The regimes to remediate contamination from historic pollution in the United States and the United Kingdom are vastly different, not only in their purpose, scope, implementation and enforcement, but also in the identity of the persons designated as “polluters.”

A. Comprehensive Environmental Response, Compensation, and Liability Act

The liability system in CERCLA is not specifically based on the polluter pays principle, perhaps due, among other things, to CERCLA being signed into law on 11 December 1980,²⁶ when application of the principle was mostly limited to the internalization of environmental costs in international trade.

CERCLA’s primary purpose is to enable the federal government swiftly to clean up abandoned and uncontrolled hazardous waste sites.²⁷ The U.S. Congress knew that significant funding would be required because, by the time CERCLA was enacted, the EPA had investigated 7,000 sites suspected of, or known to pose, risks to human health and the environment, and had already identified 397 sites that needed remediation, at an average estimated cost between \$3 million and \$5 million each.²⁸ Congress, therefore, created a trust fund, commonly known as the Superfund, established

²⁶ Pub. L. No. 96-510, 94 Stat. 2767 (1980).

²⁷ See *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1386 (5th Cir. 1989); *Dickerson v. Adm’r, EPA*, 834 F.2d 974, 978 (11th Cir. 1987); *J.V. Peters & Co. v. Adm’r, EPA*, 767 F.2d 263, 264 (6th Cir. 1985).

²⁸ 126 Cong. Rec. H9153, H9155 (1980) (statement of Rep. Florio), *reprinted in* 1980 U.S.C.C.A.N. 26,336, 26,338, *reprinted in* 2 Senate Committee on Environment and Public Works, *A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund)*, Public Law 96-510, 97th Cong., 2d Sess. 686 (committee print 1983, 3 volumes) [hereinafter *CERCLA Legislative History*]. The EPA had estimated, in 1979, that there were 30,000 to 50,000 uncontrolled hazardous waste sites in the US, of which between 1,200 and 2,000 were posing a serious risk to human health. H.R. Rep. No. 96-1016(I), 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120, *reprinted in* 2 *CERCLA Legislative History* at 47, 49.

at \$1.6 billion for five years,²⁹ to be funded by taxes.³⁰ Levying taxes, primarily from petro-chemical industries, followed the polluter pays principle because, in particular, the levies were on chemicals that would be cleaned up under the Superfund program. In addition, due to the levy applying to all companies that were producing the same petro-chemicals, they could internalize the costs.³¹ In order to ensure that contaminated sites that posed the greatest risks to human health and the environment would be remediated first, Congress established a national priorities list of sites to be remediated.³²

CERCLA's secondary purpose is to make persons who were responsible for the disposal of hazardous waste that needed to be cleaned up bear the responsibility and cost of doing so.³³ In order to facilitate swift clean ups, liability under CERCLA is strict,³⁴ joint and several,³⁵ and retroac-

²⁹ 42 U.S.C. § 9631(a) (repealed).

³⁰ CERCLA established four taxes to fund the Superfund trust fund. Most funding was raised by an excise tax on crude oil. 26 U.S.C. §§ 4611-12. The other taxes were a chemical feedstocks excise tax, *id.* §§ 4661-62, a chemical derivatives excise tax, *id.* §§ 4671-72, and an environmental corporate income tax. *id.* § 59A. The taxes were based on industries associated with the contaminated sites. The taxes raised approximately \$13.5 billion between 1981 and 1998. They lapsed in 1996 and have not been reauthorized. *See EPA Supports Superfund "Polluter Pays" Provision / Agency Submits Administration's Guidance to Congress* (EPA press release, June 21, 2010) ("EPA sent a letter to Congress in support of reinstating the lapsed Superfund 'polluter pays' taxes . . . taxes should be paying for teachers, police officers and infrastructure that is essential for sustainable growth -- not footing the bill for polluters").

³¹ *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 8 (1982) (Senate Committee on Environment and Public Works "concluded that the chemical industry, with its vast earnings, would be able to internalize these costs").

³² *See* 40 C.F.R. § 300.425 (2013).

³³ *See* *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991) (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)).

³⁴ CERCLA does not specifically provide that it imposes strict liability. Instead, it adopted the standard of liability under section 311 of the Clean Water Act, 42 U.S.C. § 9601(32) (2012); *see* 33 U.S.C. § 1321 (2012). It is well settled, however, that the standard of liability under CERCLA is strict liability, as it is under section 311 of the Clean Water Act. *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 394 (9th Cir. 1989); *see* H.R. Rep. No. 253(I), 99th Cong., 1st Sess. 74 ("No change has been made in the standard of liability under CERCLA. As under section 311 of the Federal Water Pollution Control Act, 33 U.S.C. 1321 (2012), liability under CERCLA is strict, that is, without regard to fault or wilfulness"), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2856, *reprinted in* 3 Senate Committee on Environment and Public Works, *A Legislative History of the Superfund Amendments and Reauthorization Act of 1986* (Public Law 99-499), 101st Cong., 2d Sess. 1764, 1837 (committee print 1990, 7 volumes).

³⁵ *See* *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805-11 (S.D. Ohio 1983) (defendant is jointly and severally liable unless it can show that harm was divisible and that there is reasonable basis to apportion harm). The court noted that Congress deleted a requirement for joint and several liability in all cases, and held that Congress intended

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tive.³⁶ Congress also ensured that it would be relatively easy for the EPA to enforce the regime. Liability attaches if:

- a site is a “facility”³⁷
- from which there is a “release or threatened release”³⁸
- of a “hazardous substance”³⁹
- into the “environment.”⁴⁰

liability to “be determined from traditional and evolving principles of common law.” *Id.* at 808 (quoting 126 Cong. Rec. 30,932 (1980) (remarks of Sen. Randolph), *reprinted in* 1980 U.S.C.C.A.N., *reprinted in* 1 CERCLA Legislative History, *supra* note 28, at 686; *see also* O’Neil v. Picillo, 883 F.2d 176, 179 n.4 (1st Cir. 1989) (“courts generally . . . have declined to place the burden of showing that defendants are “substantial” contributors on the government, recognizing Congress’ concern that cleanup efforts not be held hostage to the time-consuming and almost impossible task of tracing all of the waste found at a dump site”), *cert. denied*, 493 U.S. 1071 (1990).

³⁶ *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986) (“Although CERCLA does not expressly provide for retroactivity, it is manifestly clear that Congress intended CERCLA to have retroactive effect”).

³⁷ *See United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (“term ‘facility’ should be construed very broadly to include ‘virtually any place at which hazardous wastes have been dumped, or otherwise disposed of’”), *cert. denied*, 484 U.S. 848 (1987); *see also* *New York v. General Elec. Corp.*, 592 F. Supp. 291, 296 (N.D.N.Y. 1984) (“Congress sought to deal with every conceivable area where hazardous substances come to be located”).

³⁸ 42 U.S.C. § 9601(22) (2012) (subject to limited exclusions, term “release” means “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant”); *see, e.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985) (“leaking tanks and pipelines, the continuing leaching and seepage from the earlier spills, and the leaking drums all constitute “releases . . . Moreover, the corroding and deteriorating tanks, Shore’s lack of expertise in handling hazardous waste, and even the failure to license the facility, amount to a threat of release”).

³⁹ 42 U.S.C. § 9601(14) (2012) (defining “hazardous substance” as any substances designated pursuant to the Clean Water Act, RCRA, Clean Air Act – over 700 substances – but not including “petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance [or] natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas)”). Liability for remediating oil, as indicated above, is under the Oil Pollution Act 1990. 33 U.S.C. §§ 2701 *et seq.* (2012).

⁴⁰ 42 U.S.C. § 9601(8) (2012) (defining “environment” as “(A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States . . . , and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States”).

All the above terms are defined broadly. The term “persons” is also defined broadly;⁴¹ it includes “all known forms of business and commercial enterprises,”⁴² including successor corporations⁴³ and bankruptcy estates.⁴⁴

There are four categories of liable persons, called potentially responsible parties (“PRPs”), all of whom are primarily liable. They are:

- “the owner and operator of a vessel or a facility;”⁴⁵
- “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;”⁴⁶
- generators of hazardous substances, that is, persons who “arranged for” the disposal or treatment of waste;⁴⁷ and

⁴¹ 42 U.S.C. § 9601(21) (2012). The term “person” is defined to mean “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.” *Id.*

⁴² *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991).

⁴³ *Id.* at 1245 (term “corporation” includes successor corporation); *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 909 F.2d 1260, 1263 n.2 (9th Cir. 1990) (applying state law to cut off successor corporation’s liability “would result in great expense to the taxpayer, which is contrary to CERCLA’s purposes”); *see also In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1010, 1019 (D. Mass. 1989) (“[i]t would be manifest injustice . . . to permit [successor corporation] to contract away [corporation’s] liability for PCB contamination”).

⁴⁴ *In re T.P. Long Chem., Inc.*, 45 B.R. 278, 284 (Bankr. N.D. Ohio 1985) (“this court has no difficulty in finding that the debtor, and hence the debtor’s estate, is a person as defined by CERCLA”).

⁴⁵ 42 U.S.C. § 9607(a)(1) (2012). The term “facility” includes offshore as well as onshore facilities. *Id.* §§ 9601(20)(A)(17), (18). The term is defined broadly to include anywhere that a hazardous substance is located. *Id.* § 9601(9) (“(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel”). Exceptions to the term “facility” are narrow; they include consumer products in consumer use. *Id.* § 9601(9) (B). The word “and” has been interpreted to mean “or”; it thus includes owners who are not operators and vice versa. *See United States v. Fleet Factors*, 901 F.2d 1550, 1554 n.3 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

⁴⁶ 42 U.S.C. § 9607(a) (2) (2012). CERCLA incorporates the term “disposal” from RCRA, in which it is defined as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.” *Id.* § 9601(2); *see id.* § 6903(3).

⁴⁷ *Id.* § 9607(a) (3) (“any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances”). The term “arranged for” is not defined

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- transporters, that is, persons who transported a hazardous substance to a treatment or disposal facility selected by them.⁴⁸

Courts have interpreted all four categories of PRPs broadly due to CERCLA's remedial nature. CERCLA's three defenses,⁴⁹ meanwhile, have been construed narrowly.⁵⁰ The defenses are: an act of God; an act of war; an act or omission of an unrelated third party, and any combination of the three defenses.⁵¹

As stated by Justice Brennan, “[t]he remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.”⁵² Further, the EPA is not limited to enforcing CERCLA in respect of sites that are contaminated by historic pollution; it may enforce other regimes such as RCRA.

Classifying the types of PRPs in the four categories does not appear to have been particularly contentious. The Senate Bill, which was introduced on 11 July 1979 and which became CERCLA, broadly identified persons who would be liable. They were to be owners or operators of a facility or

but has been construed broadly. *E.g.*, *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) (“liberal judicial interpretation of the term is required in order that we achieve CERCLA's ‘overwhelmingly remedial’ statutory scheme”) (“In light of the broad remedial nature of CERCLA, we conclude, as other courts have, that even though a manufacturer does not make the critical decisions as to how, when, and by whom a hazardous substance is to be disposed, the manufacturer may be liable. For liability to be imposed on such a manufacturer, the evidence must indicate that the manufacturer is the party responsible for “otherwise arranging” for the disposal of the hazardous substance”); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (8th Cir. 1989) (“Courts have also held defendants ‘arranged for’ disposal of wastes at a particular site even when defendants did not know the substances would be deposited at that site or in fact believed they would be deposited elsewhere”).

⁴⁸ 42 U.S.C. § 9607(a) (4) (2012) (“any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person”). Again, this category has been construed broadly to include persons that carried out filling and grading activities during the development of a site fell within the category because it entailed moving contaminants and depositing them at another area of the site. *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988) (filling and grading creosote pools).

⁴⁹ 42 U.S.C. § 9607(b) (2012). In order to succeed in a defense, a PRP must prove that the release or threatened release and damages from it were caused “solely” by one of the defenses. *Id.*

⁵⁰ *See, e.g.*, *United States v. Stringfellow*, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987) (“rains were foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels. Furthermore, the rains were not the sole cause of the release. Therefore . . . rains were not sufficient to establish an act of God defense pursuant to CERCLA”); *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1540 & n.2 (W.D. Mich. 1989) (“Defendants have not shown any evidence . . . that a third party was the sole cause of the release and concomitant harm”).

⁵¹ 42 U.S.C. § 9607(b) (2012).

⁵² *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989).

vessel from which there was an unlawful discharge, release or disposal of hazardous substances “and any other person who caused or contributed or is causing or contributing to such discharge, release, or disposal, including but not limited to prior owners, lessees, and generators, transporters, or disposers of such hazardous substances.”⁵³ This loose terminology was subsequently revised to substantially its final form by June 1980.⁵⁴ The congressional debates that followed the establishment of the four categories of PRPs did not tend to focus on the types of persons in the categories or refer to them as “polluters.” Instead, the debates focused on whether strict, and/or joint and several liability would be imposed, and the defenses to such liability.⁵⁵

When it enacted CERCLA, the U.S. Congress considered bankruptcy law tangentially. That is, CERCLA exempts state and local governments from liability as an owner or operator if they “acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as a sovereign.”⁵⁶ In such a case, the person “who owned, operated, or otherwise controlled activities at such facility immediately beforehand” is deemed to be the owner or operator of the facility.⁵⁷ Congress thus foresaw the potential for bankrupt companies to be PRPs but did not establish any criteria for handling environmental claims in bankruptcy proceedings.

By November 1980, substantive debates on the Senate Bill had virtually ceased as Congress hurriedly enacted CERCLA in the waning days of a lame duck Congress. The Senate Bill that had been drafted by “a bipartisan leadership group of senators (with some assistance from their House counterparts), introduced, and passed by the Senate in lieu of all pending measures [following which f]aced with a complicated bill on a take it -or-leave it basis, the House took it, groaning all the way.”⁵⁸ A detailed understanding of many of CERCLA’s provisions is, therefore, unavailable. The

⁵³ S. 1480, 96th Cong., 1st Sess., § 4(a), *reprinted in* 1 CERCLA Legislative History, *supra* note 28, at 155, 168-69.

⁵⁴ S. 1480, Staff Working Paper No. 2 (June 2, 1980), *reprinted in* 1 CERCLA Legislative History, *supra* note 28, at 245, at 266-67.

⁵⁵ See 126 Cong. Rec. (daily ed. Sept. 19, 1980), *reprinted in* 1980 U.S.C.C.A.N. 26,336, 26,339, *reprinted in* 2 CERCLA Legislative History, *supra* note 28, at 222, 232 (statement of Rep. Staggers) (“issues of liability were perhaps the most difficult . . . in fashioning this legislation. In many instances, it will be difficult to determine precisely what the responsibilities of a generator or a transporter of hazardous waste or the owner or operator of the hazardous waste disposal site should have been and what a particular defendant’s portion of cleanup costs should be”); see also J.P. Sean Maloney, *A Legislative History of Liability under CERCLA*, 16 SETON HALL LEGIS. J. 517, 538 (1992); Grad, *supra* note 31, *passim*.

⁵⁶ 42 U.S.C. § 9601(20) (D) (2012).

⁵⁷ *Id.* § 9601(20) (A) (iii).

⁵⁸ Grad, *supra* note 31, at 1.

hurried drafting also inevitably led to ambiguities in CERCLA itself.⁵⁹ What was never an issue, however, was the ease with which the EPA was intended to enforce CERCLA to achieve the swift remediation of contaminated sites. As U.S. Assistant Attorney General Roger Marzulla subsequently stated: “With only slight exaggeration, one government lawyer has described a [CERCLA] trial as requiring only that the Justice Department lawyer stand up and recite: ‘May it please the Court, I represent the government and therefore I win.’”⁶⁰

The EPA,⁶¹ the U.S. Department of Justice,⁶² and commentators⁶³ have referred to CERCLA’s implementation of the polluter pays principle in the liability provisions of CERCLA despite references to the principle in its enactment being largely absent. It is, perhaps, telling that persons that are responsible for remediating contamination from historic pollution are called PRPs, not responsible or liable parties.

During the first five years after CERCLA’s enactment, the EPA’s enforcement of the Superfund program was lax and heavily biased towards

⁵⁹ See, e.g., *Artesian Water Co. v. Gov’t of New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988) (“CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage”); *Mid Valley Bank v. N. Valley Bank*, 764 F. Supp. 1377, 1387 (E.D. Cal. 1991) (“extraordinarily poorly drafted statute”); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989) (“[I]ike many a court before it, this Court cannot forbear remarking on the difficulty of being left compassless on the trackless wastes of CERCLA. This Court has previously noted the statute’s incomprehensive nature”).

