



## MICHIGAN ENVIRONMENTAL LAW JOURNAL Vol. 32, No. 1, Fall 2013, Issue 93

### Message From the Editor

**Christopher J. Dunsky**

*Editor, Michigan Environmental Law Journal*

### Results of 2013 Law Student Writing Competition

For the past eleven years, the Environmental Law Section has sponsored an annual writing competition in which law students are invited to submit essays on subjects of interest to attorneys who practice environmental law in Michigan. The competition stimulates interest in environmental law and provides articles of high quality for readers of the *Michigan Environmental Law Journal*. This year, five students from five different law schools submitted essays. After reviewing the entries, a panel of five editor-judges (plus former Section Chair Tom Wilczak) awarded prizes to the following students:

First Place (\$2,000): **Nathan Inks**, Wayne State University Law School, *Wetland Mitigation in Michigan: Working Toward the Goal of No Net Loss of Wetlands*

Second Place (\$1000): **Jamie Bowers**, Georgetown University Law Center, *Environmental Justice Implications of the Current Hydraulic Fracturing Regulatory Regime*

Third Place (\$500): **Chen Sheng**, University of Illinois College of Law, *Application of the Reasonable Use Doctrine in Riparian Rights and Groundwater Cases in the Last Decade*

Jamie Bowers' essay is published in this issue of the *Journal*, along with an article by Sarah Schenck that was submitted outside the writing competition. We plan to publish one or more of the other winning essays in the Winter issue and to publish the other essays in the Spring and Summer issues.

## U.S. Supreme Court Expands Land-Owner Rights in Land-Use Permitting Decisions

By Brad H. Sysol<sup>†</sup>

The Fifth Amendment to the U.S. Constitution forbids the federal government—and state and local units of government through the Fourteenth Amendment—from taking private property for public use without just compensation. This constitutional guarantee is “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Since the *Penn Central* case in 1978, the U.S. Supreme Court has issued a number of opinions to expand and clarify what type of government action constitutes a compensable taking. This article will analyze the Court’s most recent opinion on the type and character of government regulation under its permit authority that may require just compensation.

The classic example of a compensable taking is where the government, by way of condemnation proceedings, transfers title to private property to the government or some other private party. In addition to a transfer of title, a taking may also occur through the imposition of regulations—a so-called “regulatory taking.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (regulations may result in a compensable taking where they “are functionally equivalent to the classic taking.”) For instance, regulations that force property owners to submit to a permanent physical invasion of their property are a taking *per se*. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (requirement that landlord must permit installation of cable TV access facilities on roof of building). Similarly, regulations that leave landowners “without economically beneficial or productive options for its use,” such as by requiring land “to be left substantially in its natural state,” are also a taking *per se*. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Moreover, regulations that simply go too far by unfairly placing public burdens on a just a few property owners may be deemed a taking after reviewing certain factors on a case-by-case basis. *Penn Central*, *supra*. The *Penn Central* factors to be considered in determining whether a regulation places too much of a burden on an individual property owner are the economic impact of the regulation on the owner, the extent to which the regulation interferes with “investment-backed expectations, and the “character of the government action.” *Id.*

A related category of takings are so-called land use “exactions,” which occur when a unit of government grants a permit for a particular land use conditioned on the landowner dedicating some portion of the property to the public or for a public use. Under the doctrine of unconstitutional conditions, “the government may not require a person to give up a

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constitutional right [*i.e.*, the right to just compensation under the Fifth Amendment] . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.” *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Accordingly, a land-use exaction will pass constitutional muster only if there is an “essential nexus” and “rough proportionality” between the government’s demand and the environmental impact of the proposed land use. *See Dolan, supra* (and *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987)).

But what if the government *denies* a permit because an applicant refuses to yield to a permit condition that would violate the essential nexus and rough proportionality test, instead of *approving* a permit conditioned on the applicant satisfying the same conditions, as occurred in *Nollan* and *Dolan*? Or what if the government conditions a permit not on the applicant dedicating some portion of their land to the public or for a public purpose, but rather on the applicant’s agreement to spend money for a mitigation project on another parcel of land? Would the nexus / rough proportionality test still apply? These were the questions presented to the U. S. Supreme Court in *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S.Ct. 2586 (2013).

In *Koontz*, the petitioner (Coy Koontz, Sr.) sought a permit from respondent St. Johns River Water Management District (the “District”) to develop approximately 3.7 acres of his 14.9 acre parcel of land containing wetlands. To mitigate the environmental effects of his development, Koontz offered to deed to the District a conservation easement over 11 acres of his property. The District rejected this offer and advised Koontz that it would only grant a permit if Koontz either (a) reduced the size of his development from 3.7 to 1 acre and provide a conservation easement over the property’s remaining 13.9 acres, or (b) continue with the proposed 3.7 acre development and 11 acre easement, but also hire contractors to restore and enhance 50 acres of wetlands on District owned property located several miles away. Koontz filed suit claiming that the District’s demands were excessive in light of the environmental impacts of his proposed project, constituting a taking in violation of the Fifth and Fourteenth Amendments.

Agreeing with Koontz, a Florida state trial court held that in light of the nearly three-quarters of his property that he was willing to deed to the District for conservation purposes, “any further mitigation in the form of payment for offsite improvements to District property lacked both a nexus and rough proportionality to the environmental impact of the proposed construction.” *Id.* at 2593. The Florida appellate court affirmed, but the Florida Supreme Court reversed, holding that the *Nollan* and *Dolan* nexus/rough proportionality test did not apply for two reasons: (1) “the District did not approve petitioner’s application on the condition that he accede to the District’s demands [but] instead, the District denied his application because he refused to make concessions”; and (2) because the District did not make a demand “for an interest in real property” as in *Nollan* and *Dolan*, but instead made a “demand for money.” *Id.* at 2594.

The U.S. Supreme Court reversed. First, the Court rejected as “untenable” the notion that the government could “evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval” as opposed to a condition

subsequent. *Id.* at 2595-96. The Court noted that “[o]ur unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent,” and that doing so “would effectively render *Nollan* and *Dolan* a dead letter.” *Id.* (cite omitted). “Under the Florida Supreme Court’s approach, a government order stating that a permit is ‘approved if’ the owner turns over property would be subject to *Nollan* and *Dolan*, but an identical order that uses the words ‘denied until’ would not.” *Id.* at 2595-96. And even though no property is actually taken where the government merely denies a permit unless the applicant agrees to convey land, the Court noted that “[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.” *Id.* at 2596.

The Court next rejected “the Florida Supreme Court’s alternate holding that [Koontz’s] claim fails because [the District] asked him to spend money rather than give up an easement on his land.” *Id.* at 2598. The Court rejected this position, holding that “so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.” *Id.* at 2599. The Court noted that “a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement’s value.” *Id.* Important to the Court’s conclusion was the “direct link between the government’s demand and a specific parcel of real property,” implicating “the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.” *Id.* at 2600.

In sum, the Court held that “the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.” *Id.* at 2603.

## The Environmental Justice Implications of the Current Hydraulic Fracturing Regulatory Regime

By Jamie Bowers, Georgetown University Law Center

### I. INTRODUCTION

Hydraulic fracturing, known commonly as “fracking,” is the process of drilling and injecting fluid into the ground at a high pressure in order to fracture shale rocks to release natural gas.<sup>1</sup> Fracking creates commercially viable access to previously inaccessible oil and natural gas resources, such as shale gas.<sup>2</sup> As fracking has become a universal process used by drillers

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<sup>1</sup> For a more in-depth explanation of the hydraulic fracturing process and the materials used, see generally Hannah Wiseman, [Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation](#), 20 FORDHAM ENVTL. L. REV. 115 (2009).

<sup>2</sup> Jacquelyn Pless, [Natural Gas Development and Hydraulic Fracturing: A Policymaker’s Guide](#), NATIONAL CONFERENCE OF STATE LEGISLATURES (JUN. 2012).

worldwide, the environmental problems it causes have become more of a pressing issue. Fracking can cause contamination of groundwater, emissions of greenhouse gases and other air pollutants, a strain on water resources, and numerous other environmental and health risks.<sup>3</sup>

The environmental concerns are amplified by the increase of drilling near populated communities, which in turn has induced heightened media scrutiny.<sup>4</sup> The 2010 movie *Gasland*<sup>5</sup> exposed the effects of fracking on citizens and communities located near drilling sites, recounting shocking anecdotes about the effects of fracking on citizens near fracking sites.<sup>6</sup> People living near fracking sites often complain of nausea, headaches, breathing difficulties, fatigue, dizziness, nosebleeds, and other ailments.<sup>7</sup> However, linking these health problems to fracking is difficult for many reasons: the long latency of many illnesses, lack of medical knowledge, conflict of interest affecting scientific findings, lack of accurate health data, among other problems.<sup>8</sup> The University of Pennsylvania has commissioned a team of toxicologists to study the health effects of fracking and resolve some of the debate over the dangers to human health.<sup>9</sup>

Key natural gas sources, like the Collingwood shale in northern Michigan, are often located below rural regions.<sup>10</sup> Rural regions are often the most attractive for drilling because of the large amounts of land required for drilling sites.<sup>11</sup> However, the presence of fracking sites can have negative consequences for the surrounding communities. Across the United States, rural counties generally have lower median incomes, lower wages, and higher poverty rates than metropolitan counties.<sup>12</sup> These low-income communities tend to be the locations of fracking sites. For example, Michigan has 52 active fracking permits and 17 pending applications. The active permits are present in the counties of Cheboygan, Antrim, Kalkaska, Montmorency, Missaukee, Roscommon, Ogemaw, Osceola, Clare, Gladwin, Oceana, Muskegon, Ionia, Sanilac, and Hillsdale (most heavily in Antrim, Cheboygan, Kalkaska, and Missaukee counties). All fifteen

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<sup>3</sup> Stephen O'Day and Jessica Lee Reece, [Top Environmental Concerns in Fracking](#) OIL & GAS MONITOR (Mar. 19, 2012).

<sup>4</sup> Barclay Nicholson & Kadian Blanson, [Tracking Fracking Case Law: Hydraulic Fracturing Litigation](#), 26 NAT. RESOURCES & ENV'T 25 (Fall 2011).

<sup>5</sup> [Gasland](#), IMDb.com (2010) (last visited Nov. 30, 2013).

<sup>6</sup> The veracity of the *Gasland* claim that the flammable tap water was caused by fracking was under dispute for a short period. Dr. Michael Economides, an oil and gas industry analyst and chairman of the Board of XGAS, claimed that showing the clip and claiming it was due to natural gas drilling was irresponsible, and that almost any "gas leak" from sources within and around a home could produce flammable tap water. Michael Economides, [Slurring Natural Gas with Flaming Faucets and Other Propaganda](#), FORBES.COM (Apr. 22, 2010). However, a 2011 study by Duke University concluded that leakage from the cement seal of a borehole passing through an aquifer is the most likely cause of these incidents. Stephen G. Osborn, Avner Vengosh, Nathaniel R. Warner, and Robert B. Jackson, [Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing](#), DUKE UNIVERSITY (2011).

<sup>7</sup> Lists of health effects are extensive and varied. For an example of the wide variety of effects, see, e.g., [List of the Harmed](#), PENNSYLVANIA ALLIANCE FOR CLEAN WATER AND AIR (last visited Mar. 4, 2013).

<sup>8</sup> Alison Rose Levy, [Fracking's Most Horrifying Health Risks](#), SALON.COM (last visited Mar. 4, 2013).

<sup>9</sup> Jon Hurdle, [Taking a Harder Look at Fracking and Health](#), N.Y. TIMES (Jan. 21, 2013).

<sup>10</sup> Mark Shrope, [Fracking Outpaces Science on Its Impact](#), ENVIRONMENT YALE (2012).

<sup>11</sup> Google Sites, [Water Resources Used in Hydrofracking](#).

<sup>12</sup> Mindy Crandall, [Poverty and Rural Income](#), RURAL COMMUNITIES EXPLORER (2008).

Michigan counties with active fracking permits have a per capita income and median household income that is below the Michigan average.<sup>13</sup> Because they are less affluent, these communities frequently have the least resources available to protect themselves from negative consequences.

Within the fracking regulatory regime, there are several levels of protection available to citizens who worry that they may be affected by the health and environmental consequences of drilling sites. Many states have enacted legislation ensuring protection of water supplies, limiting water withdrawal, requiring water quality testing, and regulating waste disposal.<sup>14</sup> The Environmental Protection Agency (EPA) has some degree of power to protect against known risks of fracking by ensuring proper permitting of fracking sites, regulating the safe disposal of wastewater and stormwater from hydraulic fracturing activities, and controlling air quality impacts associated with fracking.<sup>15</sup> The EPA can also take enforcement action to make the fracking industry comply with federal environmental laws and regulations, especially with regard to violations that can lead to significant potential harm to human health and the environment.<sup>16</sup> The EPA works with state and local governments to respond to incidents and to provide an effective response when accidents occur.<sup>17</sup> If the state government's and the EPA's protection mechanisms fall short, citizens can defend themselves by bringing private civil suits against the drilling company.

However, these multiple levels of enforcement are not always completely effective. Despite efforts by states to protect citizens from the potential health effects of fracking, many communities still suffer the adverse consequences of nearby fracking operations. Although the EPA has a considerable arsenal of tools to prevent harm to citizens, it often has the resources to investigate only the most severe situations. When state and federal protection falls short, citizens can attempt to defend themselves against drilling companies through lawsuits. However, plaintiffs' attorneys often balk at taking cases from low-income citizens because the recovery available usually depends on the value of the property affected, and for low-income families the property is often not worth enough to make the case profitable. This article will make the argument that state and federal enforcement mechanisms are not always adequate to protect citizens from dangerous health and environmental effects caused by fracking operations. As a result, citizens may have to resort to self-help to protect their homes and families from adverse consequences. At this level of enforcement, however, low-income communities are presented with a considerable disadvantage. They may not have enough money to bring civil suits against drilling companies, and if they do, the remedy available may not be enough to provide satisfactory relief.

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<sup>13</sup> See Appendix A for a table showing the Michigan average per capita income and median household income contrasted against the per capita income and median household income for the counties that have fracking sites. Data are from the 2010 United States Census Data and the 2006-2010 American Community Survey 5-Year Estimates.

<sup>14</sup> Jacquelyn Pless, [Fracking Update: What States are Doing to Ensure Safe Natural Gas Extraction](#), NATIONAL CONFERENCE OF STATE LEGISLATURES (Jul. 2011).

