New Jersey Law Journal

VOL. 213 - NO 3 MONDAY, JULY 15, 2013 ESTABLISHED 1878

Environmental Law

At the Intersection of Environmental and Bankruptcy Laws

Contingent clean-up costs may be preserved in the event of a PRP's bankruptcy

By Uzoamaka N. Okoye and Natasha Songonuga

Much has been written about the twin decisions issued by the Honorable Robert Gerber in the Bankruptcy Court for the Southern District of New York in *In re Lyondell Chem. Co.*, 442 B.R. 236 (Bankr. S.D.N.Y. 2001), and *In re Chemtura Corp.*, 443 B.R. 601 (Bankr. S.D.N.Y. 2011). Judge Gerber disallowed as contingent contribution claims under Section 502(e)(1)(B) of the Bankruptcy Code all "future" environmental contribution claims filed by potentially responsible parties (PRPs) whether the claims were based on contract, contribution or a direct cause of action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

In cases where environmental liability and bankruptcy intersect, these decisions may greatly impact the landscape with respect to allocation of liability among PRPs with ongoing obligations to remediate contaminated property. However, while there has been a great deal of discussion regarding the disallowed claims in both *Chemtura* and *Lyondell*, little has been written of the court's decision in *Chemtura* to allow the contingent "future" portion of the proof of claim filed by the Delaware Sand & Gravel Remedial Trust (the DS&G trust), notwithstanding that the claim related to the debtors' future costs to pay for remedial work at a Superfund site, much like the other proofs of claim for future response costs that were disallowed by the court in *Lyondell* and *Chemtura*.

This article examines this small but interesting aspect of the *Chemtura* decision and attempts to identify the facts that set the DS&G trust's claim apart. In so doing, the question arises as to whether counsel for PRP groups should look to Judge Gerber's allowance of the DS&G trust's claim to structure PRP contributions in an attempt to solidify PRPs' contribution claims in the event of a bankruptcy by one of the PRPs.

Generally, the Bankruptcy Code aims to provide debtors with a fresh start by freeing them of liability and discharging the greatest amount of its debts. In order to provide debtors with a fresh start, the code seeks to maximize the scope of the discharge by including all "claims." 11 U.S.C. 101(5). The word "claim" is broadly defined as "[a] right to payment, whether or not such right is reduced to judgment liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal equitable, secure, or unsecure ...." The code requires disallowance of claims against a debtor where: (1) the claim is contingent as of the time of allowance or disallowance; (2) the claim is for reimbursement or contribution; and (3) the claimants share liability with the debtor with respect to such a claim, regardless of the basis of such claims (contractual, statutory or otherwise). 11 U.S.C.A. 502(e)(1)(B). Disallowance of contingent claims has been said to provide a degree of certainty and finality in satisfaction of ascertainable claims, an important bankruptcy policy. See, e.g., *In re Charter Co.*, 862 F.2d 1500 (11th Cir. 1989) (policy underlying U.S.C. 502(e)(1)(B) is to "accord fair treatment to creditors by paying ascertainable claims as quickly as possible").

Debtors faced with claims for contribution or reimbursement arising from co-liability under CERCLA and other environmental statutes for remediation of

Okoye is an associate in the real property and environmental department of Gibbons PC in Newark. Songonuga is an associate in the firm's financial restructuring and creditors' rights department.

contaminated sites have sought to disallow such claims under section 502(e). Here, the code's fresh start goal diverges from the goal of CERCLA, which is to promptly clean up contaminated property and to hold liable those responsible for the pollution. Because of its remedial purpose and as a response to health and environmental threats, CERCLA casts a wide net and is noted to be a "super-strict" liability statute. See *United States v. Burlington Northern & Santa Fe Ry.*, 502 F.3d 781, 792 (9th Cir. 2007). A current owner/operator, anyone who previously owned or operated a contaminated facility, anyone who arranged for disposal or treatment of hazardous substances, or anyone transporting hazardous substances for treatment or disposal to a subject site falls within the scope of liability under CERCLA. As such, in almost all instances, this wide scope of liability lends itself to having numerous PRPs responsible for remediating a single site. Where one or a group of PRPs has assumed responsibility for the cost of remediation, this PRP can sue for cleanup cost recovery or contribution from other PRPs co-liable under CERCLA.