⁶⁰ See William D. Evans, Jr., *The Phantom PRP in CERCLA Contribution Litigation: EPA to the Rescue?*, 26(43) ENV’T REP. (BNA) CURR. DEV. 2109, 2110 (Mar. 8, 1996).

⁶¹ E.g., US EPA, Memorandum, Interim Guiding Principles for Good Samaritan Projects at Orphan Mine Sites and Transmittal of CERCLA Administrative Tools for Good Samaritans, 2 (June 6, 2007) (“Importantly, the Good Samaritan Initiative preserves CERCLA’s ‘polluter pays’ principle”); EPA, *CERCLA/Superfund Orientation Manual* (Office of Solid Waste and Emergency Response, Technology Innovation Office EPA/542/R-92/005, Oct. 1992) II-2 (“Superfund program was founded on the premise that the polluter must pay for problems created by the polluter”); EPA, *The Buck Stops Here; Polluters are Paying for Most Hazardous Waste Cleanups*, Superfund Today 1 (EPA 540-K-96/004, June 1996) (“public’s demand that polluters pay for cleanup also makes it critical that EPA find those who are responsible”).

⁶² Statement of Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice Before the Superfund, Waste Control, and Risk Assessment Subcommittee of the Senate Environment and Public Works Committee (Mar. 21, 2000) (“Congress also decided that the parties that created these environmental hazards should pay for cleaning them up. This ‘polluter pays’ principle is implemented in the liability and enforcement provisions of the statute”). The U.S. Department of Justice brings judicial proceedings on behalf of the EPA and other federal administrative agencies.

⁶³ See, e.g., Thomas A. Rhoads & Jason F. Shogren, *Current Issues in Superfund Amendment and Reauthorization: How is the Clinton Administration Handling Hazardous Waste*, 8 DUKE ENVTL. L. & POL’Y F. 245, 245 (1998) (referring to “reliance on the ‘polluter pays’ principle in CERCLA”).

industry.⁶⁴ Criticism of the EPA and realization by the U.S. Congress that the problem of abandoned and uncontrolled waste sites was much worse than originally foreseen and could eventually cost \$100 billion to clean up,⁶⁵ resulted in major amendments when CERCLA was re-authorized by the Superfund Amendments and Reauthorization Act (“SARA”). Reasons for the amendments were to strengthen the legislation and the Superfund program and to rebuild public confidence.⁶⁶ Thus, CERCLA became even more stringent. A key change made by SARA was a bar against review of a PRP’s liability until the EPA brings a judicial action to enforce an order or brings a cost-recovery action.⁶⁷ That is, a PRP must remediate contamination before it can argue that it is not liable under CERCLA. The bar codified judicial practice. When PRPs had challenged their liability prior to the EPA having brought such proceedings, courts had refused to infer a right to do so,⁶⁸ considering that it would frustrate CERCLA’s primary purpose of swiftly cleaning up hazardous waste sites if challenges were to be allowed before contamination had been remediated.⁶⁹

⁶⁴ See Patricia Sullivan, *Anne Gorsuch Burford Dies; Reagan EPA Adm’r*, WASHINGTON POST, B06 (July 22, 2004) (Ms Gorsuch had “resigned under fire in 1983 during a scandal over mismanagement of a \$1.6 billion program to clean up hazardous waste dumps”).

⁶⁵ See H.R. Rep. No. 253(I), 99th Cong., 1st Sess. 55, reprinted in 1986 U.S.C.C.A.N. 2835, 2837, reprinted in 3 Senate Committee on Environment and Public Works, A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499), 101st Cong., 2d Sess. 1764, 1818 (committee print 1990, 7 volumes).

⁶⁶ Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

⁶⁷ 42 U.S.C. § 9613(h) (2012); see *In re Combustion Equip. Assocs., Inc.*, 838 F.2d 35, 41 (2d Cir. 1988) (declining to exercise jurisdiction under Declaratory Judgment Act to declare CERCLA claim dischargeable in bankruptcy).

⁶⁸ *E.g.*, *United States v. Outboard Marine Corp.*, 789 F.2d 497, 506 (7th Cir. 1986), cert. denied, 479 U.S. 961 (1986) (“CERCLA does not give . . . federal Courts jurisdiction to review the EPA’s [actions] prior to enforcement. Rather, these courts have held that the jurisdiction rests with the trial court only after the EPA has enforced [CERCLA] and the Gov’t subsequently sues under CERCLA . . . to recover the cleanup costs incurred”).

⁶⁹ *E.g.*, *Dickerson v. Adm’r, EPA*, 834 F.2d 974, 978 (11th Cir. 1987) (quoting *J.V. Peters & Co., Inc., v. Adm’r, EPA*, 767 F.2d 263, 264 (6th Cir. 1985)) (“purpose of CERCLA provides further evidence that Congress did not intend to provide for pre-enforcement judicial review. The primary purpose of CERCLA is ‘the prompt cleanup of hazardous waste sites’”). *Id.* at 978 (quoting *Lone Pine Steering Comm. v. EPA*, 777 F.2d 882, 886 (3d Cir. 1985) (“[t]o delay remedial action until the liability situation is unscrambled would be inconsistent with the statutory plan to promptly eliminate the sources of danger to health and environment”), cert. denied, 476 U.S. 1115 (1986)). PRPs may apply for recovery of their costs, 42 U.S.C. § 9606(b) (2) (A) (2012), but succeed only infrequently. SARA also specifically authorized PRPs to bring contribution actions against other PRPs. 42 U.S.C. § 9613(f)(1); see *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 162-63 (2004).

B. Part 2A of the Environmental Protection Act 1990

In contrast to CERCLA, Part 2A is an enforcement-unfriendly regime which, as described below, is not designed to result in the swift remediation of contaminated sites even though the U.K. Government specifically stated that Part 2A is based on the polluter pays principle.⁷⁰ By the time Part 2A received the Royal Assent on 19 July 1995, the principle had been an integral part of environmental law for over 20 years and was part of the E.U. Treaty.⁷¹ Inclusion of the principle in the Treaty, however, is directed at institutions of the European Union; Member States are not bound by it.⁷² Further, Part 2A is national, not E.U., legislation. Still further, the polluter pays principle in Part 2A differs significantly from that of the OECD and the European Union.⁷³

⁷⁰ Department of the Environment and the Welsh Office, *Paying for Our Past* (Mar. 8, 1994), ¶ 4E.1 (“polluter pays principle must be central to any regulatory regime”) [hereinafter *Paying for Our Past*].

⁷¹ Consolidated Treaty of the European Union art. 130r (2). The polluter pays principle is, together with the preventive and precautionary principles, in the Treaty on the Functioning of the EU (“TFEU”), art. 191(2). Article 191(2) provides: “Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”

⁷² See *Envtl. Prot. Agency v. Neiphin Trading Ltd.*, [2011] I.E.H.C. 67 ¶ 6.28 (Ir.) (agreeing with LUDWIG KRÄMER, *FOCUS ON EUROPEAN ENVIRONMENTAL LAW* 246 (1992), that the polluter pays principle “merely set forth principles for action by the European Community, or Union as it is now, but they do not themselves have any significant or even indirect legal effect”); see *R. v. Sec’y of State for Trade and Industry ex parte Duddridge*, [1996] ENVTL. L. REV. 325 (Court of Appeal) (agreeing Sec’y of State did not have duty to apply precautionary principle due to its inclusion in EU Treaty). The EU has applied the principle in the Environmental Liability Directive (“ELD”) in which the principle has retained its economic origins in its application to liability for remediating accidental environmental damage. Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage, as amended, 2004, O.J. (L 143), 56; see also Valerie Fogleman, *The Polluter Pays Principle for Accidental Environmental Damage; Its Implementation in the Environmental Liability Directive* 116, 128-47, in *PRINCIPI EUROPEI E ILLECITO AMBIENTALE* (Alessandro D’Adda et al. eds., 2013). The ELD does not, however, apply to environmental damage that occurred before its deadline for transposition into Member State national law on 30 April 2007. ELD, art. 17; see *Joined Cases C-379/08 & C-380/08, Raffinerie Mediterranee SpA (ERG) v. Ministero dello Sviluppo Economico*, 2010 E.C.R. I-01919, ¶ 34.

⁷³ See Blanca Mamutse & Valerie Fogleman, *Improving the Treatment of Environmental Claims in Insolvency*, [2013] J.B.L. 486, 497-99 (discussing differences in application of polluter pays principle). The U.K. Government’s attitude towards the polluter pays principle differed according to whether it was being introduced in E.U. or national legislation. In 1993, a Select Committee of the House of Lords referred to the principle as having been developed in the E.U. “on the perceived equity of requiring those whose activities cause damage to pay for rectifying it”. Select Committee on the European Communities, *Remedying Environmental Damage*, Third Report, 1993-94, H.L., Paper 10 (Dec. 14, 1993), 5, ¶ 2. The committee considered that it was “quickly apparent that [it

Unlike CERCLA, Part 2A was not intended to establish a national program to remediate contaminated land.⁷⁴ Its main objective is “to provide an improved system for the identification and remediation of land where contamination is causing unacceptable risks to human health or the wider environment”⁷⁵ The primary authorities that implement and enforce Part 2A are nearly 450 local authorities, not the national environmental authorities for England, Wales, and Scotland.⁷⁶ Unlike CERCLA, an enforcing authority’s discretion is strictly limited.⁷⁷ After the local authority in whose area the contaminated site is located makes a determination that the land meets the criteria for designation as “contaminated land,”⁷⁸ it faces nine prohibitions on the service of a remediation notice⁷⁹ and 23 grounds of appeal against it.⁸⁰

To be liable under Part 2A, a person must be an “appropriate person.”⁸¹ The word “person” is defined broadly, as in CERCLA, to include “a body of persons corporate or unincorporated”⁸² and governmental authorities.⁸³ There are two categories of appropriate persons. Class A persons, who are primarily liable, are persons that “caused or knowingly permitted” a substance to be in, on or under land such that the land is con-

provides] no more than general indications to what might be desirable policy and practice.” *Id.* at 6, ¶ 4.

⁷⁴ See Defra, *Assessing Risks from Land Contamination – A Proportionate Approach, Soil Guideline Values: The Way Forward* (CLAN 6/06, Nov. 2006) 6, ¶ 2.6 (“Part 2A was never intended to establish a national remediation program”).

⁷⁵ Department of the Environment, Transport and the Regions, DETR Circular 02/2000, Environmental Protection Act 1990: Part IIA, Contaminated Land (Mar. 20, 2000), annex 1, ¶ 25.

⁷⁶ The Environment Agency, Natural Resources Wales and the Scottish Environment Protection Agency are the authorities for a sub-set of contaminated land known as special sites. Their authority is, however, severely limited. See Valerie Fogleman, *The Contaminated Land Regime; Time for a Regime that is Fit for Purpose (Part 1)*, INT’L J. L. IN BUILT ENV’T (forthcoming).

⁷⁷ See Valerie Fogleman, *The Contaminated Land Regime; Time for a Regime that is Fit for Purpose (Part 2)*, INT’L J. L. IN BUILT ENV’T (forthcoming).

⁷⁸ EPA 1990, § 78B.

⁷⁹ *Id.* § 78H. A remediation notice is served if the appropriate person does not voluntarily remediate the contamination. If the appropriate person remediates the contamination voluntarily, the appropriate person prepares and publishes a remediation statement. EPA § 78H (7).

⁸⁰ Contaminated Land (England) Regulations 2006, S.I. 2006/1380, reg. 7. Whilst there is an argument that the grounds of appeal could be seen as protecting the enforcing authority from many challenges, this argument is simply wrong. Extensive research into regimes to remediate contamination around the world has not found another regime that is as prescribed as Part 2A.

⁸¹ EPA 1990, § 78A (9).

⁸² Interpretation Act 1978, c. 30, sched. 1.

⁸³ EPA 1990, § 159(1). Governmental authorities includes local authorities themselves.

See *id.* § 78H (5) (prohibiting service of a remediation notice on a “person if and so long as . . . it appears to the [enforcing] authority that the person on whom the notice would be served is the authority itself”).

taminated land.⁸⁴ Causing contamination is strict liability.⁸⁵ Liability for knowingly permitting contamination occurs when a person who has the power to remediate it fails to do so after a reasonable opportunity.⁸⁶ Part 2A thus imposes strict liability to a more limited extent than CERCLA. Class A persons are considered to be “polluters.”⁸⁷ If a Class A person cannot be found after a reasonable inquiry, the owner or occupier (called a Class B person) is secondarily liable.⁸⁸ Thus, unlike CERCLA, current owners and occupiers are secondarily, not primarily, liable although, unlike CERCLA, there is no “innocent purchaser defense,”⁸⁹ by which a current owner or occupier can avoid liability. Instead, an enforcing authority may, but is not required to, apply hardship provisions.⁹⁰

Another key difference between the regimes is the scope of liability. Part 2A applies joint and several liability to exclude specified appropriate persons from liability,⁹¹ with the person(s) who remain being liable in re-

⁸⁴ *Id.* § 78F (2).

⁸⁵ *Alphacell v. Woodward* [1972] A.C. 824, 839-41 (H.L.) (Eng.) (overflow from settling tanks into river due to brambles, ferns and long leaves becoming wrapped around impellers is act that subjects its operator to liability); *see Env't Agency (formerly National Rivers Authority) v. Empress Car Company (Abertillery) Ltd.* [1999] 2 A.C. 22, 32 [1998] 2 W.L.R. 350 (H.L.) (Eng.) (maintaining tank is affirmative act that subjects its operator to liability if tank is vandalised and its leaked contents pollute water).

⁸⁶ 7 Mar. 1995, Parl. Deb., H.L. (1995), vol. 562, col. 182 (U.K.) (statement of Viscount Ullswater) (“case law already provides that the test of ‘knowingly permit’ requires both knowledge of the contaminating substances and that it must be within a person’s power to do something to prevent the pollution occurring”); 11 July 1995, Parl. Deb. H.L. (1995), vol. 565, col. 1497 (statement of Earl Ferrers) (“test of ‘knowingly permitting’ would require both knowledge that the substances in question were in, on or under the land and the possession of the power to prevent such a substance being there”). The person does not need to know of the harm that may result from the contamination; only its presence. *See Circular Facilities (London) Ltd v. Sevenoaks Dist. Council*, [2005] EWHC 865, [2005] ENV. L. REV. 755, 765 (Q.B.D. Admin.) (Eng.); *see generally* Valerie Fogleman, *Circular Facilities (London) Ltd v Sevenoaks DC: The Meaning of “Knowingly Permitted” under the Contaminated Land Regime*, [2005] J.P.L. 1269.

⁸⁷ Department of the Environment and Welsh Office, *Framework for Contaminated Land; Outcome of the Gov’t’s Policy Review and Conclusions from the Consultation Paper Paying for our Past*, 4.4.1 (Nov. 1994) (referring to causer or knowing permitter as “polluter”).

⁸⁸ EPA 1990, § 78F (4).

⁸⁹ 42 U.S.C. § 9601(35) (A) (2012). A PRP has a defense if it proves that when it “acquired the facility the [PRP] did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.” *Id.* § 9601(35) (a) (i). This is accomplished by carrying out “all appropriate inquiries.” *See All Appropriate Inquiries*, ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/brownfields/aai/> (last updated Apr. 10, 2011).

⁹⁰ Department for Environment, Food and Rural Affairs, *Environmental Protection Act 1990: Part 2A; Contaminated Land Statutory Guidance*, ¶ 8.6(i) (Apr. 2012). CERCLA also includes hardship provisions. *See* 42 U.S.C. § 9622(g) (7) (2012).

⁹¹ Department for Environment, Food and Rural Affairs, *Environmental Protection Act 1990: Part 2A; Contaminated Land Statutory Guidance*, ¶¶ 7.38-.61 (Apr. 2012).

spect of contamination caused or knowingly permitted by themselves and the excluded persons. Part 2A then applies proportionate liability to apportion⁹² and attribute⁹³ liability between remaining appropriate persons.⁹⁴ The detailed exclusion tests for Class A persons are designed to transfer liability from the person who actually caused the contamination to the person who most recently knowingly permitted its continued presence.⁹⁵ Thus, in stark contrast to CERCLA, the person who caused contamination can be excluded from liability. The U.K. Government considered that excluding the actual polluter complies with the polluter pays principle,⁹⁶ specifically referring to the potential for the person who caused the contamination to be insolvent or incapable of being identified.⁹⁷

Unlike CERCLA, Part 2A includes provisions to protect insolvency practitioners from personal⁹⁸ and criminal liability,⁹⁹ with an exception if they commit an “unreasonable” act or omission. In enacting Part 2A, however, Parliament did not attempt to reconcile Part 2A with the Insolvency Act 1986 (“IA 1986”) or to minimize potential conflicts if claims involving Part 2A arise in insolvency proceedings.