<sup>15</sup> [Natural Gas Extraction—Hydraulic Fracturing](#), U.S. ENVIRONMENTAL PROTECTION AGENCY (Feb. 14, 2013).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

## II. State Regulation of Fracking

Although some federal regulation exists for hydraulic fracturing procedures, states have regulatory primacy on the issue.<sup>18</sup> This is due mainly to the uniqueness of each state's geology and environmental conditions.<sup>19</sup> Giving primacy to state regulators allows them to tailor fracking regulations to closely meet the needs of each state.<sup>20</sup>

The hydraulic fracturing process is exempt from regulation under six major federal environmental statutes: the Clean Water Act,<sup>21</sup> the Clean Air Act,<sup>22</sup> the National Environmental Policy Act,<sup>23</sup> the Safe Drinking Water Act,<sup>24</sup> the Resource Conservation and Recovery Act,<sup>25</sup> and the Comprehensive Environmental Response, Compensation and Liability Act.<sup>26</sup>

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<sup>18</sup> Pless, *supra* note 2, at 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Hydraulic fracturing has been exempted from the Clean Water Act and the Safe Drinking Water Act by the passage of the [Energy Policy Act of 2005, Pub. L. 109-58](#), Title III (Aug. 8, 2005). Section 322 provides in relevant part:

SEC. 322. HYDRAULIC FRACTURING.

Paragraph (1) of section 1421(d) of the Safe Drinking Water Act (42 U.S.C. 300h(d)) is amended to read as follows:

“(1) UNDERGROUND INJECTION.—The term ‘underground injection’—

...

“(B) excludes—

... “(ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.”

Section 323 provides:

SEC. 323. OIL AND GAS EXPLORATION AND PRODUCTION DEFINED.

Section 502 of the Federal Water Pollution Control Act (33 U.S.C. 1362) is amended by adding at the end the following:

“(24) OIL AND GAS EXPLORATION AND PRODUCTION.—The term ‘oil and gas exploration, production, processing, or treatment operations or transmission facilities’ means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.” 33 U.S.C. § 1362(24).

This additional provision had the effect of including construction activities in the definition of oil and gas exploration and production. After [33 U.S.C. § 1362\(24\)](#) was added, the EPA published a final rule exempting from NPDES permit requirements stormwater discharges of sediment from construction activities associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities unless the relevant facility had a discharge of stormwater resulting in a discharge of a reportable quantity of oil or hazardous substances.

<sup>22</sup> Oil and gas drilling operations are usually exempt from obtaining a Title V permit under the Clean Air Act because their emissions levels are slightly below the threshold.

<sup>23</sup> Hydraulic fracturing is subject to a categorical exclusion for review under the National Environmental Policy Act, [42 U.S.C. § 15942](#).

<sup>24</sup> Oil and gas operations do not meet the definition of major source under the CAA, leaving hydraulic fracturing

Extracting natural gas provides multiple benefits to states where natural gas is produced. The fracking industry contributes to job creation, capital expenditures, gross domestic product (GDP) and tax revenues, and it creates economic savings by reducing prices for natural gas and electric power.<sup>27</sup> As of 2012, the natural gas industry either actually uses fracking, or has shown significant interest in developing shale gas, in thirty-one states.<sup>28</sup> Fracking regulations vary widely among these states.<sup>29</sup> State legislatures and regulatory agencies have enacted statutes and regulations that: (1) require operators to disclose the chemicals they use, (2) require operators to monitor fluids, (3) protect water supplies, (4) limit the quantities of water that may be withdrawn for fracking, (5) require water quality testing, (6) regulate wastewater disposal, inspection of wells, and protection of air quality, and (7) impose moratoria on fracking.<sup>30</sup>

There is a wide variety of state laws and regulations that apply to fracking.<sup>31</sup> Some experts believe that the complexity and variety of state fracking regulations indicate that some states with less stringent regulations are not sufficiently protecting underground sources of drinking water.<sup>32</sup> While some fracking fluids are benign, others, such as benzene and formaldehyde, can become toxic at certain concentrations.<sup>33</sup> If underground water sources are not carefully protected, contaminants from fracking fluids can seep into the water supply.<sup>34</sup> Some states, such as Pennsylvania and New York, have comparatively comprehensive regulations that apply

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unregulated under the Clean Air Act. William J. Brady & James P. Crannell, [Hydraulic Fracturing Regulation in the United States: The Laissez-Faire Approach of the Federal Government and Varying State Regulations](#), 14 VT. J. ENVTL. L. 39, 68 (2012).

<sup>25</sup> Pursuant to the Resource Conservation and Recovery Act, drilling fluids, produced waters, and other wastes associated with oil and natural gas exploration, development, or production (oil field wastes) are exempted from listing as hazardous waste regulated by RCRA. [42 U.S.C. § 6903](#) (provides the definition of hazardous waste); [42 U.S.C. § 6921 b\(2\)\(B\)](#) (“Not later than six months after completion and submission of the study required by section [6982\(m\)](#) of this title, the Administrator shall, after public hearings and opportunity for comment, determine either to promulgate regulations under this subchapter for drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas or geothermal energy or that such regulations are unwarranted”); [40 C.F.R. § 261.4\(b\)\(3\)](#) (exempts from the RCRA definition of hazardous waste drilling fluids, produced wastewater, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy).

<sup>26</sup> The Comprehensive Environmental Response, Compensation, and Liability Act exempts crude oil and petroleum products from the definition of hazardous substances regulated by CERCLA. [42 U.S.C. § 9601\(14\)](#).

<sup>27</sup> Pless, *supra* note 2, at 2.

<sup>28</sup> Brad Plumer, [How States are Regulating Fracking \(in Maps\)](#), WASHINGTON POST (Jul. 16, 2012).

<sup>29</sup> For a comprehensive overview of the different types of regulations in each state with shale gas wells, see [A Review of Shale Gas Regulations by State](#), CENTER FOR ENERGY ECONOMICS AND POLICY [hereinafter *Shale Maps*].

<sup>30</sup> See generally Pless, *supra* note 2.

<sup>31</sup> See *Shale Maps*, *supra* note 29. See also David B. Spence, [Federalism, Regulatory Lags, and the Political Economy of Energy Production](#), 161 U. PA. L. REV. 431, 453 (2013) (stating that variation in the states’ approaches to fracking regulations accounted for the difference in growth of shale wells in each state).

<sup>32</sup> Brady & Crannell, *supra* note 24, at 68; Michael Burger, [Fracking and Federalism Choice](#), 161 U. PA. L. REV. ONLINE 150, 160 (2013); Wiseman, *supra* note 1, at 167.

<sup>33</sup> Wiseman, *supra* note 1, at 167.

<sup>34</sup> See, e.g., Michael Ricciardi, [Newest EPA Report Confirms Fracking Fluids Contaminating Pavillion, Wyoming Water Supply](#), PLANETSAVE (Dec. 10, 2011).

to fracking.<sup>35</sup> Other states simply regulate shale wells through their general oil and gas production rules.<sup>36</sup> There is no minimum protection that a state is required to impose on its fracking industry. Some experts advocate for this decentralized method of fracking regulation,<sup>37</sup> arguing that the environmental effects of fracking are overestimated and citing the need for a tailored and individualized approach to fracking regulation.<sup>38</sup> Others worry that the great disparity among state regulations could endanger public health.<sup>39</sup> Because the full range of effects of fracking on human health and the environment remain largely undetermined, we currently do not know the full consequences of lax state regulation.

State regulations that apply to fracking are not always consistent with what some local jurisdictions would prefer. Several municipalities and counties located in states where fracking occurs have banned fracking in their jurisdictions, but the authority of municipalities to ban fracking is contested.<sup>40</sup> For example, the city of Morgantown, West Virginia banned fracking within a mile of the city.<sup>41</sup> However, the Circuit Court of Monongalia County held that the ban was preempted by state law, stating that the city did not have authority to ban fracking because the fracking industry is regulated solely by the West Virginia Department of Environmental Protection (WVDEP).<sup>42</sup> The authority of municipalities to ban fracking remains uncertain, and it is unclear if bans by municipalities will withstand judicial review.

Furthermore, state environmental agencies can sometimes be unduly influenced by the industries they regulate, a phenomenon known as “agency capture.”<sup>43</sup> Some believe that a state government’s ties to the state economy make it more susceptible than the federal government to industry influence.<sup>44</sup> Due to this relationship, state enforcement of environmental regulations cycles through periods of active enforcement and lax enforcement.<sup>45</sup> Studies have identified performance flaws in many state environmental enforcement programs—specifically failure to carry out inspections, failure to take timely and appropriate

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<sup>35</sup> Wiseman, *supra* note 1, at 116.

<sup>36</sup> *Id.* at 157.

<sup>37</sup> See, e.g., Matt Willie, Hydraulic Fracturing and “Spotty” Regulation: Why the Federal Government Should Let States Control Unconventional Onshore Drilling, 2011 B.Y.U. L. REV. 1743, 1746 (2011); Joe Schremmer, [Avoidable “Fraccident”: An Argument Against Strict Liability for Hydraulic Fracturing](#), 60 U. KAN. L. REV. 1215

<sup>38</sup> Willie, *supra* note 37, at 1746.

<sup>39</sup> Wiseman, *supra* note 1; Jared B. Fish, The Rise of Hydraulic Fracturing: A Behavioral Analysis of Landowner Decision-Making, 19 BUFF. ENVTL. L. J. 219, 230 (2012).

<sup>40</sup> Sorell E. Negro, [Fracking Wars: Federal, State, and Local Conflicts Over the Regulation of Natural Gas Activities](#), 35 ZONING AND PLANNING LAW REPORT 1, 10 (Feb. 2012).

<sup>41</sup> City of Morgantown, W.Va., [Ordinance 721.03\(a\)](#).

<sup>42</sup> *N.E. Natural Energy, LLC v. Morgantown, W.V.*, No. 11-C-411, slip op. at 10 (Monongalia Cty. Cir. Ct. Aug. 12, 2011).

<sup>43</sup> Bruce A. Williams, Economic Regulation and Environmental Protection, POLITICS IN THE AMERICAN STATES, at 506 (“State governments, many scholars argue, are beholden to industrial interest groups in a way that makes adequate land-use, consumer, or environmental regulations impossible.”) See also William L. Andreen, [Motivating Enforcement: Institutional Culture and the Clean Water Act](#), 24 PACE ENVTL. L. REV. 67, 74 (2007).

<sup>44</sup> Larry Kramer, Understanding Federalism, 47 VAND. L. REV. 1485, 1498 (1994).

<sup>45</sup> Andreen, *supra* note 43, at 74.

enforcement actions, and failure to obtain meaningful penalties.<sup>46</sup> If a state environmental agency is heavily influenced by industry, it may not take all enforcement actions necessary to adequately protect the citizens of the state from adverse consequences of fracking operations. In sum, fracking regulations remain primarily the domain of the states rather than the federal government. There is no minimum protection afforded by federal law, and the strength of fracking regulations depends on the state in which one resides. While some states control fracking with cautious, comprehensive regulations, many others continue to regulate under existing oil and natural gas regulations. These potential problems with state regulatory regimes may leave citizens with ineffective recourse if they are subjected to risk from fracking operations. State laws are not always reliable as the only source of protection for citizens against the effects of fracking.

### III. The EPA's Role in Regulation of Fracking Operations

Fracking is exempt from EPA regulation under the six main federal environmental statutes. The Energy Policy Act of 2005 exempted fracking from regulation under the Safe Water Drinking Act and the Clean Water Act,<sup>47</sup> and fracking does not meet the threshold for regulation under the Clean Air Act, the National Environmental Policy Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act.<sup>48</sup> However, the EPA still has a role to play in ensuring that the public is protected from potential adverse environmental and health effects caused by fracking.

The EPA has authority to regulate fracking operations that use diesel fuels as an injectant fluid, and it has issued permitting guidance<sup>49</sup> to improve compliance by fracking operations with requirements of the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*<sup>50</sup> The EPA is also conducting a study of the impacts of hydraulic fracturing on drinking water resources.<sup>51</sup> The EPA has the authority to investigate alleged violations by fracking operations of federal environmental laws and regulations, and works with state governments to respond to accidents, to provide a quick and adequate response when emergencies occur and to encourage accident prevention.<sup>52</sup> For example, under section 300i of the Safe Drinking Water Act, 42 U.S.C. 1431, the EPA has authority to issue emergency orders if a contaminant in a source of drinking water may present an imminent and substantial endangerment to health.<sup>53</sup>

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<sup>46</sup> Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 784 (2004).

<sup>47</sup> See *supra* note 21.

<sup>48</sup> Energy Policy Act of 2005, [Pub. L. No. 109-58](#).

<sup>49</sup> See [EPA Proposed Guidelines](#).

<sup>50</sup> [Hydraulic Fracturing and the Safe Drinking Water Act: Outreach](#), U.S. ENVIRONMENTAL PROTECTION AGENCY (last visited Mar. 4, 2013). The website states that EPA and the States share primary responsibility for implementing the guidelines.

<sup>51</sup> The first progress report on the study was released in December, 2012. The final report is slated for release for public comment and peer review sometime in 2014. [Study of the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources: Progress Report](#), U.S. ENVIRONMENTAL PROTECTION AGENCY (last visited Mar. 4, 2013).

<sup>52</sup> [Natural Gas Extraction—Hydraulic Fracturing](#), U.S. ENVIRONMENTAL PROTECTION AGENCY (last visited Mar. 4, 2013). Authority to regulate remains under the Safe Drinking Water Act.

<sup>53</sup> Rebecca Jo Reser & David T. Ritter, *State and Federal Legislation and Regulation of Hydraulic Fracturing*, THE

However, the scope of EPA's authority to regulate fracking is limited. Under the Energy Policy Act of 2005, EPA has authority to implement guidance only for fracking operations that include diesel fuels as a component of fracturing liquids.<sup>54</sup> Many drilling companies no longer use diesel in the process, and other companies are rapidly shifting away from its use.<sup>55</sup> Environmental groups lobbied for a broad definition of the word "fuel" in the EPA's aforementioned permitting guidance.<sup>56</sup> A broader definition would give the EPA a larger scope of authority to control more varieties of injectants through the permitting guidance. The EPA identified six different categories of fuel that it has authority to regulate, including two types of diesel, crude oil and kerosene.<sup>57</sup> The oil and gas industry has implied that it intends to challenge any overly broad guidance that EPA may issue.<sup>58</sup> The guidelines may be subject to future litigation, and even if they withstand challenge, the industry still continues to shift away from diesel fuel as an injectant fluid; therefore, the guidelines may have limited impact.<sup>59</sup>

Further, the EPA's investigations into violations of federal environmental laws by fracking operations are not always sufficient to protect all residents. The EPA conducts self-directed investigations and receives thousands of tips yearly from citizens regarding violations by fracking operations.<sup>60</sup> However, the EPA has the ultimate authority to decide whether a reported violation is severe enough to investigate.<sup>61</sup> This wide range of discretion leaves open the possibility of agency capture.<sup>62</sup>

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ADVOCATE 35 (2011).

