

HARMONIZING INSOLVENCY & SUSTAINABILITY IN THE COURTROOM AND THE BOARDROOM

Laura N. Coordes

Arizona State University Sandra Day O'Connor College of Law

January 9, 2018

INTRODUCTION



OUTLINE

1. Tension between environmental and bankruptcy law and policy
2. Harmonization in the courts
3. Harmonization in the boardroom

ENVIRONMENTAL LAW

- CERCLA, 42 U.S.C. § 9601 et seq.
- EPA may either:
 - Clean up contaminated site and seek reimbursement from responsible parties; OR
 - Force responsible parties to perform clean-up
- *United States v. Atlantic Research Corp.*, 551 U.S. 128 (2007):
 - Potentially responsible parties (“PRPs”) can bring a private right of action against other PRPs to recover clean-up costs
 - PRP = *any* individual or organization potentially responsible for, or contributing to, a spill or other contamination at a Superfund site.

BANKRUPTCY LAW

- Conflicting policy goals:
 - Provide a “fresh start” to the “honest but unfortunate debtor”
 - See, e.g., 11 U.S.C. §§ 1141 (discharge), 1129 (allowing for < 100% recovery)
 - Maximize the value of the firm for the benefit of creditors
 - See, e.g., 11 U.S.C. §§ 1129(a) & (b) (absolute priority rule, best interests test, good faith, unfair discrimination)

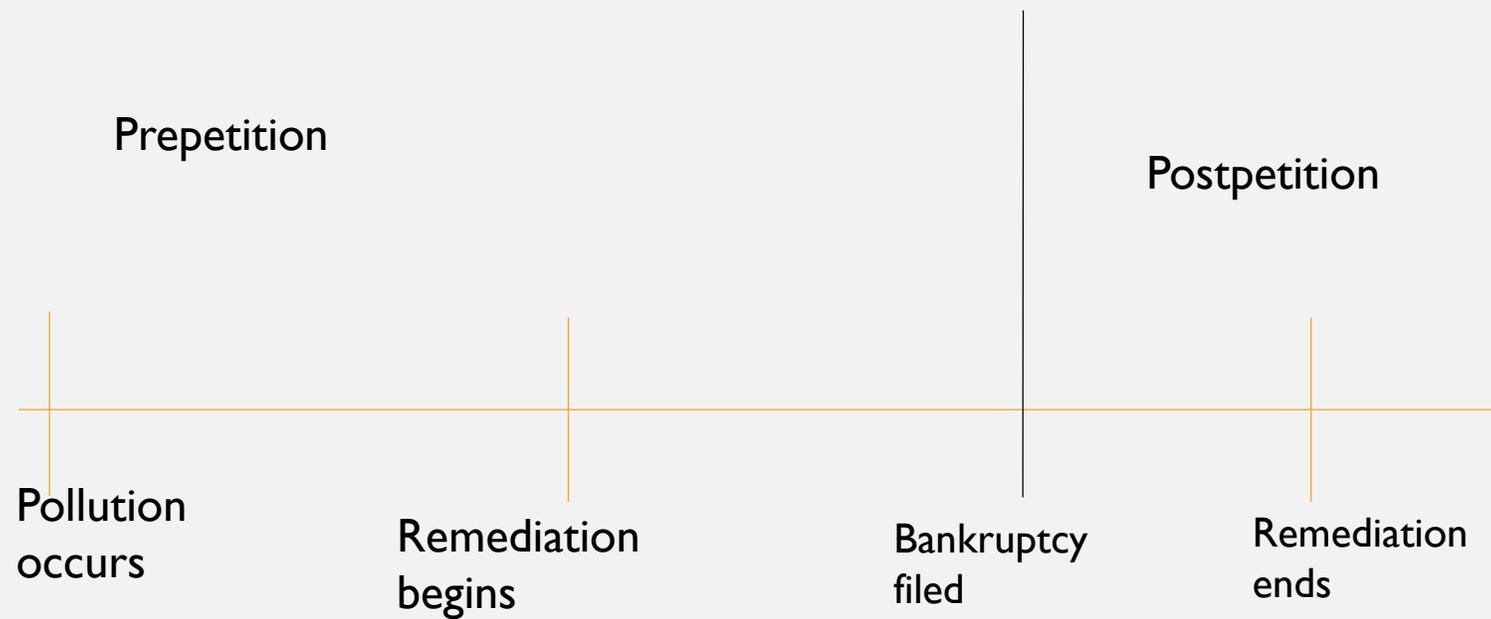
CONFLICTS

Petition Date

Prepetition Claims get
discharged

Postpetition Claims are
nondischargeable

WHEN DOES A CERCLA CLAIM ARISE?



WHEN DOES A CERCLA CLAIM ARISE?

- Right to payment approach: a claim does not arise until all four CERCLA elements exist.
 - CERCLA elements:
 - Defendant falls within one of the four categories of responsible parties
 - Hazardous substances are disposed at a facility
 - There is a release or threatened release of hazardous substances from the facility into the environment
 - Release causes the incurrence of response costs, including removal activities and enforcement activities

WHEN DOES A CERCLA CLAIM ARISE?

- Underlying act approach: claim can be discharged as long as the underlying polluting act occurred prior to bankruptcy
- Debtor-creditor relationship approach: claim can be discharged if creditor and debtor began a “relationship” before debtor filed for bankruptcy *and* if polluting act occurred prior to bankruptcy
- Fair contemplation approach: claim can be discharged only if it is based upon pre-petition conduct that can fairly be contemplated by the parties at the time of bankruptcy

HARMONIZATION IN THE COURTROOM

- Guidance from Congress is needed on how to strike the proper balance between bankruptcy law and CERCLA
- Reconsider the place of the “fresh start” goal in corporate bankruptcy

HARMONIZATION IN THE BOARDROOM

How, if at all, do the changes that come with a bankruptcy impact a corporation's sustainability goals and environmental practices?

- DIP Model vs. administrator/trustee
- Linking CSR practices with financial stability/recovery

THANK YOU!