A further major difference between Part 2A and CERCLA is the absence of a fund in the former. The U.K. Government reasoned that local authorities were merely continuing their previous responsibilities under the

⁹² *Id.* ¶¶ 7.80-7.86.

⁹³ *Id.* ¶¶ 7.87-7.91.

⁹⁴ *See Id.* ¶¶ 7.62-7.75 (apportionment for Class A persons); *id.* ¶¶ 8.80-8.86 (apportionment for Class B persons); *id.* ¶¶ 8.87-91 (attribution criteria).

⁹⁵ *See* Fogleman, *supra* note 77.

⁹⁶ *See* Paying for Our Past, *supra* note 70, at ¶ 4E.7 (“It need not be inconsistent with the [polluter pays principle] to provide for the enforcement of regulatory obligations on [persons other than the ‘actual polluter’], especially the owner. The regulator should be able to seek to enforce obligations on the person responsible for the pollution or on anyone to whom the polluter has transferred the burden of meeting the obligations however that transfer took place”); Response to the Communication from the Commission of the European Communities (COM (93) 47 final) Green Paper on remedying environmental damage; Memorandum by the Government of the United Kingdom of Great Britain and Northern Ireland (Oct., 8 1993) § 3.14 (“The polluter pays principle suggests that the polluter should generally meet the costs of remedying damage which is attributable to its actions. However, in the normal working of markets in property, responsibility for land, and for the effects of that land on others and the surrounding environment, shifts with the transfer of ownership. ... Provided that residual liability is properly reflected in price, liability based on current ownership may still be consistent with the polluter pays principle”).

⁹⁷ Paying for Our Past, *supra* note 70, at ¶ 4E.4.

⁹⁸ EPA 1990, § 78X (4) (a). The EPA 1990 defines the relevant insolvency practitioners. *Id.* §.78X (3) (a).

⁹⁹ *Id.* § 78X (4) (b). An “unreasonable” act or omission is one that would be considered unreasonable by a person acting in the same capacity as the insolvency practitioner. *Id.* § 78X (4) (a).

statutory nuisance regime.¹⁰⁰ Although funding for capital works was subsequently provided, local authorities must bid for it; it is not automatically available.¹⁰¹ Further, unlike CERCLA, there is no urgency to remediate contamination in Part 2A. Remediation notices may be appealed before any remediation begins and are automatically suspended during its appeal.¹⁰² Unlike other U.K. regimes, the suspension has no exceptions; it is absolute.¹⁰³

Still further, courts in the United Kingdom have not construed the provisions of Part 2A broadly. There are only three reported cases, two of which have been unsympathetic to enforcing authorities. In the first case, the High Court allowed an appeal against a remediation notice on the basis that the Magistrates Court had failed to state, in its judgment, that it had made a finding that the appellant, a developer, had known about the contamination it had purportedly “knowingly permitted.”¹⁰⁴ The case involved a former brick and tile works that had been re-developed for housing. Carbon dioxide and methane from decomposing vegetation in the former clay pits was entering the houses, posing a risk of asphyxiation of the residents and an explosion. Although the developer had not caused the presence of the vegetation, it had failed to remove it during the re-development of the site. The issue was, thus, whether the developer knowingly permitted the contaminants to remain on the site.

In the second case, the then House of Lords concluded that the privatized gas company was not a “polluter” and was not liable for remediating a former gasworks site that had been redeveloped as housing. The contamination was found when a resident of one of the houses “discovered a pit

¹⁰⁰ 11 July 1995, Parl. Deb. (1995) H.L., vol. 565, col. 1501; *see also* Environment Committee, Contaminated Land, Report, H.C. (1996-97), 22-II, Memorandum by Department of the Environment, 2, ¶ 14 (responsibilities under statutory nuisance regime are “broadly equivalent to those under Part IIA to cause their areas to be inspected from time to time, and to require action to deal with various matters including premises or deposits which are prejudicial to health or a nuisance”).

¹⁰¹ *See, e.g.*, Environment Agency, Contaminated Land Program; Approved Projects for 2012/13, 1 (Aug. 2012); Environment Agency, Contaminated Land Capital Projects Outcomes Report 2011-12 (Dec. 2012).

¹⁰² Contaminated Land (England) Regulations 2006, S.I. 2006/1380, reg. 12(1); *see Housing on Chemicals Site Contaminated Land*, 329 ENDS Rep. 3 (2002); *Redland and Crest to Start Site Clean-up*, 422 ENDS Rep. 23 (Mar. 2010) (remediation of contamination began 10 years after discovery of site due to length process in determining land to be contaminated land, serving remediation notices and finalisation of appeal against notices).

¹⁰³ *Cf.* Statutory Nuisance (Appeals) Regulations 1995, S.I. 1995/2644, reg. 3 (Eng.) (exceptions include alleged statutory nuisance being injurious to health); Anti-Pollution Works Regulations 1996, S.I. 1996/1006 (Eng. & Wales) (no provisions for suspension of works notices).

¹⁰⁴ *Circular Facilities (London) Ltd v. Sevenoaks Dist. Council*, [2005] EWHC 865, [2005] ENV. L. REV. 755, 764 (Q.B.D. Admin.) (Eng.).

filled with a tar-like substance in his garden.”¹⁰⁵ The developers of the housing on the former gasworks, which had been in operation before British Gas was nationalized in 1948, had been dissolved many years before the discovery. Lord Scott stated that he had “no doubt that that [Part 2A was enacted on the principle that the polluter should pay] and [had] no quarrel with that principle. But [the privatized gas company] was not a polluter and is no less innocent of having ‘caused or knowingly permitted’ the pollution than the innocent owner or occupiers of the 11 residences.”¹⁰⁶ He was scathing about the Environment Agency’s contention that the privatized company should be liable, stating that he found

it extraordinary and unacceptable that a public authority, a part of government, should seek to impose a liability on a private company, and thereby to reduce the value of the investment held by its shareholders, that falsifies the basis on which the original investors, the subscribers, were invited by government to subscribe for shares.¹⁰⁷

Finally, in contrast to the U.S. Congress strengthening CERCLA six years after its enactment, the U.K. Government weakened Part 2A in 2012 by, among other things, directing enforcing authorities to “seek to use Part 2A only where no appropriate alternative solution exists.”¹⁰⁸

IV. ENVIRONMENTAL CLAIMS IN BANKRUPTCY / INSOLVENCY PROCEEDINGS

The clashes between bankruptcy law and environmental law in the United States began much earlier than in the United Kingdom. As a result, there are many more cases on many more issues in the United States. This section examines two key issues; discharging liability for clean-up costs in a re-organization, and disclaiming property in a bankruptcy/insolvency estate as burdensome/onerous property. The first issue shows the resourcefulness of the EPA in bringing proceedings that survive re-organization, an issue which has not yet arisen in the United Kingdom. The second issue shows major differences in the approaches by courts in the United States and the United Kingdom.

A. Environmental claims in bankruptcy proceedings in the United States

Most environmental claims in bankruptcy proceedings in the United States involve CERCLA, so-called State mini-CERCLAs (that is, similar legislation to CERCLA enacted by State legislatures), and to a lesser extent

¹⁰⁵ R. (National Grid Gas PLC) v. Env’t Agency, [2006] EWHC 1083 (Admin), [2006] 1 W.L.R. 3041, ¶ 33 (Q.B.D.) (Eng.).

¹⁰⁶ R. (National Grid Gas PLC) v. Env’t Agency, [2007] UKHL 30, [2007] 1 W.L.R. 1780, 1786 (H.L.) (Eng.).

¹⁰⁷ *Id.* at 1786-87.

¹⁰⁸ Department for Environment, Food and Rural Affairs, Environmental Protection Act 1990: Part 2A; Contaminated Land Statutory Guidance, ¶ 1.5 (Apr. 2012).

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RCRA. The clashes between environmental and bankruptcy law were inevitable. The U.S. Congress did not consider the interface with bankruptcy law when it enacted CERCLA or RCRA. In particular, the bar against litigation by a PRP under CERCLA until the EPA has brought judicial proceedings is in direct conflict with the purpose of the Bankruptcy Code to administer a debtor's estate swiftly, distribute whatever assets remain fairly among creditors, and provide debtors with a fresh start¹⁰⁹ by discharging debts that arose before the bankruptcy.¹¹⁰ The clash is made even more difficult because, in addition to environmental law (which may be federal or state law) and bankruptcy law (which is federal law), doctrines of corporate/company law (which is state law) are generally involved.¹¹¹ The different approaches of CERCLA and bankruptcy law have, as one judge remarked, led creditors to be "stranded at the increasingly crowded 'intersection' between the discordant legislative approaches embodied in CERCLA and the Bankruptcy Code."¹¹²

¹⁰⁹ See, e.g., *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 974 F.2d 775, 779 (7th Cir. 1992) ("CERCLA and the Bankruptcy Act are two sweeping statutes both with very important purposes. The problem is that the goals underlying these statutes do not always coincide. Bankruptcy laws serve an important purpose of equitably distributing an insolvent debtor's funds in hopes of maximizing the creditor's interests in receiving payment and the debtor's interest in a fresh start. . . . Just as important interests underlie the bankruptcy laws, laudable goals also underlie CERCLA — namely, protecting this nation's environment by distributing the costs associated with cleaning up sites containing hazardous materials."); *In re Chateaugay Corp.*, 944 F.2d 997, 1002 (2d Cir. 1991). ("We agree that the Bankruptcy Code and CERCLA point toward competing objectives. The Code aims to provide reorganized debtors with a fresh start, an objective made more feasible by maximizing the scope of a discharge. CERCLA aims to clean up environmental damage, an objective that the enforcement agencies in this litigation contend will be better served if their entitlement to be reimbursed for CERCLA response costs based on pre-petition pollution is not considered to be a "claim" and instead may be asserted at full value against the reorganized corporation."); *In re Hemingway Transport, Inc.*, 993 F.2d 915, 921 (1st Cir.), cert. denied, 510 U.S. 914 (1993) ("CERCLA's settled policy objectives, reemphasized in [SARA], prominently include the expeditious cleanup of sites contaminated or threatened by hazardous substance releases which jeopardize public health and safety, and the equitable allocation of cleanup costs among all [PRPs]. . . . On the other hand, [the] Bankruptcy Code . . . often serves to forestall CERCLA's intended equitable allocation of responsibility.")

¹¹⁰ See Pierre G. Armand, Steven D. Cook, M. Natasha Labovitz & David F. Williams, *Current Hot Topics Involving Litigation of Environmental Issues in Large Corporate Bankruptcies* (ABA Section of Litigation 2011 Environmental, Mass Torts & Products Liability Committees Joint CLE Seminar) (Jan. 27-29, 2011): Environmental Litigation Breakout: Caution at the Intersection of Environmental and Bankruptcy Law 1.

¹¹¹ See Anne M. Lawton & Lynda J. Oswald, *Scary Stories and the Limited Liability Polluter in Chapter 11*, 65 WASH. & LEE L. REV. 451, 459 (2008).

¹¹² *In re Hemingway Transp., Inc.*, 993 F.2d 915, 921 (1st Cir.), cert. denied, 510 U.S. 914 (1993) ("CERCLA's settled policy objectives, reemphasized in the Superfund Amendments and Reauthorization Act of 1986 ('SARA'), prominently include the expeditious clean-up of sites contaminated or threatened by hazardous substance releases

i. Discharging liabilities for clean-up costs in a re-organization

A major clash involves the discharge of liabilities for clean-up costs in a re-organization under chapter 11 of the Bankruptcy Code. With limited exceptions, a debtor in a chapter 11 re-organization discharges pre-petition debts.¹¹³ The Bankruptcy Code defines a “debt” as “liability on a claim,”¹¹⁴ and a “claim” as a “right to payment”¹¹⁵ or “a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment.”¹¹⁶

The landmark case as to whether a claim for remediating contamination is a “claim” under the Bankruptcy Code is *Ohio v. Kovacs*.¹¹⁷ In 1976, the State of Ohio had brought an action against Kovacs, the chief executive officer of Chem-Dyne Corporation, as well as Chem-Dyne which operated a hazardous waste disposal site, for breaching environmental laws. In settling the action, Kovacs agreed, on behalf of himself and Chem-Dyne, to an injunction that, among other things, prohibited further pollution, barred further waste being brought onto the site, and required the removal of hazardous waste from the site. When Kovacs failed to remove the waste, the State of Ohio had appointed a receiver, who was directed to take possession of the site and Kovacs’ other assets so as to comply with the injunction. Before the clean-up was complete, Kovacs filed a bankruptcy petition.¹¹⁸ The State filed a complaint in the Bankruptcy Court that Kovacs’ obligations were not dischargeable in bankruptcy because they were not a “debt.”¹¹⁹

The U.S. Supreme Court agreed with the Sixth Circuit Court of Appeals that Kovacs’ obligations were dischargeable in bankruptcy because they had been converted into an obligation to pay money and were, therefore, a “claim” under the Bankruptcy Code.¹²⁰ The Court noted that it was not holding that the parts of the injunction prohibiting pollution and barring further waste being brought to the site were dischargeable in bankruptcy. In addition, the Court stated that it was not questioning whether

which jeopardize public health and safety, and the equitable allocation of clean up costs among all [PRPs]”).

¹¹³ See 11 U.S.C. § 1141(d) (1) (A) (2012) (confirmation of plan of re-organization “discharges the debtor from any debt that arose before the date of such confirmation”).

¹¹⁴ 11 U.S.C. § 101(12) (2012).

¹¹⁵ *Id.* § 101(5)(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”).

¹¹⁶ *Id.* § 101(5)(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”).

¹¹⁷ 469 U.S. 274 (1985).

¹¹⁸ *Id.* at 276.

¹¹⁹ *Id.* at 276-77.

¹²⁰ *Id.* at 285.

anyone “in possession of the site – whether it is Kovacs or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee – must comply with the environmental laws.”¹²¹

Due to the issue not being fully resolved, many cases followed as to whether an action to clean up contamination against a PRP under CERCLA or equivalent persons under State mini-CERCLAs is dischargeable in bankruptcy. In *In re Chateaugay Corp.*, the Second Circuit Court of Appeals held that a debtor may discharge a claim for reimbursement of the cost of cleaning up contamination.¹²² The court discussed difficulties in making such a decision, commenting that the intent of the Bankruptcy Code is “to override many provisions of law that would apply in the absence of bankruptcy,”¹²³ and noting that “an order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a ‘claim’ if the creditor obtaining the order [usually the EPA] had the option, which CERCLA confers, to do the clean-up work itself and sue for response costs, thereby converting the injunction into a monetary obligation.”¹²⁴ Thus, according to the Second Circuit, most claims under CERCLA are dischargeable in bankruptcy with the exception of an EPA order for cleaning up ongoing contamination that met the “imminent and substantial endangerment” criteria under CERCLA.¹²⁵

It thus seemed that the EPA was bound to failure in bringing many claims for clean ups against PRPs, who could then re-organize minus the claims. The EPA, however, eventually found the solution in a case involving Apex Oil Company. Apex had bought a refinery in Hartford, Illinois, in 1967. In 1987, it filed for re-organization under chapter 11. In 1990, Apex emerged from re-organization, having discharged its obligations. The EPA did not bring a claim in the re-organization proceedings. The re-organized company no longer refined oil due to its predecessor having sold the refinery in 1988. In 2003, the EPA exercised its powers under CERCLA and the Clean Water Act to investigate a plume of hydrocarbons migrating from the refinery. The hydrocarbons had contaminated the shallow groundwater and were emitting fumes into residences, posing a risk to human health and the environment. Apex refused to contribute to the clean

¹²¹ *Id.* at 283.

¹²² 944 F.2d 997, 1009 (2d Cir. 1991).

¹²³ *Id.* at 1002.

¹²⁴ *Id.* at 1008.