<sup>54</sup> The Energy Policy Act of 2005 amended the Safe Drinking Water Act to exempt regulation of underground injection of fluids for hydraulic fracturing (except for diesel fuels). SDWA section 1421 (d):

(d) "The term 'underground injection'—

(A) means the subsurface emplacement of fluids by well injection; and

(B) excludes—

(i) the underground injection of natural gas for purposes of storage; and

(ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities."

See also Mark Drajem, [EPA Sets Guidance for Using Diesel in Hydraulic Fracturing](#), BLOOMBERG (May 4, 2012).

<sup>55</sup> See Drajem, *supra* note 54.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Negro, *supra* note 40, at 3.

<sup>59</sup> See, e.g., Eric Rothenberg & Bob Nicksin, [Hydraulic Fracturing: Update on EPA Actions; Background on Environmental Issues](#), O'MELVENY & MYERS LLP (also noting that the final rule could have greater significance if the EPA defines diesel fuel broadly to include fracturing fluids containing diesel components such as benzene, toluene, ethylbenzene, and xylenes).

<sup>60</sup> EPA website that says they have thousands of tips per year. See [Natural Gas Extraction—Hydraulic Fracturing](#).

<sup>61</sup> Joel A Mintz, Clifford Rechtschaffen, & Robert Kuehn, ENVIRONMENTAL ENFORCEMENT: CASES AND MATERIALS 41 (2007).

<sup>62</sup> Matthew D. Zinn provides a definition of agency capture:

"Regulators are subject to myriad pressures and incentives that push regulatory choices in the direction desired by regulated industry."

Matthew D. Zinn, Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits, 21 STAN. ENVTL. L. J. 81, 108 (2002). See also *id* at 115 (broad agency discretion is one of the main factors contributing to agency capture).

A recent lawsuit that garnered public interest involved a Texas family named Lipsky. The drilling company Range Resources was in the business of drilling gas wells around Fort Worth, Texas in 2009.<sup>63</sup> The Lipskys noticed problems with their water pressure and water quality and alerted the EPA of the issue in August, 2010.<sup>64</sup> After investigation, the EPA concluded that the contamination was likely due to nearby gas drilling, a conclusion later corroborated by an independent peer-reviewed study by Duke University.<sup>65</sup> In December, 2010, the EPA issued an Emergency Administrative Order under Section 1431 of the Safe Drinking Water Act.<sup>66</sup> The Emergency Administrative Order concluded that contaminants were present in the underground wells, that Range Resources had caused or contributed to the endangerment of persons through the contaminants, and that the action taken by the EPA in the Emergency Order was necessary to protect the health of nearby persons.<sup>67</sup> The EPA filed suit against Range Resources in federal court to force compliance with its emergency order, but settled the case a year later.<sup>68</sup> Range Resources had negotiated with the EPA to end the lawsuit in exchange for its cooperation with the pending national study on hydraulic fracturing.<sup>69</sup> The Lipsky family stated that they felt abandoned by the agency. They were worried about having to move from their home and were stunned that the agency had evidence of their endangerment but didn't resolve the problem to their satisfaction.<sup>70</sup> Some believe that the outcome in the Lipsky case was partially due to agency capture.<sup>71</sup> The ability of industry to influence the enforcement decisions of regulatory agencies remains a possibility at both state and federal levels and has the potential to hinder the ability of agencies to protect citizens against the consequences of fracking.<sup>72</sup>

Congress may give the EPA a greater role to play in regulating the fracking industry in the future. In 2011 Congress considered amending the Safe Drinking Water Act to give EPA legal authority to regulate fracking.<sup>73</sup> Senate Bill 587, known as the FRAC Act (the Fracturing

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<sup>63</sup> *U.S. v. Range Prod. Co.*, 793 F.Supp.2d 814 (N.D.Texas, 2011).

<sup>64</sup> *Id.* at 817.

<sup>65</sup> *Id.* at 817. The EPA's findings were later independently corroborated in a peer-reviewed study led by Professor Robert Jackson. See Stephen G. Osborn, Avner Vengosh, Nathaniel R. Warner, and Robert B. Jackson, [Methane Contamination of Drinking Water Accompanying Gas-Well Drilling and Hydraulic Fracturing](#), DUKE UNIVERSITY (2011).

<sup>66</sup> 793 F. Supp. 2d at 818.

<sup>67</sup> *Id.* at 818.

<sup>68</sup> Brantley Hargrove, [State and EPA Battle Over Fracking, Flaming Well Water](#), HOUSTON PRESS (Apr. 25, 2012).

<sup>69</sup> See [EPA Halted 'Fracking' Case After Gas Company Protested](#), USA TODAY (Jan. 16, 2013); Brantley Hargrove, [The EPA Cut a Deal to Drop Lawsuit Against Fracker in Parker County Case of Flaming Water](#), DALLAS OBSERVER (Jan. 16, 2013).

<sup>70</sup> Chris Nidel, Plaintiff's Attorney Interview, Feb. 23, 2013. Chris Nidel was not involved with the case but is a toxic torts attorney in the District of Columbia who spoke candidly about what had happened to the Lipskys based on personal knowledge of the case.

<sup>71</sup> See, e.g., Earthworks, [Groups Call for EPA to Require Range Resources to Provide Clean Drinking Water to Texas Families](#), EARTHWORKS (Feb. 7, 2013).

<sup>72</sup> Zinn, *supra* note 62, at 112 (stating that environmental regulation is not especially immune from capture, particularly at the state level). See also Bruce A. Williams, Economic Regulation and Environmental Protection, POLITICS IN THE AMERICAN STATES, at 506 ("State governments, many scholars argue, are beholden to industrial interest groups in a way that makes adequate land-use, consumer, or environmental regulations impossible.")

<sup>73</sup> Negro, *supra* note 40, at 2-3.

Responsibility and Awareness of Chemicals Act),<sup>74</sup> would have repealed the provision of the Energy Policy Act that exempts fracking from regulation under the Safe Drinking Water Act.<sup>75</sup> It was introduced in March 2011 but died after it was referred to the Senate Environment and Public Works Committee. However, the bill was re-introduced as S. 1135 on June 11, 2013. In 2012 the EPA issued rules to regulate air emissions produced by fracking operations.<sup>76</sup> The EPA also investigated fracking operations in Pavillion, Wyoming, and concluded that fracking operations contributed to pollution of the surrounding water supply. A report on that matter is to be finalized in September of 2014.<sup>77</sup> These efforts may contribute to EPA gaining a larger role in regulation of fracking operations in coming years.

Although the EPA is studying the environmental effects of the ongoing fracking boom, the agency's ability to protect citizens is currently restricted for several reasons. First, the agency's authority to control fracking operations that use diesel will become less important because the industry is shifting away from using diesel as an injectant fluid. Second, the agency has limited resources to investigate individual complaints of violations by fracking operations. Third, the possibility of agency capture, as demonstrated by the outcome of the Lipsky case, means that even greatly expanding the EPA's authority would not guarantee adequate protection of citizens.<sup>78</sup> What recourse is available to a citizen who has been harmed by fracking operations but whose problems have not been effectively addressed by state or federal environmental agencies?

#### **IV. Citizen Enforcement**

If citizens want to protect their land from the environmental effects of fracking operations without depending on the state or federal government, they can sue the drilling company themselves. Most private civil suits against fracking companies are brought under common law theories of liability.<sup>79</sup> Civil complaints are generally based on common law principles of property, contracts, and common law torts (including claims for toxic tort or physical injury).<sup>80</sup>

##### **A. Trespass Claims**

Trespass claims can involve either surface or subsurface issues. Hydraulic fracturing involves temporary use of surface locations, and the fracking company is usually allowed an express or implied "easement by necessity."<sup>81</sup> This easement gives the fracking company a right to make

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<sup>74</sup> [The Fracturing Responsibility and Awareness of Chemicals Act](#), S.587 (112<sup>th</sup> Congress)

<sup>75</sup> *Id.*

<sup>76</sup> "Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews," 40 C.F.R. Parts 60 and 63. *See also* EPA Issues Updated, [Achievable Air Pollution Standards for Oil and Natural Gas](#), EPA 2012 NEWS RELEASES (Apr. 18, 2012).

<sup>77</sup> Pavillion: [Groundwater Investigation](#) (EPA REGION 8).

<sup>78</sup> Andreen, *supra* note 43, at 71.

<sup>79</sup> Margaret Anne Hill, Mary Ann Mullaney, & Heather L. Demirjian, [Shale Development and Fracking Litigation Trends](#), BLANK ROME LLP (Jul. 31, 2012).

<sup>80</sup> David E. Pierce, Developing a Common Law of Hydraulic Fracturing, 72 U. PITT. L. REV. 685 (2011). *See generally* Nicholson, *supra* note 4.

<sup>81</sup> Pierce, *supra* note 80, at 687.

reasonable use of the surface of leased land to produce natural gas.<sup>82</sup> If the company's use exceeds what is reasonable, the landowner may have a claim against the company for trespass. Subsurface issues involve movement of fissures, injectant fluids, and proppants across property lines.<sup>83</sup> Invasion of this type can be a property trespass.<sup>84</sup> Courts are divided over whether the theory of underground trespass can be a basis for recovery. The most recent decision regarding subsurface trespass is *Coastal Oil & Gas Corp. v. Garza Energy Trust*, decided by the Texas Supreme Court in 2008, which stated in dicta that although deposits of materials on the land surface would be a trespass, it would be draconian and improper to apply that rule to deposits that occur two miles below the surface.<sup>85</sup>

## B. Contract Claims

A property owner who has leased land to a fracking company can also assert a breach of contract claim against the fracking company for improperly performing hydraulic fracturing.<sup>86</sup> Companies typically drill oil and gas wells pursuant to a mineral lease—the mineral rights owner is not always the landowner. The oil and gas company often has a surface use agreement with the landowner. This contract may expressly provide a claim for breach of contract if the land or groundwater beneath the land becomes contaminated.<sup>87</sup> However, many potential plaintiffs do not have contracts with the fracking company, or if there is a contract, it may not have expressly provided a claim for breach of contract.<sup>88</sup> Because of this, courts often impose implied covenants that require oil and gas lessees to conduct activities as reasonably prudent operators.<sup>89</sup> These covenants are often imposed because of uncertainties present in oil and gas exploration—the mineral lease generally does not specify the exploration and production activities the lessee will conduct.<sup>90</sup> If the covenant of reasonable development is breached, the lessor has an action for damages.<sup>91</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 689.

<sup>85</sup> *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 (Tex. 2008) (“Had Coastal caused something like proppants to be deposited on the surface of Share 13 [tract B], it would be liable for trespass, and from the ancient common law maxim that land ownership extends to the sky above and the earth's center below, one might extrapolate that the same rule should apply two miles below the surface. But that maxim—*cujus est solum ejus est usque ad coelum et ad infernos*—“has no place in the modern world.” Wheeling an airplane across the surface of one's property without permission is a trespass; flying the plane through the airspace two miles above the property is not. Lord Coke, who pronounced the maxim, did not consider the possibility of airplanes. But neither did he imagine oil wells. The law of trespass need no more be the same two miles below the surface than above.”).

<sup>86</sup> *Geo Viking, Inc. v. Tex-Lee Operating Co.*, D-1678, 1992 WL 80263 (Tex. Apr. 22, 1992) *opinion withdrawn and superseded on overruling of reh'g*, *GEO Viking, Inc. v. Tex-Lee Operating Co.*, 839 S.W.2d 797 (Tex. 1992).

<sup>87</sup> Keith B. Hall & Lauren E. Godshall, Hydraulic Fracturing Litigation, 57 THE ADVOC. (Texas) 13 (2011).

<sup>88</sup> Pierce, *supra* note 80, at 690.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Wells, [Oil and Gas Law: Chapter 6: Implied Covenants](#) (Oct. 18, 2011).

### C. Other Common Law Torts

The common law of torts may provide remedies for plaintiffs who cannot recover under a trespass or contract theory. A person affected by fracking can bring a private civil claim under negligence, nuisance, strict liability, or toxic torts/physical injury theories.<sup>92</sup>

**Negligence:** Under a negligence theory, liability attaches if the defendant causes harm to another by failing to be as careful as a reasonable person would be.<sup>93</sup> A court can decide whether activities performed by a particular driller satisfy the standard of conduct for a reasonable person for purposes of negligence liability. Violation of any agency-promulgated regulation may be negligence *per se*.<sup>94</sup> On the other hand, compliance with all regulations could establish that the drilling company did not conduct its operations negligently.<sup>95</sup> Oil and gas drilling are governed by numerous regulations, including regulations that establish standards for well construction and precautions against spills of fluids.<sup>96</sup> A plaintiff may be able to show negligence *per se* when a drilling company fails to comply with all regulations and well contamination occurs, but conversely a defendant may be able to establish lack of negligence by showing compliance with all regulations, even though contamination has occurred.

**Nuisance:** Claims for private nuisance allege conduct that is the legal cause of an invasion of the plaintiff's interest in the private use and enjoyment of property.<sup>97</sup> The invasion must be intentional and either unreasonable or actionable under rules governing liability for abnormally dangerous conditions.<sup>98</sup> Courts then generally balance the utility of the activity against the harm it causes.<sup>99</sup> Several types of nuisance claims available to those living near fracking sites have been developed after 2008, when the Texas Supreme Court decided *Coastal Oil v. Garza*.<sup>100</sup> The Texas case *FPL Farming v. Environmental Processing*<sup>101</sup> held that permits issued under the Injection Well Act do not immunize the holder from civil tort liability, indicating that a nuisance claim could be brought against a leaking injection well.<sup>102</sup> Nuisance claims can also be brought for pollution at the land's surface as a result of oil and gas drilling.<sup>103</sup> Additionally, plaintiffs can rely on municipal ordinances that attempt to prevent nuisances caused by oil and gas drilling and fracturing.<sup>104</sup> The common law of nuisance is rapidly evolving with respect to fracking and still remains largely undeveloped. It should continue to create interesting new

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<sup>92</sup> Chris Nidel, Plaintiff's Attorney Interview, Feb. 23, 2013.