The *Chemtura* Case

In the *Chemtura* matter, the debtors — Chemtura Corporation and its affiliates, in a jointly administered Chapter 11 — objected to approximately 59 proofs of claim for contribution and reimbursement under federal and state environmental remediation statutes. The court found that the majority of these proofs of claim were filed by PRPs co-liable with the debtors for the remediation costs. However, with respect to one of those proofs of claim filed by the DS&G trust, a prepetition trust created by certain PRPs, including the predecessor of one of the debtors, to fund, among other things, remedial work, the Bankruptcy Court held that the co-liability element required under 502(e)(1)(B) was not met.

The DS&G Remedial Trust

In 1989, the Environmental Protection Agency (EPA) filed an action against the predecessor of debtor Chemtura Corporation — Witco — and other PRPs for reimbursement for the EPA's clean-up costs relating to the Delaware Sand & Gravel Landfill Superfund Site and a declaration that the parties were responsible for remediating the site. See *Response of DS&G Remedial Trust to Debtors Chemtura Corporation's Objection Pursuant to Section 502(e)(1)(B)* [Docket. No. 2859], at p. 2. Thereafter, the parties, including Witco, entered into consent decrees with the EPA and a separate settlement agreement among themselves pursuant to which the DS&G trust was created to fund the remedial work at the site. Under the DS&G trust's trust agreement, Witco was responsible to the DS&G trust for 7.76 percent of the costs associated with remediation of the site.

After the debtors filed for bankruptcy, the DS&G trust itself, not the PRP parties to the trust agreement, filed a proof of claim against Witco, seeking $577,660.38, of which $469,317.27 represented Witco's share of the estimated/anticipated future remedial costs — costs not yet incurred or paid by the DS&G trust. The EPA also filed protective claims related to Witco's obligations to remediate the site, as well as other sites. The debtors and the EPA reached a settlement resolving the EPA proofs of claim, which provided, among other things, for the allowance of millions of dollars in unsecured claims against the debtors, the reduction in the liabilities of other nondebtor PRPs and prohibited claims for contribution against the debtors.

Neither the debtor nor the DS&G trust filed a copy of the trust agreement with the Bankruptcy Court in connection with the debtors' objection, and, therefore, the actual terms of the trust agreement are not certain. Notwithstanding, it is clear that like the other proofs of claim disallowed by the Bankruptcy Court, the DS&G trust claim was a claim for contribution for remediation costs, and the future portion of the DS&G trust claim was contingent, as the DS&G trust had not made any payment in connection with that portion of the claim.

The Bankruptcy Court held that what separated the DS&G trust claim from the other disallowed proofs of claim was that the DS&G claim was filed by an entity not jointly liable with the debtors. 433 B.R. at 625. The court found that "whether the DS&G Trust is regarded as a collection agent for the EPA, its role is still as a recipient of payments for remediation — rather than as an obligor, much less a co-obligor." Therefore, the DS&G claim could not be disallowed under section 502(e).

Remedial trusts are not uncommon in large Superfund matters and may be required by the EPA to provide financial assurance that some funds will be available for future remediation costs. In light of the Bankruptcy Court's decision in *Chemtura* with regard to the structure of the DS&G trust as a nonco-liable entity, practitioners assisting and advising PRPs regarding environmental issues are well advised to consider the structure and function of remedial trusts that can be viewed as separate entities to avoid disallowance under section 502(e)(1) of contribution claims in the event of the bankruptcy of one of the PRPs. ■