¹²⁵ *See, e.g., In re CMC Heartland Partners*, 966 F.2d 1143, 1146-47 (7th Cir. 1992) (“CERCLA postpones all judicial review of administrative orders under § 106(a) until the work has been performed or the EPA itself applies for judicial enforcement”); *see* 42 U.S.C. § 9606(a) (2012) (when EPA “determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat”).

up. Its contribution was estimated at \$150 million, although it may have been able to recover some of this amount by bringing contribution actions against other PRPs. The EPA notified Apex that it would carry out the remediation itself and seek contribution from Apex under CERCLA and the Clean Water Act.

Instead, the EPA brought an action against Apex under RCRA. In contrast to CERCLA, RCRA does not include a provision that authorizes any kind of monetary relief. RCRA entitles a plaintiff, including the EPA, only to demand a cleanup.¹²⁶ The Seventh Circuit Court of Appeals rejected Apex's argument that the claim was monetary because it would have to pay a contractor to remediate the contamination because it no longer had internal capacity to carry out the works itself. The court stated that "[t]he root arbitrariness of Apex's position is that whether a polluter can clean up his pollution himself or has to hire someone to do it has no relevance to the policy of either the Bankruptcy Code or [RCRA]."¹²⁷ The court also rejected Apex's argument that, if it had known in 1986 when it declared bankruptcy that it could be liable for \$150 million in clean-up costs, it would have liquidated instead of re-organized.¹²⁸ Apex thus remained liable for remediating the contamination even though it no longer owned or operated the refinery.

The question whether remediation orders constitute "claims" in insolvency proceedings has more recently been considered by the Supreme Court of Canada in *Newfoundland & Labrador v. AbitibiBowater, Inc.*¹²⁹ AbitibiBowater, Inc. ("Abitibi"), a financially distressed company which had been involved in industrial activity in the Newfoundland and Labrador Province, obtained a stay of proceedings under the Companies' Creditors Arrangement Act ("CCAA").¹³⁰ Some months later, orders under the Environmental Protection Act¹³¹ ("EPA Orders") were issued, by virtue of which Abitibi was required to carry out remediation activities. The enforceability of the EPA Orders depended on their falling outside the CCAA definition of "claims" subject to the claims process, on the basis that they

¹²⁶ See 42 U.S.C. § 6973(a) (2012) ("upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the[EPA] may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both").

¹²⁷ *United States v. Apex Oil Co.*, 579 F.3d 734, 736-37 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010).

¹²⁸ *Id.*

¹²⁹ 2012 SCC 67 (Can.).

¹³⁰ R.S.C. 1985, c. C-36 (Can.).

¹³¹ S.N.L. 2002, c. E-142 (Can.).

were non-monetary statutory obligations.¹³² Treating the EPA Orders as claims would enable Abitibi to emerge from the CCAA restructuring “free of the obligation, able to recommence business without remediating the properties it polluted, the cost of which would fall on the Newfoundland and Labrador public.”¹³³ On the other hand, as regulatory orders, they would “remain in effect until the property has been cleaned up or the matter otherwise resolved,” thereby surviving the company’s restructuring.¹³⁴ The “distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in CCAA restructuring or bankruptcy” was therefore fundamental,¹³⁵ more specifically the question at what point a regulatory obligation arising from environmental protection legislation could be recognized as a claim capable of being proved or compromised under the CCAA.

The Supreme Court found that the requirements for a provable claim were satisfied insofar as there was a debt, liability or obligation owed to the Province, which had identified itself as a creditor by exercising its enforcement power against Abitibi, and the environmental damage had occurred before the commencement of the CCAA proceedings.¹³⁶ The third element, “that it be possible to attach a monetary value to the obligation,” necessitated a consideration of the question whether “orders that are not expressed in monetary terms can be translated into such terms.”¹³⁷ Where there were sufficient indications and certainty that the regulatory body which triggered the enforcement mechanism would “ultimately perform remediation work and assert a monetary claim to have its costs reimbursed,” the court would find that an EPA Order was subject to the insolvency process.¹³⁸ The court was unpersuaded by the argument that classing a regulatory order as a claim would undermine the polluter pays principle by extinguishing Abitibi’s environmental obligations:

This objection demonstrates a misunderstanding of the nature of insolvency proceedings. Subjecting an order to the claims process does not extinguish the debtor’s environmental obligations any more than subjecting any creditor’s claim to that process extinguishes the debtor’s obligation to pay its debts. It merely ensures that the creditor’s claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province’s position would result not only in a su-

¹³² 2012 SCC 67, ¶¶ 10-11, 14-15.

¹³³ *Id.* ¶ 64.

¹³⁴ *Id.* ¶¶ 71-72.

¹³⁵ *Id.* ¶ 74.

¹³⁶ *Id.* ¶¶ 26-29.

¹³⁷ *Id.* ¶ 30.

¹³⁸ *Id.* ¶ 36.

per-priority, but in the acceptance of a “third-party-pay” principle in place of the polluter-pay principle.

Nor does subjecting the orders to the insolvency process amount to issuing a license to pollute, since insolvency proceedings do not concern the debtor’s future conduct. A debtor that is reorganized must comply with all environmental regulations going forward in the same way as any other person. To quote the colorful analogy of two American scholars, “Debtors in bankruptcy have — and should have — no greater license to pollute in violation of a statute than they have to sell cocaine in violation of a statute.”¹³⁹

Furthermore, corporations may engage in activities that carry risks. No matter what risks are at issue, reorganization made necessary by insolvency is hardly ever a deliberate choice. When the risks materialize, the dire costs are borne by almost all stakeholders. To subject orders to the claims process is not to invite corporations to restructure in order to rid themselves of their environmental liabilities.¹⁴⁰

The court concluded that an environmental order issued by a regulatory body was capable of being treated as a contingent claim and admitted to the claims process if there was sufficient certainty that the regulatory body would bring a monetary claim against the debtor.¹⁴¹ Having established that the Province would remediate the environmental contamination itself,¹⁴² its claim was one of a monetary nature and the EPA Orders would consequently not be exempted¹⁴³ from the stay of proceedings and eventual compromise of claims in Abitibi’s restructuring under the CCAA.

ii. Abandonment of burdensome property

The U.S. Bankruptcy Code authorizes a bankruptcy trustee to “abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.”¹⁴⁴ The Bankruptcy Code does not contain any express exceptions to this power.¹⁴⁵ The issue in *Mid-*

¹³⁹ *Id.* ¶¶ 40-42 (quoting Douglas G. Baird & Thomas H. Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1200 (1984)).

¹⁴⁰ *Id.* ¶ 42.

¹⁴¹ *Id.* ¶ 54.

¹⁴² *Cf. id.* ¶ 86 (McLachlin C.J., dissenting; preferring higher threshold of “likelihood approaching certainty” that regulatory body would perform remedial work); *id.* ¶ 101 (LeBel J., concurring in finding insufficient evidence the Province would perform remedial work itself).

¹⁴³ *Id.* ¶ 62.

¹⁴⁴ 11 U.S.C. § 554(a) (2012) (“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”).

¹⁴⁵ *Midlantic Nat’l Bank v. New Jersey Dep’t of Env’tl. Prot.*, 474 U.S. 494, 509 (1986) (Rehnquist, J., dissenting) (“section 554(a) is “absolute in its terms [and] suggests that a trustee’s power to abandon is limited only by considerations of the property’s value to the

*lantic National Bank v. New Jersey Department of Environmental Protection*¹⁴⁶ was whether such a power was nevertheless implicit in the Code. The case concerned a company that processed waste oil. The company had breached its permit by accepting over 400,000 gallons of oil contaminated by polychlorinated biphenyls, leading the New Jersey Department of Environmental Protection to order it to cease operating. During negotiations between the company and the Department concerning the clean up, the company filed a chapter 11 petition for re-organization. After the Department issued an order requiring the company to clean up the facility, the company converted its chapter 11 proceeding to a chapter 7 liquidation proceeding. The bankruptcy trustee subsequently determined that the facility was a net burden to the bankruptcy estate and, following unsuccessful attempts to sell it, notified the court and creditors that he would abandon it. The Bankruptcy Court approved the abandonment and subsequently approved the trustee's abandonment of contaminated oil at another facility owned by the company.

The Third Circuit Court of Appeals reversed the Bankruptcy Court's decision. The U.S. Supreme Court (in a 5:4 decision), affirmed the Third Circuit, stating that "[n]either the Court nor Congress has granted a trustee in bankruptcy powers that would lend support to a right to abandon property in contravention of state or local laws designed to protect public health or safety."¹⁴⁷ The Court emphasized that the exception from the Bankruptcy Code is narrow, commenting that it "does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment. The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm."¹⁴⁸

Most courts that have subsequently determined the extent of a bankruptcy trustee's powers to abandon a contaminated site have construed the exception narrowly to require imminent and identifiable harm to human health.¹⁴⁹ Another factor considered by them is the assets in the bankruptcy

estate. It makes no mention of other factors to be balanced or weighed and permits no easy inference that Congress was concerned about state environmental regulations").

¹⁴⁶ *Id.* at 494.

¹⁴⁷ *Id.* at 502.

¹⁴⁸ *Id.* at 502, n.9.

¹⁴⁹ *See, e.g., In re Smith-Douglass, Inc.*, 856 F.2d 12, 15 (4th Cir. 1988). The court stated that "Not surprisingly, the bankruptcy courts interpreting *Midlantic* have reached inconsistent results. Some courts have determined that the *Midlantic* exception applies only where there is an imminent danger to public health and safety. *Id.*; *see, e.g., In re Purco, Inc.*, 76 B.R. 523, 533 (Bankr. W.D. Pa. 1987); *In re Franklin Signal Corp.*, 65 B.R. 268, 271-72 (Bankr. D. Minn. 1986). Other courts have determined that *Midlantic* requires full compliance, prior to abandonment, with the applicable environmental law. *See In re Peerless Plating Co.*, 70 B.R. 943, 946-47 n.1 (Bankr. W.D. Mich. 1987." *Id.*; *see also In re L.F. Jennings Oil Co.*, 4 F.3d 887, 890 (10th Cir. 1993). ("abundantly clear from the record on appeal that [the site] was not, at the time of abandonment, an immediate threat to public health or safety"); *see also Mary J. Koks & Tim Million,*

estate, which may be so limited that they would not cover the cost of cleaning up contamination even if the bankruptcy trustee was to abandon the site.¹⁵⁰

B. *Environmental claims in insolvency proceedings in the United Kingdom*

The first cases involving environmental claims in insolvency proceedings in the United Kingdom arose, not from Part 2A or other legislation requiring the remediation of contamination, but from waste management legislation. The issue was whether the liquidator of an insolvency estate could disclaim a waste management license as “onerous property” under section 178 of the IA 1986. Effective disclaimer facilitates the release of the insolvent estate from the burden of unprofitable contracts or unsaleable property by terminating the debtor’s rights, interests and liabilities therein.¹⁵¹

These powers are intended to assist the insolvency practitioner to bring about the liquidation of the company, without being hampered by property or obligations which might be considered a liability, or valueless, and which would interfere with distribution of any remaining assets of the company to unsecured creditors, once the claims of preferred and secured creditors have been met.¹⁵²

As shown below, English courts have established that the exercise of the disclaimer power is not constrained by provisions in environmental legislation governing clean-up obligations or the termination of licenses.¹⁵³

The Court of Appeal decided in *Re Celtic Extraction* that there was no basis on which the Waste Framework Directive could be construed to find that the polluter pays principle should prevail over unsecured creditors’ interests in the assets available for distribution.¹⁵⁴ The court held that that in the absence of clear wording, the statutory inconsistency would

Environmental Issues in Bankruptcy, 40 TEX. ENVTL. L.J. 43, 59-62 (2009/2010). (discussing majority and minority positions); Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331, 361-72 (2004) (discussing case law on abandonment power).

¹⁵⁰ See, e.g., *In re Oklahoma Ref. Co.*, 63 B.R. 562 (Bankr. W.D. Okla. 1986) (contamination “does not present immediate and menacing harm to public health and safety. Moreover, abandonment will not aggravate the existing situation, create a genuine emergency nor increase the likelihood of disaster or intensification of polluting agent. . . . For all purposes the difference between denying and allowing abandonment produces the same result. Under either scenario there are no funds available to finance the closure plan or the post-closure monitoring”).

¹⁵¹ See IA 1986, § 178 (U.K.), and Companies Act 1963, § 290 (Ir.).

¹⁵² Carolyn Shelbourn, *Can the Insolvent Polluter Pay? Environmental Licences and the Insolvent Company*, 12 J. ENVTL. L. 207, 221 (2000).

¹⁵³ See, e.g., Waste Management Act 1996, § 58 (Ir.), and EPA 1990, § 35(11) (U.K.).

¹⁵⁴ [1999] 4 All E.R. 684, ¶ 39; see Council Directive 75/442 on waste, art. 15, 1975 O.J. (L 194), 39 (repealed).

be resolved in favor of a narrow construction of the polluter pays principle, to prevent its application “to cases where the polluter cannot pay.”¹⁵⁵ This decision thus clashes with the interpretation of the Waste Framework Directive by the Court of Justice of the European Union (“CJEU”), albeit in a different context. The CJEU concluded, in a case involving a claim by a governmental authority for clean-up costs against a company that produced the oil spilled from the *Erika* off the coast of Brittany, that “whatever system is in place for allocating responsibility for environmental damage, it must ensure that the state is not burdened with the costs.”¹⁵⁶ The CJEU rejected the reasoning of Advocate General Kokott that liability could be shifted to the public, concluding instead that the producer or previous holder of the waste should be liable if it contributed to the risk that pollution would occur.¹⁵⁷

In *Re Celtic Extraction*, the Court of Appeal concluded that the power to disclaim a waste management license as “onerous property”¹⁵⁸ under section 178 of IA 1986 was not restricted by section 35(11) of the EPA 1990, which provided for waste management licenses to continue in force until their revocation or surrender.¹⁵⁹ The court distinguished between termination by act of parties under section 35(11) and the “external statutory force” of the disclaimer provision (section 178), ultimately placing “prima-

¹⁵⁵ [1999] 4 All E.R. ¶ 39.

¹⁵⁶ Case C-188/07, *Commune de Mesquer v. Total France SA*, 2008 E.C.R. I-4501, ¶ 82. The Waste Framework Directive provides that “[i]n accordance with the ‘polluter pays’ principle, the cost of disposing of waste, less any proceeds derived from treating the waste, shall be borne by . . . the holder who has waste handled by a waste collector or by an undertaking . . . and/or the previous holders or the producer of the product from which the waste came.” Council Directive 75/442 on waste, art. 15, 1975 O.J. (L 194), 39 (repealed). Article 15 of the revised Waste Framework Directive (Directive 2008/98 on waste, 2008 O.J. (L 312), 3) provides that “In accordance with the polluter-pays principle, the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders. . . . Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of the produce may share these costs.” The CJEU had concluded in an earlier case that holders of waste may be liable regardless of whether they produced the waste or possess it when the pollution occurs. Case No. C-1/03, *Van de Walle v. Texaco Belgium SA*, 2004 E.C.R. I-7613, ¶ 57.

¹⁵⁷ See David Hart Q.C. & Rachel Marcus, *The Polluter-Pays Principle: Mesquer and the New Waste Framework Directive*, 6 ENVTL. LIABILITY 195, 198-99 (2008). Liability attaches only to the extent that the person was responsible for the pollution. See C-293/97, *R. v. Sec’y of State (ex parte Standley)*, 1999 E.C.R. I-02603, ¶ 51 (“As regards the polluter pays principle, suffice it to say that the Directive does not mean that farmers must take on burdens for the elimination of polluter to which they have not contributed”).

¹⁵⁸ IA 1986, § 178(3) (defined as “(a) any unprofitable contract, and (b) any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act”).