<sup>93</sup> Hall, *supra* note 87.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> 1 Toxic Torts Prac. Guide § 6:4 (2012).

<sup>98</sup> *Id.*

<sup>99</sup> Hannah Wiseman, *Beyond Coastal Oil v. Garza Nuisance and Trespass in Hydraulic Fracturing Litigation*, 57 THE ADVOC. (TEXAS) 8 (2011).

<sup>100</sup> *Id.*

<sup>101</sup> *FPL Farming Ltd. v. Environmental Processing Sys.*, 2011 WL 3796612 (Tex. 2011).

<sup>102</sup> Wiseman, *supra* note 99, at 9.

<sup>103</sup> *Id.* at 10.

<sup>104</sup> *Id.* at 11.

legal developments.<sup>105</sup>

**Strict Liability:** Common law has long imposed strict liability on defendants who engage in ultrahazardous activity.<sup>106</sup> Courts decide whether an activity is ultrahazardous based on certain factors, including: whether the activity creates a high degree of risk, whether the activity creates the possibility of great harm as opposed to minor harm, whether it is impossible to eliminate risk with the use of reasonable care, whether the activity is a matter of common usage, whether the activity is inappropriate to the place where it is conducted, and whether the risk of the activity outweighs the value of the activity to the community.<sup>107</sup> Depending on the state, the “abnormally dangerous” doctrine of strict liability may not be available for a hydraulic fracturing claim. Some states, such as Texas, do not recognize the abnormally dangerous activity doctrine of strict liability.<sup>108</sup> Other states, such as Louisiana, limit the abnormally dangerous activity doctrine to blasting and pile driving.<sup>109</sup> Even in states that have adopted the doctrine of abnormally dangerous activity and do not construe it narrowly, there is no guarantee that hydraulic fracturing will be found abnormally dangerous (because of the balancing of risk against value).<sup>110</sup>

**Toxic Tort/Physical Injury Claims:** Prospective plaintiffs often come to attorneys hoping to sue based on their medical condition potentially caused by nearby fracking activities. Plaintiffs may complain of anything from headaches to neurological problems, spitting up blood, and animal deaths.<sup>111</sup> Environmental toxic tort claimants may seek damages for injuries caused by exposure to a harmful chemical or substance.<sup>112</sup> The common law elements of proof necessary to establish a toxic tort claim are: (1) exposure to a disease causing agent or substance; (2) the defendant is legally responsible for the plaintiff’s exposure to the agent or substance; (3) plaintiff has suffered or is currently suffering from exposure to the agent or substance; and (4) plaintiff’s injury was proximately caused by exposure to the disease-causing substance.<sup>113</sup> The plaintiff usually must prove both general and specific causation.<sup>114</sup> General causation exists when a substance is capable of causing a particular injury or condition in the general population, and specific causation exists when a substance causes a particular individual’s injury.<sup>115</sup>

This is quite a high burden on the plaintiff, and it may often be a difficult burden to carry. The

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<sup>105</sup> *Id.* at 11.

<sup>106</sup> Hall, *supra* note 87.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> See also *Berish v. Southwestern Energy Prod. Co.*, 763 F. Supp. 2d 702, 706 (M.D. Pa. 2011) (court expressed doubt that the plaintiff’s abnormally dangerous claim for hydraulic fracturing would be able to survive summary judgment).

<sup>111</sup> See List of the Harmed, *supra* note 7.

<sup>112</sup> Mark S. Dennison & Warren Freedman, Handling Toxic Tort Litigation, 57 AM. JUR. TRIALS 395 (1995).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

City and County of Denver District Court dismissed a hydraulic fracturing-related toxic tort case because the plaintiff failed to adequately link the alleged injuries to contamination from nearby natural gas production activities.<sup>116</sup> The plaintiffs, the Strudley family, submitted medical records, analysis of water and air samples, and expert testimony from a physician, but the judge ruled that the connection between the contamination and the health problems was too tenuous for the case to proceed.<sup>117</sup> The family alleged congestion, nosebleeds, and other health problems that caused them to abandon their home.<sup>118</sup>

The difficulty of linking medical injuries to fracking activities, even with the amount of evidence the Strudley family presented, makes it a problematic route of recovery. Studies are now being conducted regarding the health effects of fracking.<sup>119</sup> These studies may or may not bolster claims of a connection between health problems and fracking a connection that is currently difficult to prove.<sup>120</sup> Because other common law claims, such as trespass, nuisance, negligence, and strict liability, are more developed in case law and have less stringent causation requirements, they are more commonly used by plaintiff's attorneys seeking to recover for their clients.<sup>121</sup>

## V. Environmental Justice Implications

The EPA Office of Environmental Justice defines environmental justice as the "fair treatment of people of all races, cultures, incomes and educational levels with respect to the development, implementation and enforcement of environmental laws, regulations and policies. Fair treatment implies that no population of people should be forced to shoulder a disproportionate share of the negative environmental impacts of pollution or environmental hazards due to a lack of political or economic strength."<sup>122</sup> Individuals from low-income communities often bear an unequal burden of the effects of environmental degradation because they frequently live closer to facilities where waste is disposed of and industrial facilities are sited and permitted.<sup>123</sup>

Environmental justice is a particularly appropriate inquiry in the realm of enforcement of fracking regulations because fracking operations impact low-income and rural communities most heavily.<sup>124</sup> These communities are subject to environmental risks from nearby drilling sites. The environmental risks range from spills of toxic fracking fluid, blowouts of fracking fluids

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<sup>116</sup> *Strudley v. Antero Res. Corp.*, 2012 WL 1932470. Appealed to the Colorado Court of Appeals, Div. I, and reversed and remanded to the trial court. *Strudley v. Antero Res. Corp.*, 2013 WL 3427901. On August 29, 2013, Antero Resources Corporation has filed a petition for writ of certiorari with the Colorado Supreme Court requesting review of the Court of Appeals decision. *Strudley v. Antero Res. Corp.*, [Colorado Supreme Court Case No. 2013SC576](#).

<sup>117</sup> Derek Hawkins, [Lone Pine Strategy Yields Drillers' Win in Fracking Suit](#), LAW 360.

<sup>118</sup> *Id.*

<sup>119</sup> [EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources](#), U.S. EPA; Jon Hurdle, [Taking a Harder Look at Fracking and Health](#), N.Y. TIMES (Jan. 21, 2013).

<sup>120</sup> Chris Nidel, Plaintiff's Attorney Interview, Feb. 23, 2013.

<sup>121</sup> *Id.*

<sup>122</sup> Sandra Richardson, Environmental Justice: A Tool for Community Empowerment, 27 DEC COLO. LAW. 55 (1998).

<sup>123</sup> *Id.* at 55.

<sup>124</sup> See Appendix A for a discussion of the median household incomes in the counties where fracking sites are located in Michigan.

into water wells when they are pumped into an adjacent well, contamination of the water supply by fracking fluids and natural gas, earthquakes caused by injection of fracking waste into storage wells, rupture and subsequent leakage of open pools storing fracking waste, and rupture and possible ignition of pipelines carrying natural gas.<sup>125</sup> The nearby communities experience the brunt of these risks.<sup>126</sup>

The enforcement of environmental laws and regulations is an important element of environmental justice. Because fracking operations are most prevalent in low-income and rural communities, enforcement of environmental regulations that apply to fracking operations should target effective protection of these communities. Unfortunately, there are significant gaps in the enforcement regime.

As stated previously in this article, states have the primary authority to regulate fracking through oil and gas laws, but the stringency of state regulatory enforcement structures varies greatly among states. State regulatory schemes alone cannot protect all citizens from the potential environmental and health effects from fracking operations. Further, the federal government has limited power to protect citizens from fracking operations. At present, EPA lacks authority to create minimum fracking regulations that guarantee the public's safety from the environmental and health risks that fracking operations pose. Because of these regulatory gaps, citizens often have to find their own remedies if they experience water contamination and resultant health effects. Citizens can file private civil lawsuits under several common law theories—trespass, contract, and other common law torts. While the decision to bring suit may be simple for a family whose health is endangered, the economic analysis behind the claim often determines whether that client or family will be successful.

In order to bring a claim under any theory against a drilling company, many costs are required. Attorneys bill a client for time spent working on the case, including case initiation, discovery, settlement, pre-trial motions, trial, and post-disposition.<sup>127</sup> The costs vary depending on case complexity, client expectations, and the working relationship with opposing counsel.<sup>128</sup> If expert witnesses are needed, this adds additional cost to the lawsuit; experts cost on average from \$2,500 to \$7,500.<sup>129</sup> These costs can make toxic tort cases especially expensive because they often require multiple experts and are frequently lengthy.<sup>130</sup> When spending such amounts, there is no guarantee of a successful claim and award of damages to the plaintiff.<sup>131</sup>

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<sup>125</sup> Kevin Zeese & Margret Flowers, [U.S. Climate Bomb is Ticking: What the Gas Industry Doesn't Want You to Know](#), TRUTHOUT (Mar. 6, 2013).

<sup>126</sup> See Oberlin College *Headwaters Magazine*, [Lessons in Democracy for Environmentalists](#) (published online May 15, 2012).

<sup>127</sup> Paula Hannaford-Agor & Nicole L. Waters, Estimating the Cost of Civil Litigation, 20 COURT STATISTICS PROJECT (2013).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> N. Kathleen Strickland, [Toxic Torts: An Overview](#), AMERICAN BAR ASSOCIATION.

<sup>131</sup> *Id.*

Because of these uncertainties, plaintiffs' attorneys pick and choose their cases. Because many work on a contingency fee, they try to accept only cases that are likely to be successful.<sup>132</sup> Most plaintiffs' attorneys are more likely to bring common law claims based on injury to property (property claims) such as trespass, nuisance, negligence, or strict liability instead of toxic torts claims. There are several reasons for this: toxic tort claims are generally lengthy, require many experts, and have challenging causation requirements.<sup>133</sup> Property claims, on the other hand, are more straightforward and do not have the same high burden required for causation in toxic tort cases. Additionally, fewer experts are needed to support a property claim—usually all that is required is a property appraiser.<sup>134</sup> Toxic tort cases attempt to provide recovery for personal injuries experienced as a result of fracking, which can be injuries like nausea, headaches, breathing difficulties, fatigue, dizziness, and nosebleeds, among others. Recovery for small injuries like these can be low,<sup>135</sup> as opposed to a property claim, which can lead to recovery for up to the full value of the property.<sup>136</sup> Because of the potential to recover higher damages, along with easier causation requirements and reduced need for expert involvement, property claims are often more attractive to plaintiffs' attorneys with limited resources.

For property claims, plaintiffs' attorneys conduct an economic analysis.<sup>137</sup> In most jurisdictions, the potential recovery is based on the value of the property. The usual measure of damages in the case of destruction or injury to realty is either the difference between the value of the land before the injury and the value after the injury or the cost of restoration.<sup>138</sup> Even if the claim is successful, the damages available are limited to the value of the property.<sup>139</sup> An attorney taking on a fracking claim has to fit the case within the economic model available: once damages are awarded, the plaintiff must still have enough after paying attorney's and expert's fees to provide him with a remedy for the damage caused by the fracking. The monetary recovery needed depends on the ultimate goal of the plaintiff. Some may want to use the money awarded to pay medical bills or to repair damage to the property. However, many plaintiffs want the financial ability to move away from the property—to get away from the contamination, diesel exhaust, gas, or possible medical problems they are experiencing due to nearby fracking operations.<sup>140</sup> If the property is worth little, the amount recovered is often not

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<sup>132</sup> James Dana & Kathryn Spier, Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation, 9 J. LAW, ECONOMICS, AND ORGANIZATION 349, 350 (1993).

<sup>133</sup> Chris Nidel, Plaintiff's Attorney Interview, Feb. 23, 2013.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* See also Rachel M. Kane, Cause of Action Based on Nuisance for Personal and Property Injury Related to Hydraulic Fracturing Method of Gas Drilling, 55 CAUSES OF ACTION 2D 1 (2012).

<sup>137</sup> Chris Nidel, Plaintiff's Attorney Interview, Feb. 23, 2013.

<sup>138</sup> See Kane, *supra* note 136, at 5 (listing types of recovery available, including loss of market value to property, costs of remediation, and response costs, among others).

<sup>139</sup> Plaintiffs can try to acquire punitive damages for willful misconduct motivated by actual malice towards the plaintiff, but this depends on the facts of the case and is rare. See Bauman et al, *supra* note 139, at § 54. The United States Supreme Court has extended liability for punitive damages to include "reckless or callous disregard or indifference to the rights and safety of others." *Smith v. Wade*, 461 U.S. 30 (1983).

<sup>140</sup> See, e.g., Felicia A. Petro, [Fracking Truth Discusses Water Testing, Anti-Drill Petitions, Website](#), ALLIEDNEWS.COM (Feb. 6, 2013) (quoting Debbie Lambert as stating that noise, dust, smell, and vibrations from a fracking operation "took away [her] American dream. Now [she] wants to move."); [Gas Wells are Not Our Friends: Bradford County](#)

enough to move away from the fracking operations, and so the recovery does not achieve the fundamental purpose of the lawsuit. Without the ability to move away from the source of the problem, winning the lawsuit does not provide ultimate relief.

Enforcement of fracking regulations is subject to many uncertainties that leave residents without adequate assurance that their health and environment are completely protected from adverse consequences. Sometimes self-help through private civil lawsuits can achieve relief. However, due to the economic constraints of private civil property claims, most people in low-income communities are at a distinct disadvantage in defending themselves against negative effects of fracking operations. The economic model of fracking claims does not work well with low value properties. Even if a claim is successful in court, the goal of the plaintiffs often cannot be achieved with the money obtained. A better way to protect low-income communities from the environmental and health risks of fracking needs to be developed.

Some public interest groups take on fracking cases pro bono. However, not all cases can be handled pro bono.<sup>141</sup> One possible solution may be to promulgate federal fracking regulations under the Safe Drinking Water Act, which would at least provide a minimum level of protection for citizens from all states. However, Congress would first have to repeal the section of the Energy Policy Act that exempts fracking from regulation under the Safe Drinking Water Act.<sup>142</sup> More should be done beyond attempting to authorize federal regulation of hydraulic fracturing. EPA's Office of Environmental Justice should direct the regional EPA offices to closely monitor fracking sites. Additionally, Michigan sets a good example with Michigan House Bill 4899, introduced in July of 2013.<sup>143</sup> The bill would require the Michigan Department of Environmental Quality to hold a public hearing in the local area whenever an applicant asks for a permit or other authorization to use an oil or gas well for hydraulic fracturing. While no one solution is an ultimate panacea, a combination of approaches can help mitigate the environmental justice problems created by the location of fracking sites. By implementing several creative solutions, hopefully residents can be assured of a base level of safety from the environmental risks of fracking.