¹⁵⁹ [2000] 2 W.L.R. 991, [2001] Ch. 475, 478 (Court of Appeal) (Eng.).

cy upon the orderly winding-up of companies in advance of deploying the resources available to mitigate environmental harm.”¹⁶⁰

In *Re Irish Ispat Ltd.*,¹⁶¹ the Irish High Court also considered waste legislation in a case involving the imposition of liability for the cost of remediating contamination on a liquidator, with the result that the costs would be transferred to the creditors of the estate. That is, the assets of the insolvency estate would be used to pay the costs of remediation rather than being paid to the creditors. The issue was whether the provisions of the Waste Management Act 1996 “should be applied in priority” to the provisions of the Companies Act 1963. The court echoed the view in *Re Celtic Extraction* that the polluter pays principle could not apply to prevent disclaimer where the company had no assets.¹⁶² Furthermore, the court rejected the suggestion that large shareholder loans owed to Irish Ispat’s parent company should be differentiated from other debts “and presumably in some way be made amenable to mitigating or remedying pollution” – there was no known principle of law which could support the notion of permitting certain debts which had been proved in the winding-up “from benefiting from the *pari passu* rule and being diverted to another purpose.”¹⁶³

However, the experience in similar cases in New Zealand and Australia shows that different considerations regarding disclaimer can be applied to companies which go into voluntary liquidation with sufficient assets to discharge their debts. The cases of *Tubbs v. Futurity Investments Ltd.*¹⁶⁴ and *Sullivan v. Energy Services International Pty. Ltd.*¹⁶⁵ involved unsuccessful attempts to disclaim toxic substances and contaminated waste. The courts noted the risk that allowing disclaimer would enable voluntary liquidation to provide a means for companies to avoid their regulatory obligations and “improve the payout to creditors,”¹⁶⁶ more so “where the

¹⁶⁰ See Robert Lee & Tamara Egede, *Bank Lending and the Environment: Not Liability but Responsibility*, 2007 J. BUS. L. 868, 879; see also Carolyn Shelbourn, *supra* note 152, at 218 (notwithstanding that the “restrictions on the transfer or surrender of waste management licences had been introduced to ‘prevent problems which had arisen under earlier legislation’”).

¹⁶¹ [2004] I.E.H.C. 278 (Ir.). It should be noted however that the status of the polluter pays principle under Irish law is a matter “of some dispute.” See *John Ronan & Sons v. Clean Build Ltd.*, [2011] I.E.H.C. 350, ¶ 5.1 (Ir.); see also *Environmental Protection Agency v. Neiphin Trading Ltd.*, [2011] I.E.H.C. 67, ¶¶ 6.13-6.48 (Ir.).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ [1998] 1 NZLR 471 (High Court, Christchurch, NZ). This echoes the view expressed in English cases “that a company in financial difficulties may not go into voluntary liquidation solely to avoid its environmental liabilities.” Carolyn Shelbourn, *supra* note 152, at 225; *Re Mineral Resources*, [1999] 1 All E.R. 746, 765 (Ch., Companies Court) (Eng.); *Re Wilmott Trading* (Nos. 1 & 2), [1999] 2 B.C.L.C. 541, 544 (Ch., Companies Court) (Eng.).

¹⁶⁵ [2002] NSWSC 937 (S. Ct. NSW) (Austl.).

¹⁶⁶ See *Tubbs v. Futurity Investments Ltd.*, [1998] 1 NZLR 471, 479-80 (High Court, Christchurch, N.Z.).

whole of the evidence strongly suggests a device by those controlling the company to avoid liability.”¹⁶⁷ In circumstances where sufficient funds are available to meet creditor claims, it would therefore seem that the arguments outlined above with respect to the protection of creditors¹⁶⁸ apply with equal force to efforts by debtor companies to transfer the burden of clean-up obligations to the State¹⁶⁹ or third parties.¹⁷⁰

Notwithstanding the English authority of *Re Celtic Extraction*, environmental claims in insolvency proceedings are much less likely to involve waste management licenses in the future even if a claim was to arise that is sufficiently different to distinguish it from that case. Even though there are a large number of closed landfills that still have licenses and have not satisfied the criteria for surrender of those licenses due to their environmental condition,¹⁷¹ landfills operating after July 2001 must make financial provision to meet closure and post-closure obligations in their permits.¹⁷² The obligations include a requirement for the financial provision to be maintained for at least 30 years from the date on which a landfill is closed in order to ensure that funds are available to carry out remediation measures in the event that the closed landfill causes pollution or harm to human health.¹⁷³ The Environment Agency has also taken measures to ensure that financial provision mechanisms are accessible if a landfill operator becomes

¹⁶⁷ *Sullivan v. Energy Services Intl. Pty. Ltd.*, [2002] NSWSC 937 (S. Ct. NSW), ¶ 32 (Austl.).

¹⁶⁸ See *Re Celtic Extraction*, [2000] 2 W.L.R. 991, [2001] Ch. 475 (Court of Appeal) (Eng.); *Re Irish Ispat*, [2004] I.E.H.C. 278 (Ir.).

¹⁶⁹ *Tubbs v. Futurity Investments Ltd.*, [1998] 1 NZLR 471, 478, 480 (High Court, Christchurch (N.Z.)).

¹⁷⁰ *Sullivan v. Energy Services Int'l Pty. Ltd.*, [2002] NSWSC 937 (S. Ct. NSW), ¶ 47 (Austl.).

¹⁷¹ Approximately 1,500 landfills that were closed, largely because they did not meet the more stringent standards introduced by the Landfill Directive, still have licenses. Of these closed landfills, 26% are owned by large companies, 75 by local authorities, and 65% by small- to medium- sized companies. Approximately half of these landfills pose a high risk of polluting groundwater. The Environment Agency has succeeded in persuading the owners of only three of them to surrender their licences. See *Agency Grapples with Closed Landfill Legacy*, 434 ENDS Rep. 20-21 (Mar. 28, 2011).

¹⁷² Article 8(a)(iv) of the Landfill Directive provides that “adequate provisions, by way of a financial security or any other equivalent, on the basis of modalities to be decided by Member States, has been or will be made by the applicant prior to the commencement of disposal operations to ensure that the obligations (including after-care provisions) arising under the permit issued under the provisions of this Directive are discharged and that the closure procedures required by Article 13 are followed. This security or its equivalent shall be kept as long as required by maintenance and after-care operation of the site in accordance with Article 13(d).” Council Directive 1999/31 on the landfill of waste, 1999 O.J. (L 182), 1, 7; see Environment Agency, *Financial Provision for Landfill* ¶ 1.2 (Doc No 22_06, Apr. 21, 2011).

¹⁷³ Council Directive 1999/31 on the Landfill of Waste, art. 10, 1999 O.J. (L 182), 1, 7.

insolvent.¹⁷⁴ Future cases are more likely to involve Part 2A or, perhaps, as in the recent Scottish Coal case discussed below, planning obligations and other environmental licenses.¹⁷⁵

Since *Re Celtic Extraction*, it seems to have been assumed that the power to disclaim onerous property in an insolvency proceeding includes the disclaimer of contaminated land. Thus, there would have to be at least “imminent and identifiable harm” to human health, as in the *Midlantic* exception, for a court – even if it was considered appropriate under U.K. law – to consider an exception to the disclaimer power. As discussed, however, Part 2A is much weaker than CERCLA (or, indeed, most State mini-CERCLAs) and does not provide powers to local authorities to require appropriate persons to remediate contamination that “may present an imminent and substantial endangerment to health or the environment”, as in CERCLA. Still further, Part 2A is designed to postpone remediation rather than swiftly to carry it out.¹⁷⁶

The case in which the power to disclaim a contaminated site was assumed is *Environment Agency v. Hillridge Ltd.*¹⁷⁷ *Hillridge* involved the issue of whether the Environment Agency, as joint holder of a trust fund established as financial provision for the license, could access the fund.¹⁷⁸ The trust fund had been established by Hillridge Ltd., the holder of the waste management license, to satisfy the terms and conditions of the license. The liquidator had not only disclaimed the license as onerous property, it had disclaimed the quarry in which the landfill was located, which was owned by Hillridge’s parent company, Waste Point Ltd. The judgment simply notes that “[u]ntil disclaimed by the joint liquidators of Waste Point on December 14, 2001, the Quarry had belonged at all material times to Waste Point. As a result of that disclaimer, Waste Point’s freehold interest in the Quarry escheated to the Crown.”¹⁷⁹ The disclaimer of the site was not even an issue in the case despite Bradford City Council, the local authority, having determined that it was contaminated land under Part 2A on 16 January 2003, before the case was decided. Bradford City Council subsequently remediated the site at public expense, including at least one grant

¹⁷⁴ See *Agency to Tighten Grip on Financial Provisions for Landfill*, 356 ENDS Rep. 38-39 (Sept. 1, 2004).

¹⁷⁵ See *Re Directions*, Nimmo [2013] CSOH 124 ¶¶ 34-68 (Scot.) (appeal pending).

¹⁷⁶ See text accompanying notes 102-103.

¹⁷⁷ [2003] EWHC 3023, [2004] 2 B.C.L.C. 358 (Ch.) (Eng.).

¹⁷⁸ See *Row on Financial Cover for Waste Sites Deepens*, 269 ENDS Rep. 34 (June 1997). Under its agreement with the Environment Agency, Hillridge paid £367,273 into a joint trust account with the Environment Agency. The money included £332,583.78 from an accumulation account that had been established with the Bradford Metropolitan Borough Council as part of a section 106 agreement under the Town and Country Planning regime. By 30 September 2003, the joint trust fund contained £391,610.18, including further payments by West Point Ltd and interest. *Env’t. Agency v. Hillridge Ltd.*, [2003] EWHC 3023, [2004] 2 B.C.L.C. 358, ¶¶ 8-10 (Ch.) (Eng.).

¹⁷⁹ *Env’t. Agency v. Hillridge Ltd.*, [2003] EWHC 3023, [2004] 2 B.C.L.C. 358, ¶ 3 (Ch.) (Eng.).

of £2 million from the contaminated land capital projects program.¹⁸⁰ Thus, whilst the contamination may not have posed imminent harm, it was certainly substantial.

The Scottish Coal case, examined further in section VIII of this article, also involved the disclaimer of contaminated land and environmental permits. The permits were for carrying out operations at Scottish Coal's open cast mining sites to protect the environment from water pollution. Scottish Coal was also obliged under planning law to restore the sites when mining ceased.¹⁸¹ The legal issues in the case, which is on appeal, differ markedly from those under English law because there is no equivalent of section 178 of the IA 1986 under Scots law. Lord Hodge agreed that the liquidators could disclaim the land and permits but did so because the court had to reach a decision that did not affect "referred matters," that is, matters that had not devolved to Scotland under the Scotland Act 1998. Whereas environmental law had devolved, insolvency law had not. The court was bound, therefore, to construe the relevant environmental law, the Water Environment (Controlled Activities) (Scotland) Regulations 2011, narrowly so as not to create a new liquidation expense that would rank ahead of the claims of preferential creditors.¹⁸²

The costs that the public may have to bear are huge. Scottish Coal had been spending about £1.4 million each month to maintain its sites in compliance with the environmental permits. Even after selling some sites, it still has to spend £478,000 each month to maintain the unsold sites, with the result that all funds in the insolvency estate would be gone in between 20 and 22 months without paying any creditors. Complying with planning requirements to remediate its sites would cost about £73 million.¹⁸³

In discussing *Re Celtic Extraction*, Lord Hodge concluded that provisions in the environmental permits held by Scottish Coal that differed from those in the waste management licenses would have led him to conclude that the liquidators were required to comply with the surrender procedures in the permits. He also concluded that rulings by the CJEU since *Re Celtic Extraction* would have led him to construe the environmental legislation (which is derived from E.U. law) under which the permits were issued broadly.¹⁸⁴ In particular, he commented that:

¹⁸⁰ See Marc Meneaud, *£2m Won to Clear Up Manywells Tip*, TELEGRAPH & ARGUS (Apr. 14, 2009, 7:33 PM); Bradford Dist. Council, Manywells Landfill Remediation Newsletter (July 2006).

¹⁸¹ *Re Directions, Nimmo*, [2013] C.S.O.H. 124, ¶ 5 (Scot.) (appeal pending); see Water Environment (Controlled Activities) (Scotland) Regulations 2011, S.S.I. 2011/209.

¹⁸² *Re Directions, Nimmo*, [2013] C.S.O.H. 124, ¶¶ 64-68 (Scot.) (appeal pending).

¹⁸³ *Id.* ¶¶ 6-7. Scottish Coal had £27 million in restoration bonds for its sites in East Ayrshire but complying with planning conditions in restoring those sites would cost between £48 million and £90 million. See Isabella Kominski, *KPMG Not Liable for Scottish Mine Restoration*, 463 ENDS Rep. 21 (Sept. 2013).

¹⁸⁴ *Re Directions, Nimmo*, [2013] C.S.O.H. 124, ¶¶ 54-55 (Scot.) (appeal pending).

there is a strong public interest in the maintenance of a healthy environment, the remediation of pollution and the protection of biodiversity. There is a conflict between the results sought by the directive and the insolvency regime. I do not think that the insolvency regime has any primacy which means that [the Scottish transposing legislation] can exclude a liquidator's power to disclaim only if . . . it says so expressly.¹⁸⁵

An appeal by the Scottish Environment Protection Agency was heard in early September. The Agency commented, prior to the hearing, that it "believes in the polluter pays principle, which means that work to prevent damage to the environment should be funded by those whose activities created the risk of pollution."¹⁸⁶

Other insolvencies involving environmental claims have also occurred in the United Kingdom in 2013. For example, Greensolutions (Glasgow), a Northern Irish company, operated a soil washing business at a former gasworks site owned by Clyde Gateway (a regeneration agency) in Dalmarnock. Following a dispute with Clyde Gateway, Greensolutions moved its business to another site, leaving 6,500 cubic meters of spoil in four heaps at the Dalmarnock site.¹⁸⁷ On 25 July 2013, the High Court of Justice in Northern Ireland accepted a petition by the Commissioners of H.M. Revenue & Customs to wind up the company. The Official Receiver was appointed as liquidator.¹⁸⁸

Another example involves Lawrence Recycling and Waste Management, which entered administration in September 2013. The company, which had expanded in 2008,¹⁸⁹ managed and operated a site at Kidderminster at which it had a permit to process 250,000 tonnes of waste per year. Massive fires occurred at the site in December 2012 and June 2013, with the latter taking seven-and-a-half weeks to extinguish due to the amount of waste waiting to be recycled at the site. The Environment Agency, Wyre Forest District Council, Hereford and Worcester Fire and Rescue Service, and Worcestershire County Council incurred costs of £250,000 as a result of the second fire. The costs included demolishing buildings at the site to allow access to the burning waste, removing and landfilling burnt waste, and using aeration equipment to prevent further fish kills and pollution from fire-fighting water from entering the Staffordshire and Worces-

¹⁸⁵ *Id.* ¶ 51.

¹⁸⁶ *SEPA Statement re Court of Session Decision*, SCOTTISH ENVIRONMENT PROTECTION AGENCY (July 18, 2013), http://www.sepa.org.uk/about_us/news/2013/sepa_statement_re_court_of_ses.aspx.

¹⁸⁷ See David Leask, *Row over Contaminated Soil at Clyde Gateway Site*, EVENING TIMES (July 31, 2013), <http://www.eveningtimes.co.uk/news/row-over-contaminated-soil-at-clyde-gateway-site-131935n.21738198>.

¹⁸⁸ See Jon Reeds, *Cluster Site Company Liquidated*, BROWNFIELD BRIEFING (Aug. 7, 2013), <http://www.brownfieldbriefing.com/news/cluster-site-company-liquidated> (available on subscription).

¹⁸⁹ See *Case Study: Lawrence Recycling and Waste Management; Materials Recovery Facility Opens New £10M Facility*, WRAP (Dec. 2009), www.wrap.org.uk/sites/files/wrap/LawrenceWEB.pdf.

tershire Canal. In addition, the Environment Agency invoiced the company £12,686 and £120,000 for costs incurred due to the December 2012 and June 2013 fires, respectively.¹⁹⁰ The Environment Agency and Wyre Forest District Council are creditors in the insolvency proceedings.¹⁹¹

V. CORPORATE VEIL-PIERCING AND DIRECTORS' LIABILITY IN RESPONSE TO ENVIRONMENTAL CLAIMS

The role of companies in the context of environmental liability not only raises concerns in relation to the prospect of environmental claims being discharged through insolvency proceedings,¹⁹² but also more specifically the operation of the fundamental concepts of limited liability and separate corporate personality.¹⁹³ These areas of English and Irish company law have not however been specially adapted to give effect to the goal of environmental protection, as explained in section VI below. The necessity therefore remains for finding ways to enhance the contaminated land regime through reliance on alternative routes to attaching liability, aimed at ensuring stronger compliance with the polluter pays principle. Some of these alternative methods are considered in section VII.

¹⁹⁰ See *Agencies Confirm Steps to Put out Fire at Lawrence Recycling*, WYRE FOREST DIST. COUNCIL (July 17, 2013), <http://www.wyreforestdc.gov.uk/cms/communications/news/2013/july-2013/agencies-confirm-confirm-steps.aspx>; *Public Agencies Confirm Response to Fire at Lawrence Recycling*, WYRE FOREST DIST. COUNCIL (June 26, 2013), <http://www.wyreforestdc.gov.uk/cms/communications/news/2013/june-2013/multi-agency-response-update.aspx>; Becky Carr, *Bill Continues to Mount for Lawrence Recycling Fire*, The Shuttle (Aug. 8, 2013, 8:45 AM), http://www.kidderminstershuttle.co.uk/news/10599399.Bill_continues_to_mount_for_Lawrence_Recycling_fire/.

¹⁹¹ See Becky Carr, *Authorities Respond to Lawrence Entering Administration*, WORCESTER NEWS (Sept. 12, 2013, 6:50 AM), http://www.worcesternews.co.uk/news/10668853.Authorities_respond_to_Lawrence_s_entering_administration/.

¹⁹² See generally Jeffrey S. Theuer, *Aligning Environmental Policy and Bankruptcy Protection: Who Pays for Environmental Claims under the Bankruptcy Code?*, 13 T.M. COOLEY L. REV. 465 (1996); Ingrid Michelsen Hillinger & Michael G. Hillinger, *Environmental Affairs in Bankruptcy: 2004*, 12 AM. BANKR. INST. L. REV. 331 (2004); Arlene Elgart Mirsky, Richard J. Conway, Jr. & GERALYN G. HUMPHREY, *The Interface between Bankruptcy and Environmental Laws*, 46 BUS. LAW. 623 (1991).

¹⁹³ See generally George W. Dent, Jr., *Limited Liability in Environmental Law*, 26 WAKE FOREST L. REV. 151 (1991); David S. Bakst, *Piercing the Corporate Veil for Environmental Torts in the United States and the European Union: The Case for the Proposed Civil Liability Directive*, 19 B.C. INT'L & COMP. L. REV. 323 (1996); K. Bergman, *Bankruptcy, Limited Liability and CERCLA: Closing the Loophole and Parting the Veil*, Univ. Md. Pub. L. Research Paper No. 2004-02.

VI. CLAIMS AGAINST DIRECTORS AND OFFICERS OF INSOLVENT COMPANIES AND COMPANIES WITH LIMITED ASSETS

There are no English cases on whether the corporate veil may be pierced to hold a director or officer liable for the costs of remediating contamination when the company has insufficient assets or is insolvent. The only reported English case is *Buckinghamshire County Council v. Briar*,¹⁹⁴ in which Mr. and Mrs. Briar were held liable under conventional principles for the costs of cleaning up a site on which waste had been unlawfully tipped. The court concluded that the corporate veil should be pierced on the basis that the company to which they had transferred the land was a façade or sham and had been used as a device “to conceal the true facts.”¹⁹⁵

Courts in Ireland and, to a lesser extent Canada, have been faced with the difficult issue of whether directors and officers of companies that have insufficient funds to remediate contamination are liable for the costs of remediating it.

A. *Environmental Claims against Directors and Officers in Ireland*

The issue in *Environmental Protection Agency v. Neiphin Trading Ltd.*¹⁹⁶ was whether the Irish High Court had the power to impose “fall back” orders on directors and officers of a company that had insufficient assets to remediate contamination caused by it. The court found that the power to make fall-back orders sprang from its inherent veil-piercing jurisdiction, and not from provisions of the Waste Management Act 1996 or the polluter pays principle:

[A]lthough the principle of separate corporate personality is not set in stone . . . the Court cannot disregard the fundamental nature of the separate legal personality principle and . . . in the absence of an express statutory abridgment of that principle, the Court should lean against an interpretation permitting the corporate veil to be pierced. This is in the interests of legal certainty, a very important principle underpinning our law.

[A]lthough a jurisdiction does already exist to lift the veil of incorporation in the case of a company being used for a fraudulent or other improper purpose that jurisdiction, which is of long standing, is intended to ensure (a) that a statutory privilege is not abused, and (b) that the Court’s own process is not abused. Every Court is entitled as a matter of inherent jurisdiction to seek to protect its own process and may in an appropriate case lift the corporate veil to ensure that its order are not frustrated by a cynical and strategic reliance on the principle of separate corporate personality by the directors (or shareholders) of a company. Whenever, under the planning code, a Court has seen fit to lift the corporate veil . . . it has

¹⁹⁴ [2003] ENV. L. REV. 583 (Eng.).

¹⁹⁵ *Id.* ¶ [152] (referring to *Trustor A.B. v. Smallbone* (No. 2), [2001] 1 W.L.R. 1177 (Ch.) (Eng.)).

¹⁹⁶ [2011] I.E.H.C. 67 (Ir.).

invariably done so to that end. If the polluter pays principle only required the lifting of the veil in similar circumstances s.57 and s.58 could be harmoniously interpreted on the basis that the necessary jurisdiction already exists and is of long standing. However, it demands more than that. It demands that the polluter should pay in all circumstances which may require the veil to be lifted in any case where a company cannot comply, even in cases where the shareholders /directors are not fraudulently or improperly attempting to hide behind the company. The jurisprudence of the Irish Courts has long set its face against such an incursion. Absent the existence of a fraudulent or improper purpose the Courts will not lift the corporate veil unless authorized to do so by statute.¹⁹⁷

Thus, “insofar as the polluter pays principle forms part of the landscape of environmental law” in Ireland, its scope did not appear to extend to enabling the courts to impose fall-back orders on individuals whose sole connection to the environmental pollution was their position as directors or shareholders of a company held liable under the waste management legislation.¹⁹⁸ In other words, “the ‘polluter pays’ principle cannot . . . be used to infer provisions into the law which simply are not there” thereby imposing liability where it would not otherwise exist.¹⁹⁹

It should however be noted that this decision was made against the backdrop of “a dispute as to the status of the ‘polluter pays’ principle in EU law and the extent to which those very Directives which the 1996 [Waste Management] Act was enacted to transpose actually require the application of the ‘polluter pays’ principle.”²⁰⁰ The Irish High Court concluded from a consideration of the 1996 Act as a whole that the polluter pays principle had only been incorporated to a “fairly limited” extent by the Irish legislature.²⁰¹ There were “very limited references” to it within the 1996 Act, and the provision which was previously seen²⁰² as incorporating the principle “merely define[d] it.”²⁰³ As claims in Ireland have tended to involve waste legislation,²⁰⁴ this is a significant aspect of the *Neiphin* judgment.

¹⁹⁷ *Id.* ¶¶ 6.50-52.

¹⁹⁸ *John Ronan & Sons v. Clean Build Ltd.*, [2011] I.E.H.C. 350, ¶ 6.18 (Ir.).

¹⁹⁹ *Id.* (paraphrasing Edward J’s conclusion in *Neiphin Trading*).

²⁰⁰ *Envtl. Prot. Agency v. Neiphin Trading Ltd.* [2011] I.E.H.C. 67, ¶ 6.13 (Ir.).

²⁰¹ *Id.* ¶ 6.48.

²⁰² *Waste Management Act 1996*, § 5 (construed differently in *Wicklow County Council v. Fenton (No. 2)*, [2002] I.E.H.C. 350 (Ir.)).

²⁰³ *Id.* ¶ 6.48.

²⁰⁴ Ireland does not have a regime to remediate contamination from historic pollution. Article 15.5 of the Irish Constitution bars the imposition of retroactive liability. Irish Const. art. 15.5(1) (“Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.”); see Aoife Shields, *Critical Analysis of the Land Damage Provisions of the Environmental Liability Directive*, 16(2) IRISH PLANNING & ENVTL. L.J. 57, 59-60 (2009) (discussing article 15.5 in reference to remediation of contamination).

This may be seen from the subsequent decision of the Irish High Court in *John Ronan & Sons v. Clean Build Ltd.*,²⁰⁵ which also involved the question of liability under the Waste Management Act 1996. Clarke J. recognized that “the status of the ‘polluter pays’ principle under Irish law but moreover the question of its relevance are matters of some dispute” before turning to examine “the wider context and genesis” of the principle and review the Irish jurisprudence.²⁰⁶ He considered the finding in *Neiphin* that the polluter pays principle could not be used to infer non-existent provisions into the law did “not suggest the polluter pays principle should not be given any consideration *at all* by the court nor [did] it address circumstances where a director or shareholder is found to be independently liable under the 1996 Act.”²⁰⁷ Thus, “where primary liability under the Act could be found to attach to a respondent, who also happened to be a director or shareholder of another respondent, then there was no need to make a ‘fall-back’ order unless such liability were found to have been incorrectly attributed in view of the provisions of the 1996 Act.”²⁰⁸ It was

clear that a person in a position similar to that of being a manager, supervisor or operator of a relevant activity is a holder for the purposes of the 1996 Act. The fact that the business may be conducted by a corporate entity does not prevent individuals (whether they be directors, shareholders or otherwise) from being managers, supervisors or operators.²⁰⁹

Personal liability could accordingly be imposed on the directors on the basis of their “active role in the management and control of the site.”²¹⁰ It is inferred from the reasoning in this case that directors with a more passive role in the management of a company would not be caught by the definition of a “holder” of waste.²¹¹

B. Environmental Claims against Directors and Officers in Canada

A recent case involving claims against directors and officers for remediating contamination concerns Northstar Aerospace (Canada) Inc. and its predecessors (“Northstar”). Northstar owned and operated a helicopter and aircraft parts manufacturing facility in Cambridge, Ontario, from 1981 to 2010. In 2004, Northstar discovered trichloroethylene (“TCE”) and hexavalent chromium in groundwater migrating from the site into a nearby residential area. Concentrations of TCE in 450 residences exceeded health-based standards. Northstar notified the Ontario Ministry of Envi-

²⁰⁵ [2011] I.E.H.C. 350 (Ir.).

²⁰⁶ *Envtl. Prot. Agency v. Neiphin Trading Ltd.* [2011] I.E.H.C. 67, ¶ 5.1 (Ir.).

²⁰⁷ *Id.* ¶ 6.18 (emphasis in original).

²⁰⁸ *Id.* ¶ 6.9.

²⁰⁹ *Id.* ¶ 7.1.

²¹⁰ *Id.* ¶¶ 7.1-3.

²¹¹ Alison Fanagan, *Director Liability for Clean Up and Related Issues*, 2 ENVTL. LIABILITY 48, 50 (2012).

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ronment (“MOE”)²¹² and, between 2004 and 2012, voluntarily carried out investigatory, mitigation and remedial measures, including monitoring air in the residences, and created an accounting reserve of C\$22.8 million for the measures.

In 2012, after the MOE became concerned that Northstar would not have sufficient funds to continue remediating and monitoring the contamination, it issued EPA Orders against Northstar and its U.S. parent company, Northstar Aerospace Inc., requiring them to continue carrying out the measures and to provide C\$10 million in financial assurance to ensure funding for the measures.

On 14 June 2012, Northstar and two related Canadian companies applied for and were granted orders protecting them and staying proceedings against them and their directors and officers under the CCAA. At the same time, Northstar’s parent company filed proceedings in U.S. Bankruptcy Court. All the directors of Northstar, none of which had held their positions when the contamination occurred, resigned, leaving two officers to manage the company and continue remedial measures to the extent permitted under the CCAA order. The court further ordered that the directors and officers should be granted a charge on the companies’ property not exceeding C\$1,750,000 as security for indemnities by the companies to them.

On 27 June 2012, the court approved the sale of Northstar’s assets, rejecting the MOE’s request to disapprove the sale or not distribute the proceeds on the basis that its orders were regulatory orders not subject to the stay. The court concluded that the orders should be stayed because their purpose was enforcement of Northstar’s payment obligations. Virtually all of Northstar’s assets other than the site were subsequently sold and distributed. The sale proceeds were insufficient to pay Northstar’s secured lenders, leaving no assets available for unsecured creditors. On 2 August 2012, the court ordered a claims procedure against Northstar’s directors and officers concerning obligations and liabilities that had arisen after the CCAA proceedings had begun.

On 24 August 2012, Northstar was declared bankrupt and ceased carrying out remedial measures. The remaining asset, the site, vested in the

²¹² The account of the proceedings against Northstar is derived from Baker v. Director, (Case Nos. 12-158 to 12-169, Environmental Review Tribunal, Mar. 22, 1=2013); Government of Ontario, Rationale for Exemption to Public Comment (EBR Registry No. 011-7787, Ministry Reference No. 4242-8UQP7D, Dec. 14, 2012), http://www.ebr.gov.on.ca/ERS-WEB-External/displaynoticecontent.do?noticeId=MTE4MTc1&statusId=MTc2ODQ1_ (last visited, Sept 1, 2013); and the following law firm accounts: Goodman’s Update, *Environmental Law* (July 26, 2013); Davies, *Directors and Officers Liable for Interim Clean-up Costs* (July 15, 2013); Osler, *Ontario Divisional Court Confirms that Former Directors and Officers Must Remediate While Order is Under Appeal* (July 8, 2013); & Heenan Blaikie LLP, *How Much Should Directors and Officers of Insolvent Companies Pay for Clean-Ups?* (June 21, 2013).

trustee in bankruptcy, who disclaimed its interest in it, with the result that the MOE had a secured claim for remedial and monitoring measures against the site and an unsatisfied secured claim against Northstar. The MOE then continued the remedial measures.

On 14 November 2012, soon after the stay expired, the MOE issued a further EPA Order against Northstar's 12 former directors and officers requiring them to carry out measures that the MOE had previously required Northstar to carry out at an estimated annual cost of C\$1.4 million. The MOE also claimed against them for about C\$15 million for its past and future remedial costs, contending that they knew about the contamination and had managed and controlled the site between 2003 and 2012. The EPA Order has priority to existing secured claims, meaning that if the MOE's claims are accepted, up to C\$1.75 million from the proceeds of the sale of the site would be paid to the MOE. There are, however, no bidders for the site.

The directors and officers appealed to the Environmental Review Tribunal to stay the order on the grounds that they did not cause the contamination or have the requisite control of Northstar's activities and property. The Tribunal refused, concluding that they had not established that paying remedial costs would result in irreparable harm to them. The directors and officers appealed and sought judicial review to the Ontario Divisional Court on the basis that they could not defray or recover the costs. The court rejected the appeals on the basis that an interim decision of the Tribunal is not subject to an appeal and that judicial review may only be sought following a final decision by the Tribunal. The court noted that the Environmental Protection Act specifically bars the Tribunal from staying the operation of a decision if the stay would endanger human health or safety or impair or result in a serious risk of impairment of any property, plant or animal.

However, although an overall stay was not precluded by section 143(3) of the Act since the MOE's actions in taking over the remediation work had reduced the threat to human health and safety posed by the contaminants at the site, the appellants had not shown that the financial harm they would suffer would be irreparable and this strictly financial prejudice should be weighed against the "harm to the public interest that would result from the granting of a stay."²¹³ Ironically, although the Tribunal's assessment of the "irreparable harm" factor had noted that the directors might be able to recover the costs of complying with the EPA Order from a C\$1.75 million charge on the assets of Northstar Canada, set aside in the CCAA proceedings to indemnify the directors and officers of the company ("D&O Charge");²¹⁴ it was determined by the CCAA court that the direc-

²¹³ Baker v. Director, Ministry of the Env't, Environmental Review Tribunal Case Nos.: 12-158 to 12-169, ¶ 88 (Can.).

²¹⁴ *Id.* ¶¶ 76 & 83; Baker v. Director, Ministry of the Env't, 2013 ONSC 4142, ¶ 20 (Can.).

tors and officers were “not entitled to the benefit of the D&O Charge Reserve.”²¹⁵ Moreover, the MOE’s claims against the directors and officers did not entitle it to recourse against the D&O Charge as this would enable it to improve its unsecured status by issuing EPA Orders for remediation “after the commencement of CCAA Proceedings, based on an environmental condition which occurred long before the CCAA Proceedings,” thereby achieving indirectly a result which it could not achieve directly.²¹⁶

Ultimately therefore, not only were the directors and officers required to comply with the EPA Order to remediate while it was under appeal, but the litigation demonstrates the high levels of personal liability to which directors and officers are exposed in the context of environmental liability, and the inadequacy of the insolvency regime to provide relief at the expense of the priority status of creditors.²¹⁷ In contrast to cases where debtor companies and directors are exempt from liability and the cost of remediation is shouldered by public authorities, the subjection to cleanup liabilities in this case of directors who had no personal involvement in the circumstances surrounding the contamination, may be a source of some disquiet.²¹⁸ At the other extreme, the outcome may encourage regulatory authorities to more proactively seek to ensure that clean-up responsibilities are imposed on directors and officers at the earliest opportunity.