## VI. Conclusion

As the nation develops a greater need for new sources of energy, much national attention has turned to fracking as a source of new natural gas. Regulation of the fracking process is dominated by the states, with limited input from the federal government. States currently have a wide range of regulations in effect—some states have enacted comprehensive regulations while others have just incorporated fracking into the general oil and gas permitting process. Because of the variability of state fracking regulations, the uncertainty whether municipalities have authority to enact enforceable fracking ordinances, and the possibility of state agency

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[Man Dies After Fracking Operations Started Nearby](#) (Jan. 27, 2012) (claiming that a Bradford County man died due to water contamination after fracking operations commenced in Pennsylvania near his home—he was reportedly told to move from his home and away from the fracking operations by a toxicologist).

<sup>141</sup> Chris Nidel, Plaintiff's Attorney Interview, Feb. 23, 2013.

<sup>142</sup> Wiseman, *supra* note 1, at 185-86.

<sup>143</sup> [H.B. 4899, to amend 1994 PA 451](#) (Natural Resources and Environmental Protection Act), *available at*.

capture, states do not always adequately protect citizens from environmental and health risks of fracking. The federal government has a limited ability to regulate fracking. It has some authority, such as permitting fracking operations that use diesel as an injectant fluid, but its authority is very limited compared with that of the states. There are gaps in the regulatory schemes that affect citizens living near fracking operations, who often live in low-income communities.

Because citizens are not always adequately protected from effects of fracking by state and federal agencies, many consider litigation against drilling companies. However, low-income communities are at a distinct disadvantage when bringing fracking claims. Property value plays a huge role in assessing damages, and low-income communities usually have low value properties. Even if a claim can be successfully litigated, the recovery, after deduction of attorney’s fees and other trial costs, may not be enough to achieve the plaintiffs’ goals, whether they are to move from the property or to pay off accumulated medical bills. With the increasing prevalence of fracking operations, citizens need a more effective method of protection, especially because low-income communities are unable to defend themselves. Several actions can help remedy the environmental justice problems caused by the location of fracking sites: promulgating federal regulations to provide a national minimum standard of protection, requiring the Office of Environmental Justice to direct EPA regional offices to monitor fracking sites, and passing/proposing legislation to require public hearings for permit applications for fracking sites. A mix of solutions can help to close the current gaps in the fracking regulatory regime to adequately protect low-income communities.

## Appendix A

This table compares the average Michigan per capita income and median household income with the Michigan counties that have active drilling sites or drilling permits. As the table shows, every single county with a drilling site or permit has a per capita income and median household income below the Michigan average.

County/State	Per Capita Income	Median Household Income
Michigan Average	\$25,135	\$60,341
Cheboygan	\$23,038	\$37,903
Antrim	\$23,912	\$43,123
Kalkaska	\$19,770	\$39,350
Montmorency	\$19,102	\$34,447
Missaukee	\$19,560	\$40,376
Roscommon	\$20,194	\$33,542
Ogemaw	\$18,321	\$35,968
Osceola	\$17,861	\$38,341
Clare	\$18,491	\$34, 399
Gladwin	\$20,571	\$37,936
Oceana	\$18,402	\$39,543

Muskegon	\$19,719	\$40,670
Ionia	\$19,386	\$46,454
Sanilac	\$19,645	\$40,818
Hillsdale	\$20,006	\$42,989

## Buoying Environmental Burdens in Bankruptcy Floodwaters

By Sarah Schenck\*

Environmental law and bankruptcy law do not make good bedfellows. The goals of each area of law are vastly different, and when forced to compromise, neither party is satisfied.

Environmental law seeks to hold entities liable for costs of environmental cleanup, while bankruptcy law offers companies a “fresh start”<sup>1</sup> and provides a structure through which parties can free themselves of financial problems.<sup>2</sup> When a potentially responsible party (“PRP”) that has caused environmental contamination becomes insolvent and cannot pay for environmental cleanup, the tension between the two competing areas of law crescendos.

This tension is apparent in the American auto manufacturing industry, which has brought attention to the conflicts between environmental and bankruptcy laws through dozens of plant closures. In the fall of 2008, the “Big Three” automakers, General Motors, Chrysler, and Ford, turned to Washington for emergency financial assistance.<sup>3</sup> After receiving billions of dollars in federal aid, General Motors and Chrysler both filed for Chapter 11 bankruptcy, but Ford was able to recover on its own due to a fund it had created prior to the recession.<sup>4</sup> In the wake of the Chapter 11 proceedings, over one hundred auto manufacturing sites closed across the country,<sup>5</sup> many of which are likely contaminated from manufacturing processes.

Chrysler filed for bankruptcy on April 30, 2009,<sup>6</sup> and General Motors filed for bankruptcy shortly thereafter on June 1, 2009.<sup>7</sup> Though the U.S. Bankruptcy Court created a \$500 million environmental trust fund specifically for environmental investigation and cleanup for General

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<sup>1</sup> S. Rep. No. 95-989, at 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5792 (“The Committee feels that the policy of the bankruptcy law is to provide a fresh start.”).

<sup>2</sup> See generally ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, [Bankruptcy Basics](#), 9-10 (3d ed. 2011), *available at* (discussing discharge of debts in bankruptcy) [hereinafter *Bankruptcy Basics*].

<sup>3</sup> David Herszenhorn, [Federal Aid to Detroit Seems Likely](#), N.Y. TIMES (Sep. 18, 2012).

<sup>4</sup> James B. Stewart, [When Debating the Auto Bailout, Consider Lehman’s Fate](#), N.Y. TIMES (Mar. 9, 2012), [hereinafter *Debating the Bailout*].

<sup>5</sup> Valerie Sathe Brugeman, Kim Hill, & Joshua Cregger, [Repurposing Former Automotive Manufacturing Sites](#), DEPT OF LABOR (Nov. 2011) at 81.

<sup>6</sup> Jim Rutenberg & Bill Vlasic, [Chrysler Files to Seek Bankruptcy Protection](#), N.Y. TIMES (Apr. 30, 2009).

<sup>7</sup> [A Primer on the G.M. Bankruptcy](#), N.Y. TIMES DEALBOOK (Jun. 1, 2009).

Motors in 2011,<sup>8</sup> Chrysler was not so lucky. The U.S. Bankruptcy Court established an “Environmental Reserve” for Chrysler, allocating only \$15 million for environmental cleanup when it approved the joint liquidation plan proposed by Old Carco (formerly known as Chrysler LLC) and debtors in 2010.<sup>9</sup> The auto manufacturing sites affected by the 2009 bankruptcies will be difficult to sell and redevelop due to contamination associated with auto manufacturing plants and lack of available funding for the cleanup. One city affected by the Chrysler bankruptcy was Kenosha, Wisconsin.<sup>10</sup>

Faced with the prospect of a dead zone in the heart of its city, Kenosha used local ordinances and, together with the Wisconsin Department of Natural Resources, reserved the ability to file a superlien to leverage power in negotiating favorable terms under which Old Carco Liquidation Trust would liquidate and later abandon the property.<sup>11</sup>

In order to prevent dozens of valueless, contaminated properties from burdening future land use and economic development across the country, cities and states need to develop local ordinances and state superlien<sup>12</sup> statutes that endow them with negotiating power when facing the threat of abandonment of contaminated sites. As shown in the Kenosha case, these tools can provide cities and states ammunition with which to craft favorable deals benefitting the public while ensuring that insolvent companies do not leave municipal wastelands in their wake.<sup>13</sup>

This article begins by giving a brief overview of bankruptcy law, Chapter 11 reorganization, and the intersection between bankruptcy and environmental law. It then gives an overview of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)<sup>14</sup> and examines important case law involving Chapter 11 debtor environmental obligations and notes when environmental claims may be discharged during Chapter 11 reorganization. Finally, it addresses the environmental problems arising from the recent auto industry bankruptcy, analyzes the proceedings in Kenosha, Wisconsin, and argues that cities can use local ordinances and state superlien statutes to leverage power in cleanup negotiations.

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<sup>8</sup> [Who We Are](#), RACER TRUST (last visited Mar. 10, 2013).

<sup>9</sup> Trial Filing at 32; Article X, Part A, ¶193A, *In re Old Carco, LLC*, Nos. 10 Civ. 2493(AKH), 09-50002(AJG) (Bankr. S.D.N.Y. Sep. 14, 2010), 2010 WL 5798397.

<sup>10</sup> See *infra* Part III.B.

<sup>11</sup> See *infra* Part III.B.

<sup>12</sup> See *infra* Part III.B.3.

<sup>13</sup> See *infra* Part III.B.3.

<sup>14</sup> 42 U.S.C. § 9601 *et seq.*

## I. Bankruptcy Law

### A. Overview

In 1978, Congress enacted the Bankruptcy Code.<sup>15</sup> Codified as Title 11 of the United States Code, it has since been amended several times.<sup>16</sup> Each federal judicial district in the country has a bankruptcy court; state courts lack jurisdiction over bankruptcy proceedings.<sup>17</sup>

Sometimes in Chapter 11 cases, much of the bankruptcy process is administrative and an appointed Trustee oversees the case.<sup>18</sup> Chapter 11 allows Trustees to abandon burdensome property if it is of inconsequential value to the estate.<sup>19</sup> Contaminated property can be of inconsequential value when appraisers reduce its market value for estimated environmental cleanup costs, which can range anywhere from thousands to millions of dollars.<sup>20</sup> Abandonment of contaminated property is complicated because of potential or imminent threats to human and environmental health. This article focuses on Chapter 11 bankruptcy proceedings because two of the Big Three filed for Chapter 11 bankruptcy in 2009.

### B. Chapter 11

A failing business that wishes to remain in operation while simultaneously repaying some of its creditors can use Chapter 11 (entitled Reorganization) to reduce its debt and restructure its business through a court-approved reorganization plan.<sup>21</sup> The plan is usually structured so that the debtor repays a portion of its debts to secured creditors, while discharging burdensome obligations and debts to unsecured creditors.<sup>22</sup> A successful plan results in a reduced debt load and a presumably profitable restructured business.<sup>23</sup> Congress described the fundamental features of Reorganization as “the thankless task of determining who should share the losses incurred by an unsuccessful business and how the values of the estate should be apportioned among creditors and stockholders.”<sup>24</sup>

When a debtor files for Chapter 11 bankruptcy, it must first file a petition with the bankruptcy court in the district where it is domiciled or has a residence.<sup>25</sup> Unless otherwise ordered, the debtor also files four documents: (1) schedules of assets and liabilities; (2) a schedule of current income and expenditures; (3) a schedule of executor contracts and unexpired leases; and (4) a statement of financial affairs.<sup>26</sup> The timing of the petition filing is important in environmental proceedings because it may determine whether an environmental claim is considered

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<sup>15</sup> 11 U.S.C. §§ 101-1532 (2012).

<sup>16</sup> Bankruptcy Basics, *supra* note 2, at 5.

<sup>17</sup> *Id.*; [Bankruptcy](#), U.S. COURTS (last visited Mar. 10, 2013).

<sup>18</sup> Bankruptcy Basics, *supra* note 2, at 6.

<sup>19</sup> See 11 U.S.C. § 554(a) (discussing generally, abandonment of property of the bankruptcy estate).

<sup>20</sup> John Sharkey, [Contaminated Property Can Be Hard to Value](#), THE BUSINESS REVIEW (Nov. 10, 1997).

<sup>21</sup> Bankruptcy Basics, *supra* note 2, at 29.

<sup>22</sup> See *id.* at 7.

<sup>23</sup> See *id.*

<sup>24</sup> S. REP. NO. 95-989, at 10 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5796.

<sup>25</sup> Bankruptcy Basics, *supra* note 2, at 29.

<sup>26</sup> Fed. R. Bankr. P. 1007(b).

“dischargeable” under bankruptcy.<sup>27</sup> During Chapter 11 proceedings, a debtor can generally discharge any “claims”<sup>28</sup> that arose *before* the confirmation date of the reorganization plan.<sup>29</sup> These claims are called pre-petition claims; post-petition claims are those that are filed after the company has filed its bankruptcy petition and are not subject to the bankruptcy (i.e., they must be paid in full by the bankruptcy trustee or the reorganized company).<sup>30</sup> The decision to argue that a claim arose pre-petition or post-petition is largely a strategic choice for the party seeking bankruptcy protection and the court makes a fact-intensive inquiry to determine whether a claim arose pre- or post-petition.<sup>31</sup>

Remediation, which involves actions taken to clean up environmental contamination, can include removal of pollutants or contaminants from soil, sediment, ground water, or surface water. If remediation conducted by a government agency clearly occurred pre-petition, the claim is generally dischargeable under the reorganization plan; conversely, when the remediation indisputably occurred post-petition, the claim is not dischargeable.<sup>32</sup> Pre-petition remediation claims tend to be more complicated than post-petition claims because courts interpret post-petition claims less consistently.<sup>33</sup>

The ability to discharge pre-petition claims threatens the vitality of environmental cleanup efforts in bankruptcy. If a business is able to discharge its environmental claims utilizing Chapter 11 bankruptcy proceedings, local, state, and federal government agencies are left to deal with cleanup efforts, and the burden of cleanup costs inevitably falls on taxpayers instead of the responsible parties.

### **C. Priority Administrative Expenses & Preserving the Estate**

The Bankruptcy Code establishes a pecking order that stipulates which creditors get paid by debtors and in what order.<sup>34</sup> A secured creditor holds a claim against the debtor, such as a mortgage or lien, and has a “right to take and hold or sell” the debtor’s property in satisfaction of part or all of its claim.<sup>35</sup> An unsecured creditor, on the other hand, is not guaranteed any payment.<sup>36</sup> While a secured creditor is more likely to be paid in full (or closer to “full”) because the debtor’s property guarantees part or all of its claims, an unsecured creditor is not assured

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<sup>27</sup> Andrew N. Davis & Cynthia C. Retallick, *Conflicting Goals of Environmental Law and Bankruptcy Demand Innovative Business Strategies*, *MANAGING ENVIRONMENTAL LIABILITIES IN BANKRUPTCY* 20 (Aspatore ed., 2010).

<sup>28</sup> “The term ‘claim’ means—(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.” 11 U.S.C. § 101(5).

<sup>29</sup> Davis & Retallick, *supra* note 27, at 20.