VII. DEVELOPING OTHER AVENUES OF LIABILITY

The heightened focus on directors’ liability seen above in relation to Ireland and Canada draws attention to the importance of developing other effective avenues of liability to respond to the problem of corporate environmental liability. This is considered below with respect to direct parent company liability, and the development of directors’ duties in the United Kingdom.

A. Direct Parent Company Liability

Although the ability to pierce the corporate veil to reach parent companies is extremely limited in English law,²¹⁹ the recent Court of Appeal decision in *Chandler v. Cape PLC*,²²⁰ raises the prospect of direct liability based on a parent company’s conduct. The matter involved a claim by an employee who had contracted asbestosis through his employment with a

²¹⁵ *In re Northstar Aerospace, Inc.*, 2013 ONSC 1780, ¶¶ 27-34 (Can.).

²¹⁶ *Id.* ¶ 35.

²¹⁷ *See id.* ¶¶ 16 & 34-35.

²¹⁸ C. Cornell, *Who Should Pay for Brownfield Cleanup?*, BUILDING (Aug, 1 2013); J. Gray, *Directors face prospect of unlimited liability in pollution case*, GLOBE AND MAIL (May 1, 2013), noting comment by environmental lawyer Dianne Saxe: “Really, what they are saying is, officers and directors, whether you have done anything wrong or not, retroactively, you have given a blank cheque for whatever we decide to order to you to do.”

²¹⁹ *Adams v. Cape Industries PLC*, [1990] Ch. 433 (Eng.).

²²⁰ [2012] EWCA Civ 525 (Eng.).

subsidiary of Cape PLC, and the question was thus whether Cape PLC bore any liability as the parent of the employer company. In particular, could a duty of care on the part of Cape PLC to its subsidiary's employees be established on the basis of an assumption of responsibility?²²¹ Assessing the evidence, the court found that Cape PLC owed a direct duty of care to the employees, and that this case demonstrated that

in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case:

- (1) the businesses of the parent and subsidiary are in a relevant respect the same;
- (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
- (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and
- (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.²²²

The decision is expected to pave the way for more cases to be brought against parent companies arising from the operations of their subsidiaries where it can be shown that the parent company's conduct justifies the imposition of liability.²²³ It furthermore highlights, in corporate group contexts and parent/subsidiary relationships, the implications of sharing information or technical knowledge.²²⁴ The outcome is thus strongly relevant from an environmental protection perspective, and although it remains to be seen whether – and how – this approach might develop beyond the field of health and safety, particularly in relation to late-manifesting harms or damage; it accords with the U.S. approach to direct liability of parent companies. In *United States v. Bestfoods*,²²⁵ an action for the costs of cleaning up industrial waste, the U.S. Supreme Court held that “a corporate parent that actively participated in, and exercised control over, the operations of [a polluting facility owned and operated by the subsidiary]

²²¹ *Id.* ¶ 62.

²²² *Id.* ¶ 80.

²²³ Brian Cain, *Parent's Liability for a Subsidiary*, 36 COMPANY SEC'Y'S REV. 7, 54, 55 (2012); see also Rehana Azib, *Health and Wealth*, [2012] NEW L.J. 798 (from health and safety perspective, factual scenario in *Chandler* is unlikely to arise in future due to compulsory insurance for employers since 1972).

²²⁴ See, e.g., Martin Petrin, *Assumption of Responsibility in Corporate Groups: Chandler v Cape PLC*, 76 MODERN L. REV. 589, 618 (2013) (“Cape would have been better off and could possibly even have escaped liability had it not conducted any asbestos and health related research and had it taken a decidedly ‘hands-off’ approach to health issues arising in group companies”).

²²⁵ 524 U.S. 51 (1998).

may be held directly liable in its own right as an operator of the facility”;²²⁶ “The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary.”²²⁷ By comparison, activities involving the facility which were consistent with the parent company’s role as investor, “such as monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures,” would not invoke direct liability.²²⁸ The central issue was whether “in degree and detail,” actions directed at the facility on behalf of the parent company were “eccentric under accepted norms of parental oversight of a subsidiary’s facility.”²²⁹

Bestfoods shows that a parent company may be directly liable as an “operator” on a construction of relevant environmental legislation,²³⁰ quite independently of the application of tort-based concepts of responsibility seen in *Chandler*. Direct liability recognizes the strong influence exerted by parent companies on the activities of their subsidiaries.²³¹ The decision in *Chandler* has moreover drawn attention to the importance of tort law as an instrument for environmental protection. Tort law, as a compensation and risk-control mechanism,²³² supports the goals of environmental protection in two significant ways:

Tort law allows the victims of irresponsible corporate conduct to bring actions against the enterprise and to seek damages for the harm caused by business activities. This results not only in the direct compensation of injured parties but also forces corporations to incorporate negative externalities into the costs of their business activities. This provides a disincentive to the externalization of risks, deters corporations from engaging in overly risky activities and motivates corporations to apply and monitor certain corporate standards.²³³

Nevertheless, it is acknowledged that as a mechanism focused on offering redress in respect of harm to persons and property, tort law is “ill equipped to deal with environmental issues.”²³⁴ This includes situations

²²⁶ *Id.* at 55.

²²⁷ *Id.* at 68 (quoting Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis under CERCLA: Finding Order in the Chaos of Pervasive Control*, 72 WASH. U.L. QUARTERLY 223, 269 (1994)).

²²⁸ *Id.* at 72 (quoting Oswald, *supra* note 211, at 282).

²²⁹ *United States v. Best Foods*, 524 U.S. at 72.

²³⁰ CERCLA in this case.

²³¹ See Bastian Reinschmidt, *The Law of Tort: A Useful Tool to Further Corporate Social Responsibility?*, [2013] COMPANY LAW 103, 108 (direct liability provides grounds for treating parent companies as sole/joint tortfeasors); cf. Petrin, *supra* note 224, at 612-13 (critiquing control factor considered in *Chandler*).

²³² See Reinschmidt, *supra* note 231, at 106.

²³³ *Id.*

²³⁴ *Id.* at 110.

where, for instance, the damaged natural resources are un-owned²³⁵ or no person is affected.²³⁶ Although strong arguments can be made in favor of expanding the scope of tort law to provide protection for environmental interests,²³⁷ its inherent limitations may prevent it from playing a major role in this context. Tort law focuses on harm rather than risks,²³⁸ and as a mechanism aimed at cure rather than prevention,²³⁹ encounters difficulties such as establishing causation and responsibility in complex cases²⁴⁰ and the quantification of harm.²⁴¹ An alteration to “the internal conceptual and normative geography of tort law”²⁴² would be necessary to overcome its principal fault-liability base,²⁴³ and its emphasis on harm to persons.²⁴⁴ Suggestions include “extending the catalogue of rights” recognized by tort law to encompass individual interests in the environment, and imposing of forms of strict liability for more hazardous activities.²⁴⁵ For the time being however, the ability to pursue a parent company as sole/joint tortfeasor²⁴⁶ as seen in *Chandler*, provides a significant advantage bearing in mind the low incidence of veil-piercing with respect to tort claims.²⁴⁷ Tort law can thus enable reparation to be provided which would otherwise be unavailable as a result of the operation of established principles of corporate law, such as separate legal personality.²⁴⁸

²³⁵ See Michael Anderson, *Transnational Corporations and Environmental Damage: Is Tort Law the Answer?*, 41 WASHBURN L.J. 399, 409 (2002).

²³⁶ See Reinschmidt, *supra* note 231, at 106.

²³⁷ See *id.* at 110-11; Anderson, *supra* note 235, at 408-10.

²³⁸ Peter Cane, *Using Tort Law to Enforce Environmental Regulations?*, 41 WASHBURN L.J. 427, 429 (2002).

²³⁹ *Id.* at 441.

²⁴⁰ Anderson, *supra* note 235, at 409.

²⁴¹ *Id.* at 410.

²⁴² Reinschmidt, *supra* note 231, at 110.

²⁴³ Cane, *supra* note 238, at 448.

²⁴⁴ *Id.*; Reinschmidt, *supra* note 231, at 110.

²⁴⁵ Reinschmidt, *id.*

²⁴⁶ See *id.* at 108 (proposing same).

²⁴⁷ Charles Mitchell, *Lifting the Corporate Veil in the English Courts: An Empirical Study*, 3 CO. FINANCIAL & INSOLVENCY L. REV. 15, 24 (1993); see U.S. study by Robert Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1058 (1991); and in Australia by Ian M. Ramsay & David B. Noakes, *Piercing the Corporate Veil in Australia*, 19 CO. & SECURITIES L.J. 250-71 (2001), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=299488 at 2 (last visited Sept. 14, 2013).

²⁴⁸ See David M. Ong, *The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives*, 12 EUROPEAN J. INTL. L. 685, 698 (2001) (“established corporate legal principles such as that which provides for the separate legal personality of different companies within the same group of companies prevent the imposition of corporate environmental liability on the whole group”).

B. Incorporation of Environmental Concerns into Directors' Duties in the United Kingdom

The necessity for finding ways to surmount the barriers presented by traditional corporate law principles is further demonstrated by the U.K. experience of the introduction of a statutory duty for directors to promote the company's success with regard to various factors, including "the impact of the company's operations on the community and the environment."²⁴⁹ Viewed against the backdrop of proposals for the reform of corporate governance to "include incorporation of environmental concerns within the scope of directors' duties, either explicitly by legislation, or implicitly by the extension of fiduciary duties owed to the company"²⁵⁰ it may be seen as a progressive step.²⁵¹ However, a reading of the provision shows that

In construing the statutory list of factors relevant to determine whether a director acted to promote the success of the company, it is essential to interpret the constituent parts of the list in the context of promoting the best interests of company shareholders. In the context of shareholder interests, one would imagine, although it is not specifically alluded to in the list of factors to be considered, that success will continue to be viewed primarily in a commercial context, so measured by the profitability of the company and its ability to declare healthy dividends.²⁵²

In promoting the company's success "for the benefit of its members as a whole," it is not evident whether a director will be liable for a breach of the section 172 duty if despite "generating profits and a healthy dividend, matters relevant to . . . the community, environment or future business reputation of the company are only afforded a negligible or indeed nil consideration."²⁵³ These misgivings are reinforced by the outcome of an early attempt to enforce this aspect of the section 172 duty in the case of *R. (on the application of People and Planet) v. H.M. Treasury*.²⁵⁴ This involved an

²⁴⁹ Companies Act 2006, c. 46, § 172(1)(d).

²⁵⁰ Ong, *supra* note 248, at 692.

²⁵¹ MARK STALLWORTHY, UNDERSTANDING ENVIRONMENTAL LAW (2008), 185; Cynthia A. Williams & John M. Conley, *Triumph or Tragedy? The Curious Path of Disclosure Reform in the U.K.*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 317, 320 (2007).

²⁵² Stephen Griffin, *The Regulation of Directors under the Companies Act 2006*, [2008] CO. L. NEWSLETTER 1, 2. The relevant subsection reads "172(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to— (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company." *Id.*

²⁵³ Griffin, *supra* note 252, at 2.

²⁵⁴ [2009] EWHC 3020 (Q.B.D. Admin.) (Eng.).

application by People and Planet, an organization campaigning for action on climate change and respect for human rights, to bring judicial review proceedings in relation to the policy adopted by H.M. Treasury with regards to the Government's 70 per cent shareholding in the Royal Bank of Scotland ("RBS") acquired as a result of substantial financial support provided during the market turmoil of 2008. The court rejected the argument that H.M. Treasury should have sought to impose its policies vis-à-vis combating climate change and the promotion of human rights on RBS' Board of Directors on the ground that it "would clearly have a tendency to come into conflict with, and hence would cut across, the duties of the RBS Board as set out in section 172(1),"²⁵⁵ including their statutory obligation "to manage the company for the benefit of the shareholders as a whole and acting fairly as between them."²⁵⁶ It would furthermore give rise to "a real risk of litigation" by minority shareholders complaining that the Government's efforts to impose its policy on the Board of RBS had detrimentally affected the value of their shares.²⁵⁷ Decisions regarding the management of RBS were matters for the judgment of the directors of RBS.²⁵⁸ While H.M. Treasury could "properly seek to influence the Board of RBS to have regard to environmental and human rights considerations in accordance with the Board's duty under section 172," the pursuit of a more interventionist policy would create a risk of pressing the RBS Board beyond the limits of their own duties.²⁵⁹ The case may thus be seen as illustrating the extent to which section 172 "has raised expectations that it cannot deliver," and the ineffectuality of company law as a "vehicle for the achievement of environmental or human rights objectives beyond what the law requires generally."²⁶⁰ It also weakens somewhat the prospect that stakeholders to whom no direct duty is owed under section 172 may still bring judicial challenges against deficiencies in directors' decision-making with respect to "stakeholder regard and engagement."²⁶¹ Recent empirical research has found that in well-run companies' engagement with stakeholders can surpass the "mere consideration of interests" indicated in section 172, encompassing "consultation and feedback, resulting in a loop of continuous learning and modification on the part of the company."²⁶² Thus while the impact of section 172 appears limited by virtue of its construction and enforceability,²⁶³

²⁵⁵ *Id.* ¶ 34.

²⁵⁶ *Id.* ¶ 2.

²⁵⁷ *Id.*

²⁵⁸ *Id.* ¶ 35.

²⁵⁹ *Id.*

²⁶⁰ Stephen Copp, *S.172 of the Companies Act 2006 Fails People and Planet?*, [2010] CO. LAW. 406, 408.

²⁶¹ Ahmed Al-Hawamdeh, Iris Chiu, Marc Goergen, Christine Mallin & Eve Mitleton-Kelly, *The Interpretation of the Directors' Duty under Section 172 Companies Act 2006: Insights from Complexity Theory*, [2013] J. BUS. L. 417, 430 & 432.

²⁶² *Id.* at 432.

²⁶³ See, e.g., analysis by Carrie Bradshaw, *The Environmental Business Case and Enlightened Shareholder Value*, [2012] LEGAL S. 1; Charlotte Villiers, *Directors' Duties*

it may nevertheless assist in exerting a positive influence on corporate processes and conduct.

The possibility of an expansive application of section 172 is furthermore hampered by the dual role of the provision. It not only forms an express duty for directors, but within the statutory framework for the overall enforcement of directors' duties through a derivative action, the view of a director acting in accordance with section 172 presents a mandatory and a discretionary bar to a court's permission to continue a derivative claim. That is to say, where a member of the company seeks permission to continue a derivative claim under section 261 or section 262, a court *must* dismiss the application if it is satisfied (*inter alia*) that a person acting in accordance with section 172 would not seek to continue the claim; or if the application is not precluded by one of the mandatory bars to continuance in section 263(2), the court *must take into account (inter alia)* the importance that a person acting in accordance with section 172 would attach to continuing the claim.²⁶⁴ The cases applying this "hypothetical director" test show that it has been strongly influential in the development of the recently-introduced statutory derivative action.²⁶⁵ Of particular interest is the judicial implementation of the test with reference to factors centered on the financial and commercial consequences of the proceedings for the company:

They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (*e.g.* by losing the services of a valuable employee or alienating a key supplier or customer) and so on.²⁶⁶

Notably, "[t]he weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a

and the Company's Internal Structures Under the UK Companies Act 2006: Obstacles for Sustainable Development, (2010) Univ. Oslo Faculty of Law Legal Studies Research Paper Series No. 2010-03; Deryn Fisher, *The Enlightened Shareholder – Leaving Stakeholders in the Dark: Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of Their Decisions on Third Parties?*, [2009] INTL. CO. & COM. L. REV. 10.

²⁶⁴ Companies Act 2006, c.46, §§ 263(2)(a), 263(3)(b) (Eng.).

²⁶⁵ See Companies Act 2006, c. 46, pt. 11 (Eng.); *Franbar Holdings v. Patel*, [2008] EWHC 1534 (Eng.); *Mission Capital v. Sinclair*, [2008] EWHC 1339 (Eng.); *Stimpson v. Southern Private Landlords Ass'n.*, [2009] EWHC 2072 (Eng.); *Iesini v. Westrip Holdings Ltd.*, [2009] EWHC 2526 (Eng.); *Kiani v. Cooper*, [2010] EWHC 577 (Eng.); *Stainer v. Lee*, [2010] EWHC 1534 (Eng.); *Kleanthous v. Paphitis*, [2011] EWHC 2287 (Eng.); *Parry v. Bartlett*, [2011] EWHC 3146 (Eng.).