<sup>30</sup> *Id.*

<sup>31</sup> See Mary J. Koks & Tim Million, *Environmental Issues in Bankruptcy*, 40 *TEX. ENVTL. L. J.* 43, 53 (2010).

<sup>32</sup> *Id.*

<sup>33</sup> See *id.*

<sup>34</sup> See 11 U.S.C. § 507.

<sup>35</sup> *Bankruptcy Basics*, *supra* note 2, at 75.

<sup>36</sup> *Id.* at 76.

repayment.<sup>37</sup> Instead, an unsecured creditor receives a share of the residual assets after higher priority claims have been paid.<sup>38</sup> Administrative claims, which can include environmental cleanup expenses, are nestled between secured and unsecured creditor claims.<sup>39</sup> Allocating the majority of the available funds to environmental cleanups can undermine Chapter 11 business reorganization efforts. However, failing to give administrative expense priority to an environmental claim would allow recovery of only “pennies on the dollar”<sup>40</sup> which undermines the goals of CERCLA. These goals include making parties responsible for environmental contamination pay for cleanup efforts.<sup>41</sup> Despite the delicate balancing act of this *pas de deux*, Congress has let the show play on in the courts.<sup>42</sup>

Courts generally interpret the Bankruptcy Code to give priority status to the costs of Environmental Protection Agency (“EPA”) cleanup actions.<sup>43</sup> The Code provides that an administrative priority includes “the actual, necessary costs and expenses of preserving the estate.”<sup>44</sup> Courts have construed this clause to include expenses incurred “to remove the threat posed by such substances [that] are necessary to preserve the estate.”<sup>45</sup> The EPA is entitled to administrative expense priority for cleanup costs incurred between the filing of a bankruptcy petition and the court confirmation of the reorganization plan, while unsecured creditors do not receive a penny until such cleanup costs are paid in full.<sup>46</sup> Federal district courts have determined that administrative priority expenses can include response costs incurred post-petition based on conduct that occurred pre-petition when costs are necessary to prevent conditions that pose an imminent threat to public health or safety.<sup>47</sup> Costs incurred pre-petition, however, do not have administrative expense priority and are dischargeable.<sup>48</sup> The

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<sup>37</sup> See Scott E. Blair, Note, Toxic Assets: The EPA’s Settlement of CERCLA Claims in Bankruptcy, 86 N.Y.U. L. REV. 1941, 1951 (2011).

<sup>38</sup> *Id.*

<sup>39</sup> 11 U.S.C. § 507(a)(2) (2012).

<sup>40</sup> Ingrid Michelsen Hillinger & Michael G. Hillinger, Environmental Affairs in Bankruptcy: 2004, 12 AM. BANKR. INST. L. REV. 331, 390 (2004).

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See Blair, *supra* note 37, at 1951-52 (discussing that, with respect to the hazardous clean-up costs associated with Chapter 11 Bankruptcy, courts justify giving the EPA administrative priority by relying on U.S. Supreme Court decisions such as *Midlantic Nat’l Bank v. N.J. Dep’t of Env’tl. Prot.*, 474 U.S. 494, 507 (1986) (holding that bankrupt entities may not violate statutes designed to protect public health), and *Ohio v. Kovacs*, 496 U.S. 274, 285 (1985) (demanding compliance with environmental laws)).

<sup>44</sup> 11 U.S.C. § 503(b)(1)(A).

<sup>45</sup> *In re Chateaugay Corp.*, 944 F.2d 997, 1009-10 (2d Cir. 1991). See also *In re Wall Tube & Metal Products Co.*, 831 F.2d 118, 123-24 (6th Cir. 1987) (holding that environmental costs were entitled to administrative expense priority because expenses were “actual and necessary” to preserve the estate in compliance with state law and to protect the public’s health and safety); *In re Peerless Plating Co.*, 70 B.R. 943, 948-49 (Bankr. W.D. Mich. 1987) (finding that the Trustee could not abandon contaminated property in violation of CERCLA, thus creating an implicit duty on the Trustee’s part to use the estate’s “unencumbered assets” to clean up the site in compliance with CERCLA).

<sup>46</sup> Blair, *supra* note 37, at 1952.

<sup>47</sup> See *Chateaugay*, 944 F.2d at 1009; see also *In re Stevens*, 68 B.R. 774, 783 (Bankr. D. Me. 1987).

<sup>48</sup> E-mail from Ingrid Hillinger, Professor of Law, Boston Coll. Law Sch., to author (Apr. 30, 2012, 4:58AM CST) (on file with author) [hereinafter *Hillinger E-mail*]; see also *Stevens*, 68 B.R. at 780 (discussing the inability of the bankruptcy court to “elevate a prepetition unsecured claim to an administrative priority”)

one exception to this rule exists when an environmental agency holds a lien to secure its expenses.<sup>49</sup> When an agency holds a lien, its expenses are treated like a secured claim and it receives the value of its lien during Chapter 11 proceedings.<sup>50</sup>

Administrative expense priority under Chapter 11<sup>51</sup> is also given to expenses incurred to “preserve the estate” in accordance with state law.<sup>52</sup> Title 28 U.S.C § 959(b) provides that “a trustee, receiver or manager . . . shall manage and operate the property . . . according to the requirements of the valid laws of the State.”<sup>53</sup> However, there is a good deal of discrepancy in how courts have construed this statute. For example, the District Court for the Northern District of Texas limited its holding in *In re National Gypsum Co.*<sup>54</sup> to apply to costs that were necessary to avoid “imminent and identifiable harm to the environment and public health.”<sup>55</sup> The court in *In re American Coastal Energy, Inc.*<sup>56</sup> disagreed with this limitation, holding that the court does not need to determine whether the contamination imposes actual and imminent threats; rather, the court must determine whether the debtor is in violation of state law designed to protect human health and safety.<sup>57</sup> Courts have relied on public policy considerations in awarding administrative expense priority to the EPA, which favors allowing the EPA to clean up sites that may pose a threat to public health and safety if left unaddressed.<sup>58</sup>

## II. CERCLA

### A. Overview

Congress passed CERCLA to address environmental issues related to contaminated and hazardous waste sites.<sup>59</sup> The policy goals underlying CERCLA include attributing liability to entities responsible for environmental contamination and allowing the EPA to recover costs of its cleanup efforts.<sup>60</sup>

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<sup>49</sup> Hillinger E-mail, *supra* note 48.

<sup>50</sup> *Id.*

<sup>51</sup> 11 U.S.C. § 503(b)(1)(A).

<sup>52</sup> See 28 U.S.C. § 959(b) (2012) (providing guidance on the judiciary and judicial procedure).

<sup>53</sup> *Id.*

<sup>54</sup> 139 B.R. 397 (Bankr. N.D. Tex. 1992).

<sup>55</sup> *Id.* at 413.

<sup>56</sup> 399 B.R. 805 (Bankr. S.D. Tex. 2009).

<sup>57</sup> *Id.* at 811 (“The fact that the debtor does not intend to operate the property does not diminish its duty under § 959 to manage the property in accordance with state law. A debtor’s obligation to expend funds to bring the estate into compliance with a state health and safety law is not contingent upon whether the obligation arose before or after the bankruptcy filing.”)

<sup>58</sup> See Blair, *supra* note 37, at 1952-53 (citing *In re Chateaugay Corp.*, 944 F.2d 997, 1010 (2d Cir. 1991) (giving administrative priority to those costs EPA incurred to “remedy the ongoing effects of a release of hazardous substances”); *In re Wall Tube & Metal Prods. Co.*, 831 F.2d at 118, 122-24 (6th Cir. 1987) (giving priority to EPA on public policy grounds)).

<sup>59</sup> 42 U.S.C. § 9601 *et seq.*; [Basic Information](#), EPA.GOV (last visited Mar. 10, 2013).

<sup>60</sup> *Id.*; Laurence S. Kirsch & Geraldine E. Edens, ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS 5 (James B. Witkin ed., 3d ed. 2004).

Notwithstanding several exceptions, CERCLA imposes liability on four categories of “potentially responsible parties” (PRPs): (1) the present owner and operator of a facility where hazardous substances have been released; (2) any person<sup>61</sup> who owned or operated the facility at the time hazardous substances were disposed; (3) any person who arranged for disposal or treatment of the hazardous substance; and (4) any person that transported hazardous substances to a disposal or treatment facility.<sup>62</sup> These parties are responsible for “all costs of removal or remedial action incurred by the United States Government or a State.”<sup>63</sup> CERCLA thus enables federal and state environmental agencies to recover costs incurred for investigations and cleanup related to contaminated properties. CERCLA not only allows the EPA to recover costs it incurs when assessing and responding to a release of hazardous substances; it also allows the EPA to compel PRPs to remediate contaminated sites.<sup>64</sup>

## **B. Case Law**

The scope of environmental claims under bankruptcy law, including which expenses are prioritized and which claims can be discharged in bankruptcy, has been largely shaped by the courts. Environmental agencies that incur cleanup costs argue that the debtor’s liability for cleanup costs does not arise until after the Chapter 11 reorganization plan has been confirmed, thereby preventing environmental claims from being discharged.<sup>65</sup> In other words, if environmental claims are considered post-petition or post-reorganization confirmation claims, they survive the bankruptcy proceedings and attach to the reorganized business or entity without being discharged. Debtors, however, contend that “claim” should be read broadly “to ensure that all legal obligations of the debtor, no matter how remote or contingent,” will be dealt with in the bankruptcy case.<sup>66</sup> If the courts followed this latter line of reasoning, liability connected with pre-petition contamination would be discharged in the debtor’s plan of reorganization.<sup>67</sup>

Courts grapple with a number of issues when determining how to reconcile environmental claims with bankruptcy interests. Some of the issues that may surface in litigation related to bankrupt auto-manufacturing sites include: (1) whether environmental claims are exempted from automatic stay during bankruptcy proceedings;<sup>68</sup> (2) which environmental laws a business must comply with under operational obligations and abandonments;<sup>69</sup> and (3) whether the environmental claim is considered a “claim” within the meaning of the Bankruptcy Code.<sup>70</sup>

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<sup>61</sup> 42 U.S.C. § 9601(21) (2012) (defining person as “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”).

<sup>62</sup> *Id.* § 9607(a) (1-4).

<sup>63</sup> *Id.* § 9607(a)(4)(A).

<sup>64</sup> 42 U.S.C. § 9606(a); Kirsch & Edens, *supra* note 60, at 4.

<sup>65</sup> Stanley M. Spracker & James D. Barnette, *The Treatment of Environmental Matters in Bankruptcy Cases*, 11 *BANKR. DEV. J.* 85, 89 (1994-1995) (internal quotations omitted).

<sup>66</sup> *Id.* at 94.

<sup>67</sup> *Id.* at 89-90.

<sup>68</sup> *See infra* Part II.B.1.

<sup>69</sup> *See infra* Part II.B.2.

<sup>70</sup> *See infra* Part II.B.3.

### C. Automatic Stay

An automatic stay provides debtors with a grace period in which creditors are precluded from pursuing any debt or claim that arose pre-petition, including pursuing judgments, foreclosures, or repossessions, or undertaking other collection activities.<sup>71</sup> There are a few exemptions to the automatic stay. Under Chapter 11, “governmental unit’s or organization’s police and regulatory power, including the enforcement of a judgment other than a money judgment,” are exempt from automatic stay.<sup>72</sup>

Courts have distinguished between orders for payment of cleanup costs (which are generally dischargeable) and costs arising from the government’s exercise of state police powers in its “role as protector of the public health and welfare”<sup>73</sup> (which are not necessarily dischargeable). In general, courts have not limited this police power exception to imminent and identifiable harm to human health. The Ninth Circuit has held that the police power exemption applies when there have been past violations, but has never limited the exemption to “urgent need[] or the prevention of ongoing or future harm.”<sup>74</sup> The Third Circuit has similarly construed the statute broadly,<sup>75</sup> and the Eighth Circuit has agreed with the Fifth Circuit that Chapter 11 “does not limit the exercise of police or regulatory powers to instances where there can be shown imminent and identifiable harm or urgent public necessity.”<sup>76</sup>

The EPA’s ability to compel a party to remediate a contaminated site coupled with administrative expense priority allows CERCLA to be effective during bankruptcy. While the EPA’s power may be a potential obstacle to the successful reorganization of a company under Chapter 11, it ensures that cleaning up contamination caused by a private entity is not done at the expense of the public.

### D. Operational Obligations and Abandonment

If a debtor wishes to operate its business while reorganizing under Chapter 11, it must comply with legal obligations under state environmental laws. Federal law requires that:

[A] trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.<sup>77</sup>

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<sup>71</sup> [Reorganization Under the Bankruptcy Code](#), U.S. COURTS (last visited Mar. 10, 2013).

<sup>72</sup> See 11 U.S.C. § 362(b)(4).

<sup>73</sup> See *Penn Terra Ltd. v. Dep’t of Env’tl. Res.*, 733 F.2d 267, 272 (3d Cir. 1984).

<sup>74</sup> *California ex rel. Brown v. Villalobos*, 453 B.R. 404, 411 (D. Nev. 2011).

<sup>75</sup> See *Penn Terra Ltd.*, 733 F.2d at 273 (3d Cir. 1984); *In re Nortel Networks, Inc.*, 669 F.3d 128, 140 (3d Cir. 2011).

<sup>76</sup> *In re Commonwealth Cos.*, 913 F.2d 518, 522 (8th Cir. 1990) (quoting *In re Commonwealth Oil Refining Co.*, 805 F.2d 1175, 1184 (5th Cir. 1986) (referring to 11 U.S.C. § 362(4)(b)).

<sup>77</sup> 28 U.S.C. § 959(b) (2012).

Though the statute specifically addresses only state law, courts have interpreted section 959(b) to also include local ordinances and permit regulations that impose environmental compliance obligations.<sup>78</sup>

Moreover, a bankruptcy trustee cannot simply abandon a property if the property in question poses a risk to public health or safety. In *Midlantic Nat. Bank v. New Jersey Dep't of Env'tl. Prot.*,<sup>79</sup> the Supreme Court considered whether trustees in bankruptcy can abandon property in contravention of laws designed to protect public health and safety.<sup>80</sup> In this case, Quanta Resources Corporation ("Quanta") was a waste oil processor that filed a petition for reorganization under Chapter 11 and later converted its action to a liquidation proceeding under Chapter 7.<sup>81</sup> An investigation of the New York facility revealed over 70,000 gallons of PCB-contaminated oil in "deteriorating and leaking containers."<sup>82</sup> When Quanta notified its creditors and the Bankruptcy Court for the District of New Jersey of its intention to abandon the property pursuant to Chapter 11,<sup>83</sup> the State of New York and New York City objected, stating that "abandonment would threaten the public's health and safety, and would violate state and federal environmental law."<sup>84</sup> The Supreme Court held that "a [bankruptcy] trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."<sup>85</sup> Taking into consideration the goals of federal environmental law, the Court concluded that Congress did not intend bankruptcy law to abrogate state and local laws.<sup>86</sup>

The majority of courts have interpreted the *Midlantic* decision narrowly, allowing trustees to abandon contaminated property unless the contamination poses imminent and identifiable harm to human or environmental health.<sup>87</sup> A minority of courts have interpreted *Midlantic* broadly, requiring trustees to bring the property into compliance with all state and federal environmental regulations before they can abandon the property.<sup>88</sup> While the minority

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<sup>78</sup> Koks & Million, *supra* note 31, at 55 (citing Lawrence R. Ahern III & Darlene T. Marsh, ENVIRONMENTAL OBLIGATIONS IN BANKRUPTCY § 8:36 (Scott M. Ratcliffe & Elaine Keller-Petryk eds., 2009)).

<sup>79</sup> 474 U.S. 494 (1986).

<sup>80</sup> *See id.* at 496.

<sup>81</sup> *Id.* at 496-97.

<sup>82</sup> *Id.* at 497.

<sup>83</sup> *See* 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.")

<sup>84</sup> *Midlantic*, 474 U.S. at 498.

<sup>85</sup> *Id.* at 507.

<sup>86</sup> *Id.* at 506.

<sup>87</sup> *See* Koks & Million, *supra* note 31, at 60 (citing [In re Smith-Douglas, Inc.](#), 856 F.2d 12 (4th Cir. 1988); [N.M. Env't. Dep't v. Foulston \(In re L.F. Jennings Oil Co.\)](#), 4 F.3d 887 (10th Cir. 1993); [In re Unidigital, Inc.](#), 262 B.R. 283 (Bankr. D. Del. 2001); [State of N.J. Dep't of Env'tl. Prot. v. North American Prods. Acquisition Corp.](#), 137 B.R. 8 (D.N.J. 1992); [In re St. Lawrence Corp.](#), 248 B.R. 734 (D.N.J. 2000); [In re H.F. Radandt, Inc.](#), 160 B.R. 323 (Bankr. W.D. Wis. 1993); [In re Doyle Lumber, Inc.](#), 137 B.R. 197 (Bankr. W.D. Va. 1992); [In re Guterl Special Steel Corp.](#), 316 B.R. 843 (Bankr. W.D. Pa. 2004); [In re Shore Co., Inc.](#), 134 B.R. 572 (Bankr. E.D. Tex. 1991); [In re Purco, Inc.](#), 76 B.R. 523 (Bankr. W.D. Pa. 1987); [In re Okla. Refining Co.](#), 63 B.R. 562 (Bankr. W.D. Okla. 1986); [In re Brio Refining, Inc.](#), 86 B.R. 487 (Bankr. N.D. Tex. 1988); [In re FCX, Inc.](#), 96 B.R. 49 (Bankr. E.D. N.C. 1989)).

<sup>88</sup> Koks & Million, *supra* note 31, at 62. *See also* [In re Peerless Plating Co.](#), 70 B.R. 943, 947-48 (Bankr. W.D. Mich.

interpretation better serves the goals of CERCLA, the interests of local communities, and land use policies, the majority interpretation is arguably a better compromise of the incongruent goals of bankruptcy and environmental law because it allows companies a chance to successfully reorganize unless contamination is a threat to human health and the environment.

#### **E. Environmental Claims: When Can They Be Discharged?**

In 1985, the Supreme Court addressed the issue of whether an environmental cleanup obligation is considered a claim during bankruptcy proceedings and whether the obligation is dischargeable.<sup>89</sup> In this case, the State of Ohio sued the chief executive officer and stockholder of Chem-Dyne Corp., William Kovacs.<sup>90</sup> The State of Ohio had obtained an injunction ordering Kovacs to clean up an industrial and hazardous waste disposal site in Hamilton, Ohio.<sup>91</sup> When Kovacs failed to clean up the site, Ohio appointed a receiver to take possession of Kovacs's assets in order to begin cleanup. Kovacs then filed a petition for reorganization under Chapter 11 bankruptcy, but later converted it to a liquidation bankruptcy under Chapter 7.<sup>92</sup>

Debtors can discharge all debts that arose *before* bankruptcy during Chapter 11 proceedings, except for a handful of types of debt that are exempt from discharge under section 523.<sup>93</sup> Ohio did not argue that Kovacs's obligation to clean up the site fell within one of the section 523 exceptions; rather, it argued that Kovacs's obligation to clean up the site arose under state law and was not a debt (or "liability on a claim") within the meaning of 11 U.S.C. § 101(5).<sup>94</sup> The Bankruptcy Code defines a "claim" as:

- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
- (B) right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.<sup>95</sup>

Ohio argued that the injunction was not a "claim" because the breach was not a "payment," and Kovacs's default was a breach of the state statute, not a breach of an ordinary commercial

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1987) (requiring a trustee to comply with CERCLA before abandoning contaminated property); *In re Wall Tube & Metal Prods. Co.*, 831 F.2d 118, 122 (holding that trustee Wall Tube could not abandon the estate "in contravention of the State's environmental law").

<sup>89</sup> *Ohio v. Kovacs*, 469 U.S. 274 (1985).

<sup>90</sup> *Id.* at 276.

<sup>91</sup> *Id.* at 275-76.

<sup>92</sup> *Id.* at 276, n.1.

<sup>93</sup> See 11 U.S.C. § 727(b) (2012) ("Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case . . . .")

<sup>94</sup> *Kovacs*, 469 U.S. at 278.

<sup>95</sup> 11 U.S.C. § 101(5) (2012).

contract that would give rise to a claim.<sup>96</sup> The Court held that a debtor's obligation to comply with a state court injunction requiring it to clean up hazardous waste was a "claim" within the meaning of the Bankruptcy Code and was thus dischargeable.<sup>97</sup> Moreover, because the State appointed a receiver to execute cleanup of the site, the order was for payment of cleanup, not an order to make the debtor clean up the site.<sup>98</sup>

The decision in *Kovacs*, however, was largely based on the unusual circumstances of the receivership, and did not resolve the broader issue of whether environmental claims would be dischargeable in situations involving contamination that posed a threat to human health or the environment. Lower courts have since analyzed this issue and generally found that injunctions ordered to protect the public from threats to human health and the environment are not dischargeable when the statute in question requires *only* performance, not payment for performance.<sup>99</sup>

### III. Auto Manufacturing Sites

#### A. Background

Starting in 2006, the "Big Three" began to shed more than 100,000 jobs and close factories nationwide.<sup>100</sup> Despite these efforts, the automakers could not adapt quickly to the declining market for new cars and trucks.<sup>101</sup> With rising oil prices beginning in 2001 and the onset of the economic slowdown in late 2007, the Big Three's fortunes took a dive.<sup>102</sup> As gas prices soared in 2008 and sales continued to plummet, the automakers "burned through their cash reserves at alarming rates."<sup>103</sup>

Of the 447 automaker and automaker-captive plants that were in operation in the United States, 267 have closed since 1979.<sup>104</sup> Forty-two percent of those, or 112 plants, shut their doors between 2004 and 2010, the majority (65%) of which were located in Michigan, Ohio, and Indiana.<sup>105</sup> In order to repurpose these sites, owners and cities must overcome significant barriers including "[r]ezoning, building demolition, slab removal, environmental remediation

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<sup>96</sup> *Kovacs*, 469 U.S. at 279.

<sup>97</sup> *Id.* at 274.

<sup>98</sup> *See id.* at 283.

<sup>99</sup> Davis & Retallick, *supra* note 27, at 22. For example, the Third Circuit Court of Appeals has held that a state's attempt to force a debtor to clean up contamination that poses an ongoing hazard is not a claim within the meaning of the Bankruptcy Code. *In re Torwico Elec., Inc.*, 8 F.3d 146, 151 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994). Similarly, the Second Circuit Court of Appeals has held that an EPA clean up order that terminates or ameliorates pollution is not a claim subject to discharge during bankruptcy. *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991).

<sup>100</sup> Louis Uchitelle, [If Detroit Falls, Foreign Makers Could Be Buffer](#), N.Y. TIMES (Nov. 16 2008).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Brugeman, Hill, & Cregger, *supra* note 5, at 6.

<sup>105</sup> *Id.*

and purchase price negotiation . . . .”<sup>106</sup> The Center for Automotive Research, a non-profit organization that performs economic and systems modeling research, found that 72% of closed plants “were one of the top three employers in the community when [the sites] closed”<sup>107</sup> and that “counties with less economic activity have lower rates of repurposing former auto manufacturing facilities.”<sup>108</sup> Bankruptcy proceedings further complicate this process for cities that are also struggling with unemployment and declining tax bases.

## B. Case Study: Kenosha Chrysler

### 1. Background

The long history of auto manufacturing in Kenosha, Wisconsin began in 1902 with the production of 1,500 Ramblers.<sup>109</sup> The City of Kenosha dealt with its first decommissioned auto manufacturing site in the late 1980s by cleaning up and redeveloping the former American Motor Corporation Kenosha Harbor site.<sup>110</sup> That site, now called “Kenosha Harbor Park,” includes one-quarter mile of lakefront property with courtyards, public seating areas, and a recreation trail that connects the park to a 250-boat marina.<sup>111</sup>

The former Chrysler Kenosha Engine Plant (“the Site”), which became “another industrial casualty” when Chrysler declared bankruptcy in 2009, occupies 107 acres of land in the heart of the city.<sup>112</sup> The Site is within a half mile of 3,700 residential-related properties and eight schools.<sup>113</sup> Production began in 1917 under Nash Motors, which later became American Motors Corp (AMC), and continued producing engines until 2009.<sup>114</sup> Chrysler Corporation bought AMC in 1988, and later merged with Germany’s Daimler-Benz in 1998 to form DaimlerChrysler AG.<sup>115</sup> Though Chrysler Corporation conducted a number of investigative and cleanup actions of the Site before declaring bankruptcy, there has not been a comprehensive investigation of the entire property since the 1990s.<sup>116</sup> Presently known contaminants found on the Site include petroleum, chlorinated solvents, including trichloroethene, benzene and toluene, hydraulic fluid, and metals.<sup>117</sup>

On April 30, 2009, Old Carco LLC (formerly known as Chrysler LLC) and twenty-four of its affiliated debtors filed voluntary petitions under Chapter 11 of the Bankruptcy Code.<sup>118</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 81.

<sup>109</sup> [Automobile Culture](#), WISCONSIN HISTORICAL SOCIETY (last visited Mar. 17, 2013).

<sup>110</sup> See Pam Mylotta, [Kenosha Harbor Redevelopment](#), WISCONSIN DEPARTMENT OF NATURAL RESOURCES (2006).

<sup>111</sup> *Id.*

<sup>112</sup> [Kenosha Engine Plant Investigation & Cleanup](#), WISCONSIN DEPARTMENT OF NATURAL RESOURCES (last visited Mar. 17, 2013) [hereinafter *Cleanup*].

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *In re Old Carco LLC*, 454 B.R. 38, 42 (Bankr. S.D.N.Y. 2011); see also Stipulation and Agreed Order by and

Following the bankruptcy proceedings finalized in May 2010, Old Carco Liquidation Trust (the “Trust”) became the successor in interest to Old Carco LLC (“Old Carco”) and its affiliated debtors and debtors in possession under Chapter 11.<sup>119</sup> The Trust was established to liquidate the Debtors’ assets that had been transferred to the Liquidation Trust and to implement the Plan of Liquidation.<sup>120</sup> As owner of the Site, the Trust is a “responsible party” under Wisconsin law<sup>121</sup> and Federal law.<sup>122</sup> The Wisconsin Department of Natural Resources (“WDNR”), along with the Wisconsin Department of Justice and other local, state and federal agencies, has worked on cost recovery efforts through bankruptcy.<sup>123</sup>

The WDNR filed a proof of claim of \$36 million for the plant in October 2009.<sup>124</sup> Through the bankruptcy reorganization plan, \$10 million of the total \$15 million made available through the federal Troubled Asset Relief Program funds created for Chrysler will be available to resolve the environmental problems in Kenosha.<sup>125</sup> Eventually, the Trust, Kenosha, and the various government agencies struck a deal that determined how the contamination would be addressed, preventing any litigation of the issues discussed earlier in this article, including the bankruptcy priority of the contamination claim and the effect of the automatic stay.

## 2. Local Ordinances

When the Trust began work on the Kenosha site, it failed to apply for and secure the necessary permits required by Kenosha ordinances.<sup>126</sup> Upon discovering “massive piles of contaminated dirt” on the Site, the City of Kenosha issued a cease and desist order and petitioned the U.S. Bankruptcy Court for the Southern District of New York for injunctive relief to require the Trust to halt work on the Site.<sup>127</sup> As a result of these actions, the Trust canceled plans for its auction to sell equipment and allow companies to recover scrap metal from the Site.<sup>128</sup> Auctions of this nature help debtors generate funds to pay some of their creditors.

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Between Old Carco Liquidation Trust, the State of Wisconsin, the City of Kenosha, Wisconsin, the United States of America and the First Lien Agent Resolving Disputes Related to the Debtors’ Former Kenosha Engine Plant and Certain Related Real Property, *In re Old Carco LLC*, No.09-50002 at p.2 (Bankr. S.D.N.Y. Oct. 20, 2011) [hereinafter *Stipulation and Agreed Order*].

<sup>119</sup> *In re Old Carco*, 454 B.R. at 42.

<sup>120</sup> *Id.*

<sup>121</sup> See WIS. STAT. § 292.35(e) (2011) (defining “[r]esponsible party” as “a generator, an owner or operator, a transporter or a person who possesses or controls a hazardous substance that is discharged or disposed of or who causes the discharge or disposal of a hazardous substance”).

<sup>122</sup> See 42 U.S.C. § 9607(a) (2012).

<sup>123</sup> Cleanup, *supra* note 112.

<sup>124</sup> *Id.*

<sup>125</sup> News Release, [Wisconsin Attorney General J.B. Van Hollen and DNR Secretary Cathy Stepp to Join Local and Federal Officials in Announcing the Redevelopment and Remediation of Former Chrysler Engine Plant Site in Kenosha](#), WIS. DEP’T OF JUSTICE (Oct. 19, 2011); see also Cleanup, *supra* note 112.