²⁶⁶ *Iesini v. Westrip Holdings Ltd.*, [2009] EWHC 2526, ¶ 85 (Eng.); adopted in *Kiani v. Cooper*, [2010] EWHC 577, ¶ 13 (Eng.); and *Stainer v. Lee*, [2010] EWHC 1534, ¶ 27 (Eng.).

clear case.” Therefore the courts remain “wary of . . . substituting their judgment for the business judgment of directors,”²⁶⁷ but it is clear that their perspective of the hypothetical directors’ views is shaped by the direct interests of the company rather than much wider considerations. Human rights, community and environmental issues may be treated as “external to the company” while those pertaining to “employees and creditors are internal.”²⁶⁸ For the moment, it seems that corporate social responsibility concerns “will be considered by a court if the claimant can establish a direct benefit to the company through bringing a claim.”²⁶⁹ The courts’ endorsement of a stakeholder-driven performance by directors of their section 172 duty to promote the company’s success would thus sit uncomfortably with the status of the hypothetical director test as a check on the enforcement of directors’ duties generally.

In the absence of a directors’ duty which sanctions “profit-sacrificing behavior motivated by environmental concerns”²⁷⁰ and complementary ease of enforcement, it is also arguable that the prospect of criminal liability provides stronger incentives for directors to comply with environmental requirements. With respect to the EPA 1990 for instance, which provides for corporate and personal criminal liability where an offence “is proved to have been committed with the consent or connivance of, or . . . attributable to any neglect on the part of any director, manager, secretary or other similar officer,”²⁷¹ it is noted that the presence of sound environmental management systems may provide a defense.²⁷² This is particularly relevant to offences which do not provide for strict liability, but are couched in terms of reasonableness, practicability and diligence.²⁷³ Ong makes a similar observation in relation to fault-based criminal liability, that

where a corporate offence has in fact been committed, it will be very difficult to avoid a finding of negligence on the part of one or more of the directors or other company officers, unless there is convincing evidence of the existence and efficient operation of sound and comprehensive corpo-

²⁶⁷ Ahmed Al-Hawamdeh, *et al.*, *supra* note 261, at 432.

²⁶⁸ David Gibbs, *Has the Statutory Derivative Claim Fulfilled its Objectives? The Hypothetical Director and CSR*, [2011] CO. LAW. 76, 80; *see also* Bradshaw, *supra* note 263, at 155 (“company is a ‘club’, where shareholders are . . . in the club, and non-shareholding stakeholders deal with the company from the outside”).

²⁶⁹ Gibbs, *supra* note 268, at 82.

²⁷⁰ Bradshaw, *supra* note 263, at 16-17.

²⁷¹ EPA, § 157(1). All the major environmental legislation in the United Kingdom includes similar liability provisions for directors and officers. *See, e.g.*, Water Resources Act 1991, c. 57, § 217(1), *as amended by* Water Act 2003, sched. 7, ¶ 12 (Eng. & Wales); Environmental Permitting (England and Wales) Regulations 2010, S.I. 2010/675, reg. 41.

²⁷² *See* Valerie Hall, *When Pollution Leads to Prosecution*, [1997] 7 ESTATES GAZETTE 131.

²⁷³ *See id.*

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rate environmental management systems designed to ensure full compliance with the law.²⁷⁴

It has been held by a U.K. court that the policy underlying provisions relating to corporate offences is to “encourage those who direct or control [companies or corporate bodies] to promote the purposes of the legislation as a whole.”²⁷⁵ Consequently, a director may be prosecuted in accordance with the EPA 1990 without the company having been convicted of the offence or prosecuted in the same proceedings.²⁷⁶ This is in keeping with the notion that environmental statutes seek to promote responsible conduct and are often underpinned by the philosophy that environmental harm is avertible.²⁷⁷ The treatment of environmental offences is further supported by the formal oversight and review of sentencing practices, to ensure clarity and consistency.²⁷⁸ The desire to avoid criminal liability should encourage boards of directors to pursue “sound corporate environmental management policy” which “transcends mere compliance with environmental law and becomes intrinsic to the overall corporate policy decision-making structure.”²⁷⁹ This deterrent effect is reinforced by the exposure of directors who have been convicted of an indictable offence in connection with the management of a company, to disqualification from the promotion, formation, or management of another company without the leave of the court, under the U.K. Company Directors Disqualification Act 1986.²⁸⁰ Corporate environmental management systems therefore not only contribute to the protection of companies and their officers from possible environmental liability, but enable them to strengthen their corporate reputation, and gain a competitive advantage as well as “strategic data for longer

²⁷⁴ Ong, *supra* note 248, at 706.

²⁷⁵ *Maclachlan v. Harris*, 2009 S.C.C.R. 783, ¶ 11 (High Court of Judiciary) (Scot.).

²⁷⁶ EPA 1990, § 157(1) (“Where an offence under any provision of this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly”).

²⁷⁷ Lucia Ann Silecchia, *Pinning the Blame and Piercing the Veil in the Mists of Metaphor: the Supreme Court’s New Standards for the CERCLA Liability of Parent Companies and a Proposal for Legislative Reform*, 67 *FORDHAM L. REV.* 115, 185-86 (1998).

²⁷⁸ *See, e.g.*, Sentencing Council, *Environmental Offences Guideline Consultation* (Crown, 2013) (Eng.).

²⁷⁹ Ong, *supra* note 248, at 707.

²⁸⁰ Section 2(1) reads: (1) The court may make a disqualification order against a person where he is convicted of an indictable offence (whether on indictment or summarily) in connection with the promotion, formation, management, liquidation or striking off of a company, with the receivership of a company’s property or with his being an administrative receiver of a company. Company Directors Disqualification Act 1986, c. 46, § 2(1); *see* Hall, *supra* note 272.

term business planning.”²⁸¹ Exposure to criminal sanctions in insolvency may, by contrast, bring the interests of the company and its management into direct conflict with their environmental responsibilities, as seen in the recent liquidation of the Scottish Coal Company Ltd., in which the liquidators’ concern that the risks associated with open cast mining sites “could involve potential liabilities which could incur criminal penalties” was among the factors justifying the disclaimer of certain sites and statutory licenses shortly after the commencement of the liquidation.²⁸²

VIII. MINIMIZING THE IMPACT OF ENVIRONMENTAL INSOLVENCIES IN PRACTICE

Recent U.K. liquidations demonstrate the extent to which efforts are made in practice to reduce the impact of environmental insolvencies. For the Scottish Coal Company Ltd. and U.K. Coal Operations Ltd., discussed in Part IV above, entry into liquidation provided a means of protecting the insolvent estate from depletion through compliance with on-going clean up or maintenance obligations. In *Re Directions, Nimmo*,²⁸³ involving the disclaimer by Scottish Coal Company (“SCC”) of some of its sites and statutory licenses or permits, it was acknowledged that:

SCC’s directors applied for the company to be wound up rather than appoint an administrator because it was insolvent and did not wish the cost of performing its environmental obligations to use up the funds realized from the sale of its assets. . . . The [liquidators] wish to protect SCC’s unsecured creditors and the bank, as holder of the floating charge, from the dissipation of the proceeds of disposal of SCC’s assets which continued performance of the statutory obligations will entail.²⁸⁴

The funds available would meet the considerable cost of maintaining the sites under the liquidators’ control (which had gone down from £1.4 million to £478,000 following the sale of several sites) for no more than 20 to 22 months.²⁸⁵ Compared with the estimated £10.5 million to be raised from the realization of assets, the costs of restoring the sites in accordance with SCC’s obligations would be about £73 million.²⁸⁶ Similarly, U.K. Coal’s liquidators justified the disclaimer of a colliery destroyed by fire immediately following their appointment on the basis that this “was a high risk site with substantial liabilities attaching to it. The costs of securing and holding the mine (which we expected to exceed £100,000 per week) would

²⁸¹ Ong, *supra* note 248, at 708.

²⁸² See *Opencast Mining in East Ayrshire – Update (Report by Chief Executive)*, East Ayrshire Council Cabinet, May 24, 2013, ¶ 8.

²⁸³ [2013] C.S.O.H. 124 (Scot.) (appeal pending).

²⁸⁴ *Id.* ¶¶ 6 & 7.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

have been an expense and, as such, these costs would have been paid ahead of the dividend to creditors.”²⁸⁷

However, an examination of both insolvencies also reveals that disclaimer was effected in the context of transactions encompassing sales of other assets, making it possible for some business operations and employment to be preserved.²⁸⁸ U.K. Coal first entered administration, a statutory procedure whose primary goal is the rescue of the company as a going concern,²⁸⁹ and completed a restructuring which included the transfer of the majority of its business and assets and a compromise with major creditors, before entering liquidation and disclaiming the damaged mine.²⁹⁰ To expedite the formal administration procedure, which only lasted a few days, the administrators were excused by the High Court²⁹¹ from compliance with the statutory requirements to send out proposals for achieving the purposes of the administration,²⁹² and convening an initial creditors’ meeting²⁹³ on the basis of commercial necessity. As part of what the court described as “restructuring following sophisticated advice,”²⁹⁴ the national Pension Protection Fund (“PPF”) took over U.K. Coal’s £543 million pension deficit.²⁹⁵ In return, it would receive payments in the form of debt instruments from the new company to which the viable mining operations had been transferred, which were “expected, over time, to be materially higher than any sum it would have received” had the company simply gone into liquidation.²⁹⁶

In similar vein, the acquisition of assets from SCC and another liquidating company Aardvark (TMC) Ltd. was structured in a way which sought to combine the immediate purchase of viable sites with the longer-term absorption of sites requiring restoration.²⁹⁷ Independently of the sale

²⁸⁷ *Ocanti Opco Ltd. - in Liquidation (formerly UK Coal Operations Limited)*, PwC, <http://www.pwc.co.uk/business-recovery/administrations/ukcoal/index.jhtml> (last visited Aug. 27, 2013).

²⁸⁸ *See id.*; *see also* Robbie Dinwoodie, *Hundreds of Jobs to be Saved as Coal Mines are Transferred*, HERALD SCOTLAND (July 6, 2013).

²⁸⁹ IA 1986, ¶ 3(1), Sched. B1 (U.K.).

²⁹⁰ *See* PwC statement, *supra* note 287.

²⁹¹ *In re U.K. Coal Operations Ltd* [2013] EWHC 2581.

²⁹² IA 1986, ¶ 49, Sched. B1 (U.K.).

²⁹³ IA 1986, ¶ 51, Sched. B1 (U.K.).

²⁹⁴ *In re U.K. Coal Operations Ltd* [2013] EWHC 2581, para [2].

²⁹⁵ Andrew Bounds, *PPF to Take on U.K. Coal Pensions*, FINANCIAL TIMES (June 29, 2013).

²⁹⁶ Press Release, *UK Coal and the Pension Protection Fund*, PENSION PROTECTION FUND (July 9, 2013),

<http://www.pensionprotectionfund.org.uk/news/pages/details.aspx?itemid=329&archive=1>. *See generally* Briefing Note, *Making a Recovery* (describing role in company restructurings), PENSION PROTECTION FUND,

http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/Making_a_recovery.pdf (last visited Sept. 2, 2013).

²⁹⁷ *See* news releases by the purchaser Hargreaves Services plc, *Acquisition of Assets from Aardvark (TMC) Limited (in creditors’ voluntary liquidation)*, (May 16, 2013),

of secured debt, movable and immovable property, the two insolvent companies' interest in problematic sites was hived down to companies owned by them ("HiveCos") with the aim of addressing "outstanding restoration liabilities."²⁹⁸ The purchaser, Hargreaves Services plc., ("HSP") would support mining activities at the HiveCo sites,²⁹⁹ in addition to gaining exclusive options for the future purchase of shares in the HiveCos.³⁰⁰ These options would be exercised to take over the HiveCos and integrate them into HSP's corporate group if the "outstanding restoration issues [were] resolved on commercially acceptable terms."³⁰¹ It was observed on behalf of HSP that a restructuring process of this kind "significantly reduced" the number of properties requiring disclaimer by the liquidators.³⁰² This indicates that there is scope for pragmatic solutions to evolve in response to environmental liabilities, and such solutions may be more heavily reliant on contractual techniques. Confining our concerns to the problems associated with disclaimer risks obscuring the related transactions within a bespoke company rescue initiative. It furthermore creates the danger that legal reforms focused on particular aspects of the treatment of environmental liability in insolvency may undermine the flexibility and effectiveness of the practical solutions which are currently being deployed.

IX. CONCLUSIONS

While the reach of the polluter pays principle has been extended from the international trade context to national regimes for the remediation of contamination from historic pollution, company and insolvency law remain remarkably untouched. Although the discussion in Part II demonstrates differing approaches between the United States and the United Kingdom to this issue, strong similarities are identifiable between many of the difficulties which arise in insolvency/bankruptcy proceedings. These include the discharge of liabilities through reorganization and the abandonment or disclaimer of burdensome property, and have been shown to be pertinent to other common law jurisdictions including Canada, Ireland, Australia and New Zealand. The case authorities from these jurisdictions are linked by the limited application of the polluter pays principle in the

<http://hsprod.investis.com/ir/hsp/ir.jsp?page=news-item&item=1508983072358950> and *Acquisition of Assets from The Scottish Coal Company Limited in Liquidation* ("Scottish Coal"), (July 5, 2013), <http://hsprod.investis.com/ir/hsp/ir.jsp?page=news-item&item=1546188226560000>.

²⁹⁸ *Id.*

²⁹⁹ *Id.* (care and maintenance in case of SCC; and mining services, production and marketing of coal with respect to Aardvark).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See Hargreaves Services PLC, RNS No. 8376E (May 16, 2013) (statement of Chief Executive Officer Gordon Banham), *available at* <http://hsprod.investis.com/ir/hsp/ir.jsp?page=news-item&item=1508983072358950>, (last visited Sept. 2, 2013).

context of insolvency proceedings. The successful imposition of directors' liability in recent Irish and Canadian cases has leaned heavily on the role of the environmental legislation, rather than the intervention of company or insolvency law.

At the same time, the pre-occupation with the relationship between the principle of limited liability and the protection of the environment³⁰³ reflects an expectation that insofar as environmental harm is caused by companies, company law will provide a means of resolving it. It therefore remains crucial to examine developments in this field in light of their implications for environmental protection. This includes the recognition of direct parent company liability, and developments in corporate governance which give rise to some anticipation of the emergence of a directors' duty to protect environmental interests³⁰⁴ – especially at present when consideration is being given by the U.K. Government to proposals for strengthening the regulation of directors by amending their statutory duties for key sectors, enabling regulators to disqualify directors in their sector; and permitting material breaches of relevant sectoral regulation, together with the scale of loss suffered by creditors and impact on wider society, to be taken into account in disqualification proceedings.³⁰⁵ Targeting parent company and managerial decision-making vis-à-vis a company's activities³⁰⁶ can contribute to the development of more responsible conduct on the part of its controllers, while other areas of law such as tort law and criminal law can likewise play an important part in improving business practices and expanding corporate environmental liability.

The restructuring activities of the Scottish Coal Company and U.K. Coal Ltd. demonstrate the potential for creative practical responses to environmental insolvencies, which place limited reliance on formal procedures. More soberingly though, they indicate that high site maintenance and restoration costs are seen as destructive to attempts to rescue the business and in fact encourage recourse to liquidation proceedings for the purpose of disclaiming sites and licenses. This dichotomy exemplifies the continuing challenge for the various national regimes outlined in this paper, of working towards a more collaborative relationship between environmental, company and insolvency law.

³⁰³ See, e.g., George W. Dent, Jr., *supra* note 193; David S. Bakst, *supra* note 193; Cindy Schipani, *Infiltration of Enterprise Theory into Environmental Jurisprudence*, 22 J. CORP. L. 599, 614-19 (1997).

³⁰⁴ Ong, *supra* note 248, at 688, 723-24.

³⁰⁵ *Transparency & Trust: Enhancing the Transparency of U.K. Company Ownership and Increasing Trust in U.K. Business*, Discussion Paper (Department for Business Innovation and Skills, July 2013).

³⁰⁶ See, e.g., Silecchia, *supra* note 277, at 194 (focus in *Bestfoods* on facility “forces courts to inquire into the actual process of environmental decision-making”); *id.* at 172 (decision placed “attention where it should be: on the connection between parent companies and contaminated sites, not in the artificial corporate connections between parents and subsidiaries”).