<sup>126</sup> Telephone Interview with Arthur J. Harrington, Chair of Renewable Energy & Energy Efficiency Law Practice Group and Member of Environmental and Energy Law Practice Group, Godfrey & Kahn S.C. (Apr. 3, 2012).

<sup>127</sup> Sean Ryan, [August Meeting Key to Sale of Chrysler Site](#), THE BUSINESS JOURNAL (Oct. 21, 2011).

<sup>128</sup> *Id.*

Wisconsin assistant attorney general, Mark Bromley, said that the State and Kenosha were concerned that the Trust would be able to abandon the property after selling the equipment and materials before the State could work out a deal with the Trust to clean up the contaminated property.<sup>129</sup> According to Arthur Harrington, an attorney for the City of Kenosha in the case, the Trust, having first ignored the permits required by local ordinances, soon realized that its ability to run the auction would not be certain unless it met with the City and negotiated a deal.<sup>130</sup> The ordinances giving the City of Kenosha and the State of Wisconsin leveraging power in its dealing with the Trust were Chapter 13 salvage ordinances<sup>131</sup> and Chapter 9 razing ordinances.<sup>132</sup> Both the salvage ordinances and the razing ordinances require permits to engage in the respective activities, accompanied by fees to be established by the Kenosha Common Council.<sup>133</sup>

The resulting deal stipulated a set of requirements that the Trust is obligated to fulfill before abandoning the property.<sup>134</sup> The deal also allows the City access to the property to monitor compliance during salvage and demolition.<sup>135</sup> The City will not incur any costs for demolishing buildings down to ground-level, or for the repair and continued operation of groundwater recovery systems.<sup>136</sup> Finally, the City rescinded its cease and desist order, dropped pending litigation between itself and the Trust,<sup>137</sup> and released property liens worth \$400 million. The Trust agreed to pay \$10 million of the Environmental Reserve Cash to an escrow account to assist cleanup operations.<sup>138</sup> Kenosha has the option to take title to the property.<sup>139</sup> Overall, the resulting deal was highly favorable to the City of Kenosha and the government agencies that would have otherwise had to expend time and resources on cleanup and recovering costs from PRPs.

### 3. Superliens

A critical tool that led to a favorable outcome for the City of Kenosha was the WDNR's ability to file a superior lien, or "superlien,"<sup>140</sup> against the property. A lien is a "legal right or interest that a creditor has in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied."<sup>141</sup> Liens are typically prioritized by the date they are recorded. Superliens, however, "claim a higher priority than they would ordinarily obtain under the laws governing security

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<sup>129</sup> *Id.*

<sup>130</sup> Telephone Interview with Arthur J. Harrington, *supra* note 126.

<sup>131</sup> Code of General Ordinances § [13.01D](#), KENOSHA.ORG (2012).

<sup>132</sup> *Id.* § 9.17E.

<sup>133</sup> *Id.* §§ 9.17A, 13.01H.

<sup>134</sup> Stipulation and Agreed Order, *supra* note 118; see Jon Olson, Officials Celebrate Chrysler Site Agreement, KENOSHA NEWS, Oct. 20, 2012.

<sup>135</sup> Stipulation and Agreed Order, *supra* note 118, at 22-25.

<sup>136</sup> *Id.* at 11-21.

<sup>137</sup> *Id.* at 10-11.

<sup>138</sup> *Id.* at 29.

<sup>139</sup> *Id.* at 28-29.

<sup>140</sup> For the purpose of this article, "superliens" and "superior liens" are synonymous.

<sup>141</sup> BLACK'S LAW DICTIONARY 1006 (9th ed. 2009).

interests.”<sup>142</sup> When a state places a superlien on a debtor’s property, the state effectively becomes a secured creditor and may have priority over some or all previously recorded liens.<sup>143</sup>

In the case of state environmental superliens, the state’s lien for cleanup cost recovery takes precedence over all other liens (with potential exceptions), even if the other liens were recorded prior to the environmental lien.<sup>144</sup> When an environmental agency obtains a lien to secure its pre-petition expenses, its later claim to recover pre-petition costs is treated like a secured claim, and the agency is able to get the value of its lien in bankruptcy.<sup>145</sup> Environmental superliens help states maintain financial stability in the face of the financial burdens associated with CERCLA and individual state programs.<sup>146</sup> There are eight states with superlien provisions: Connecticut, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, Pennsylvania, and Wisconsin.<sup>147</sup> Arkansas and Tennessee previously had environmental superliens, but have since removed the priority status of the liens from the statutes.<sup>148</sup> Montana’s superlien statute is restricted to former mining facilities.<sup>149</sup>

Debtors and creditors could challenge the constitutionality of a state superlien statute by arguing that a superlien statute conflicts with the objectives set forth in the Bankruptcy Code; namely, the superlien statutes hinder the debtor’s ability to achieve a “fresh start” and equitably distribute the debtor’s assets.<sup>150</sup> Debtors could thus argue that the federal Bankruptcy Code preempts conflicting state superlien statutes. However, state superlien statutes are “designed to operate within the framework of the Bankruptcy Act” because they simply designate the state as a prioritized lienholder.<sup>151</sup> As a prioritized lienholder under the Bankruptcy Code, a state has the fiscal ability to perform its police function, and courts “may be

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<sup>142</sup> Analysis of State Superfund Programs: 50-State Study, 36 ENVTL. LAW INST. (2001 Update) [hereinafter *Superfund Programs*].

<sup>143</sup> Steven R. Selsberg, Priority Lien Statutes: The States’ Answer to Bankrupt Hazardous Waste Generators, 31 WASH. U. J. URB. & CONTEMP. L. 373, 375 (1987).

<sup>144</sup> Superfund Programs, *supra* note 142.

<sup>145</sup> Hillinger E-mail, *supra* note 48.

<sup>146</sup> Selsberg, *supra* note 143, at 379.

<sup>147</sup> See CONN. GEN. STAT. § 22a-452a (2011); LA. REV. STAT. ANN. § 30:2281 (2012); ME. REV. STAT. ANN. tit. 38, § 1371 (2011); MASS. GEN. LAWS. ANN. ch. 21E, § 13 (2001); MICH. COMP. LAWS. ANN. § 324.20138 (2012); N.H. REV. STAT. ANN. § 147-B:10-b (2013); N.J. STAT. ANN. § 58:10-23.11f (West 2013); 32 PA. CONS. STATS. ANN. § 5116 (2012); WIS. STAT. § 292.81 (2011). There is a good deal of variation in the state superlien statutes. Some statutes provide a residential property exemption; some extend “superpriority” standing based on prerequisites; some are retroactive. For a comparison of variation in state superlien provisions that existed as of 2002, see Jonathan Remy Nash, Environmental Superliens and the Problem of Mortgage-Backed Securitization, 59 WASH. & LEE L. REV. 127, 152-58 (2002).

<sup>148</sup> Nash, *supra* note 147, at 130 n.13 (quoting Robert S. Bozarth, Environmental Liens and Title Insurance, 23 U. RICH. L. REV. 305, 324 (1989)); see also ARK. CODE ANN. § 8-7-516 (2011); TENN. CODE ANN. § 68-212-209 (2012).

<sup>149</sup> MONT. CODE ANN. § 82-4-239 (2011).

<sup>150</sup> Selsberg, *supra* note 143, at 390. Other constitutionality issues include potential violations of the Takings Clause and Contracts Clause, U.S. CONST. art. I, § 10. See *Kessler v. Tarrats*, 466 A.2d 581 (N.J. Super. Ct. Ch. Div. 1983), *aff’d*, 476 A.2d 326 (N.J. Super. App. Div. 1984) (upholding constitutionality of superlien statute and rejecting claimant’s Takings Clause and Contracts Clause arguments).

<sup>151</sup> Selsberg, *supra* note 143, at 390.

less inclined to hold that the Bankruptcy Act preempts a critical police function” that benefits public health and safety and may be crucial to conducting effective cleanups.<sup>152</sup>

The federal government also has the power to file liens for environmental claims. CERCLA allows the federal government to impose a lien on contaminated property, vessels, and facilities in order to recover costs it has spent on cleanup.<sup>153</sup> These federal liens do not take priority over liens that predate it. Conversely, a state superlien against contaminated property *does* take priority over liens that predate it, including those that were perfected before the superlien.<sup>154</sup> While the CERCLA liens provide a floor for environmental protection, the state superlien statutes provide a ceiling for “higher environmental quality and lower net government expenditures on environmental cleanups.”<sup>155</sup> The two laws are thus complementary.

The Land Recycling Law<sup>156</sup> authorizes the WDNR to place a superior lien on property to recover response action expenses it incurs.<sup>157</sup> Wisconsin’s superior lien statute<sup>158</sup> authorizes this environmental lien to take precedence over all other liens, with the exceptions of residential property and federal tax liens.<sup>159</sup> For residential property, valid prior liens (such as a mortgage) still have priority over the WDNR superior lien.<sup>160</sup> If the WDNR intends to place a superior lien on a property, it first notifies owners and mortgagees that a superior lien may be placed on the property.<sup>161</sup> This first notice should be sent before the WDNR incurs any investigative or cleanup action expenses.<sup>162</sup>

In the Kenosha scenario, the Confirmed Plan of Reorganization stipulated:

Pending any sale, transfer or abandonment of the [Property in Kenosha, Wisconsin], the Liquidation Trust must comply with all applicable environmental safety and health laws with

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<sup>152</sup> *Id.* at 390 n. 128.

<sup>153</sup> 42 U.S.C. §§ 9607(l), (m), (r).

<sup>154</sup> See Jonathan Remy Nash, *The Illusion of Devolution in Environmental Law*, 38 URB. LAW. 1003, 1008 (2006); see also *229 Main Street Ltd. P’ship v. Com. of Massachusetts, Dep’t of Env’tl. Prot.*, 251 B.R. 186, 190-91 (D. Mass. 2000) (discussing the effectiveness of superlien statutes with respect to states trying to ensure environmental cleanups are adequately financed).

<sup>155</sup> Nash, *supra* note 147, at 162.

<sup>156</sup> [1993 Wis. Act 453](#).

<sup>157</sup> WIS. DEP’T OF NATURAL RES., Pub-RR-507, [DNR’s Superior Lien Authority: What it Means for Property Owners](#) (Sep. 2012) at 1 [hereinafter *DNR’s Authority*].

<sup>158</sup> WIS. STAT. § 292.81(3) (2011). “Any expenditures made by the department under s. 292.11 [hazardous substance spills] or 292.31(1) [environmental repair database; analysis], (3) [environmental repair] or (7) [implementing the federal superfund act] shall constitute a lien upon the property for which expenses are incurred if the department files the lien with the register of deeds in the county in which the property is located. A lien under this section *shall be superior to all other liens that are or have been filed against the property*, except that if the property is residential property, as defined in s. 895.52(1)(i), the lien may not affect any valid prior lien on that residential property.” *Id.* (emphasis added).

<sup>159</sup> *Id.*

<sup>160</sup> *DNR’s Authority*, *supra* note 157.

<sup>161</sup> WIS. STAT. § 292.81(2)(a) (2011).

<sup>162</sup> *Id.*

regard to the [Property], including any off-site discharges. And [Wisconsin] reserves the right to take regulatory enforcement action against the Liquidation Trust, including but not limited to civil judicial or civil administrative actions for injunctive relief for any violations of the environmental laws on the [Property], from and after the confirmation date.<sup>163</sup>

In essence, the parties agreed that the Trust would comply with all environmental and health laws and allowed the State of Wisconsin to take action against the Trust if it failed to do so. The WDNR did in fact send notice of intent to incur expenses and file a superior lien on March 11, 2011<sup>164</sup> and again on July 7, 2011,<sup>165</sup> when the Trust failed to initiate any of the necessary response actions under Wisconsin Law.<sup>166</sup>

In the Notice of Presentment of Stipulation and Agreed Order by and between Old Carco Liquidation, the State of Wisconsin, the City of Kenosha, the United States of America, and the First Lien Agent, the State of Wisconsin alleged that it was “both entitled to assert, and intends to assert, a superior lien against the Kenosha Engine Plant pursuant to Chapter 292 . . . to secure the repayment of the costs incurred by the WDNR in performing response actions with respect to environmental contamination at the Kenosha Engine Plant and offsite.”<sup>167</sup> Though the WDNR never actually filed a superior lien, its ability to do so gave the City of Kenosha and the affiliated state and federal agencies leverage in their negotiations with the Trust.<sup>168</sup>

Negotiating a favorable deal for the City of Kenosha with the bankruptcy trust as well as five separate government agencies was likened to “herding cats.”<sup>169</sup> The local razing and demolition ordinances and the State of Wisconsin’s superior lien statute were instrumental to the ultimately favorable terms for Kenosha and the government agencies. These local and state laws prevented the Trust from otherwise abandoning a contaminated site that likely would have burdened Kenosha with a dead zone for decades.

The success of the final deal between the City of Kenosha and the Trust demonstrates the strategic advantage offered by strong local ordinances and state superlien statutes in negotiations involving insolvent companies and contaminated properties. Cities and states facing the threat of insolvent companies abandoning contaminated properties can protect themselves from burdensome property by enacting tight razing and demolition ordinances and state superlien statutes. As more manufacturing sites close and relocate, these local and state

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<sup>163</sup> Stipulation and Agreed Order, *supra* note 118, at 6; *see also* Letter from Mark F. Giesfeldt, Dir., Bureau for Remediation and Redevelopment, to Old Carco Liquidation Trust, Jones Day, and JP Morgan Chase Bank (Mar. 11, 2011); Letter from Mark F. Giesfeldt, Dir., Bureau for Remediation and Redevelopment, to Old Carco Liquidation Trust, Jones Day, and Simpson Thacher & Bartlett LLP (Jul. 7, 2011); E-mail from Jeffrey B. Ellman, Partner at Jones Day, to Sean H. Lane, U.S. Bankruptcy Judge for the Southern District of New York (Apr. 19, 2010, 2:35 PM) (providing revised language to which parties agreed) (correspondence on file with author).

<sup>164</sup> Letter from Mark F. Giesfeldt (Mar. 11, 2011), *supra* note 163.

<sup>165</sup> *Id.*

<sup>166</sup> *See* WIS. STAT. § 292 (2012).

<sup>167</sup> Stipulation and Agreed Order, *supra* note 118, at 7.

<sup>168</sup> Telephone Interview with Arthur J. Harrington, *supra* note 126.

<sup>169</sup> Olson, *supra* note 134.

laws will be instrumental to the successful and timely cleanup of contaminated properties that obstruct economic development, future land use, and healthy environments.

#### **IV. Conclusion**

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