No. _______

IN THE
Supreme Court of the United States

COUNTY OF SAN MATEO, ET AL.,

Applicants,

v.

PEABODY ENERGY COMPANY,

Respondent.

On Application for Recall and to Stay Mandate of the United States Court of Appeals for the Eighth Circuit

APPLICATION FOR RECALL OF MANDATE AND STAY PENDING PETITION FOR CERTIORARI

Directed to the Honorable Neil M. Gorsuch,
Associate Justice of the United States
And Circuit Justice for the Eighth Circuit

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TO THE HONORABLE NEIL M. GORSUCH, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE EIGHTH CIRCUIT:

INTRODUCTION

In this case, the United States Court of Appeals for the Eighth Circuit deepened the split of authority among the circuits on a fundamental question of bankruptcy law that is likely to recur with increased frequency in the wake of recent pandemic-related bankruptcies: under what circumstances is a cause of action that provides for exclusively equitable relief a "claim" subject to discharge in bankruptcy under 11 U.S.C. § 101(5)?[1] The Eighth Circuit held that even where, as here, state law "limits the recovery on [a cause of action] to equitable relief," that cause of action is dischargeable if the debtor could end up "pay[ing] money" to implement the required equitable relief, "without regard to who receives the payment"—*i.e.,* even if none of that money is or could be paid to the creditor-plaintiff, as is the case here. *In re Peabody Energy Corp.*, 958 F.3d 717, 724–25 (8th Cir. 2020) (Attached as Appendix A).

That holding conflicts with the law of at least four other circuits, each of which has expressly held that causes of action providing exclusively equitable relief are dischargeable under Section 101(5) only if "the holder of an equitable claim can,

[1] Section 101 of the Bankruptcy Code defines a dischargeable "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 "a 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." *See* 11 U.S.C. § 101(5).

in the event that the equitable remedy turns out to be unobtainable, obtain a money judgment instead." *See United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009), *cert. denied*, 131 S. Ct. 67 (2010); *see also Matter of Davis*, 3 F.3d 113, 116 (5th Cir. 1993) (Section 101(5) allows only discharge of "contingent claims for money damages that are alternatives to equitable remedies"); *In re Torwico Elecs., Inc.*, 8 F.3d 146, 150 (3d Cir. 1993) (same); *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991) (cause of action not dischargeable where plaintiff has "no option to accept payment in lieu of" equitable relief). The only circuit to reach the same conclusion as the Eighth Circuit is the Sixth Circuit in *United States v. Whizco, Inc.*, 841 F.2d 147, 150 (6th Cir. 1988) (claim for mine cleanup injunction dischargeable where defendant did "not have the physical capacity to reclaim the mine site himself, and [thus] would have to hire others to perform the work for him").

Applicants County of San Mateo, City of Imperial Beach, and County of Marin ("Government Plaintiffs"), which are three California public entities that filed nuisance abatement causes of action, among other things, against Respondent Peabody Energy Company ("PEC") and others, intend to petition for a writ of certiorari to have this Court resolve this critical but disputed question of bankruptcy law. If the Eighth Circuit's mandate is not recalled and the order of the bankruptcy court stayed, the Government Plaintiffs will be required by that order to dismiss all claims against PEC in their underlying lawsuits (which are currently stayed for unrelated reasons), thus potentially mooting the parties' dispute and causing the Government Plaintiffs irreparable harm.

For these reasons and as further detailed below, Government Plaintiffs respectfully request that this Court recall the Eighth Circuit's mandate in this matter and stay its judgment pending this Court's final determination of the issues raised in the Government Plaintiffs' upcoming petition for writ of certiorari.

FACTUAL AND PROCEDURAL BACKGROUND

Government Plaintiffs filed three separate complaints in California state court against major investor-owned energy companies, including PEC, on July 17, 2017. Each lawsuit alleged eight state law causes of action, including a representative public nuisance cause of action on behalf of the People of the State of California for equitable abatement,[2] and seven other claims for violations of other California tort laws. *Cty. of San Mateo v. Chevron Corp.,* San Mateo Super. Ct., No. 17 CV-03222; *City of Imperial Beach v. Chevron Corp.*, Contra Costa Super. Ct., No.

[2] California's Code of Civil Procedure provides a cause of action "in the name of the people of the State of California to abate a public nuisance," which may be brought only by "the district attorney or county counsel of any county in which the nuisance exists, or by the city attorney of any town or city in which the nuisance exists." Cal. Civ. Proc. Code § 731. Equitable abatement is the sole relief that section 731 authorizes government plaintiffs to recover in such representative public nuisance actions. *See People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 122 (Cal. Ct. App. 2017); *see also Cty. of Santa Clara v. Superior Court*, 50 Cal.4th 35, 55–56 (2010). Money damages or other alternative monetary relief is never available. *See id*. Under California law, a nuisance is "[a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, . . . or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . . ." Cal. Civ. Code § 3479. A public nuisance, in turn, is "one which affects at the same time an entire community or neighborhood, or any considerable number of persons . . . ." *Id.* § 2480.

C17-01227, App. 9461–9571; *Cty. of Marin v. Chevron Corp.*, Marin Super. Ct., No. CIV 17-02586.

The defendants in the California cases (including PEC) removed the Government Plaintiffs' lawsuits to the U.S. District Court for the Northern District of California, where the cases were assigned to a single judge who subsequently remanded all three for lack of federal subject-matter jurisdiction. *See Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018). The California district court on April 9, 2018, stayed its remand order pending appeal. *Cty. of San Mateo v. Chevron Corp.*, No. 3:17-cv-04929-VC, Dkt. 240 (N.D. Cal. Apr. 9, 2018).

Defendants in the California lawsuits appealed the district court's remand order to the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1447(d), which affirmed and ordered the cases remanded to the three state courts in which they were filed. *Cty. of San Mateo v. Chevron Corp.*, ___ F.3d ___, 2020 WL 2703701 (9th Cir. May 26, 2020).

On April 13, 2016, before those California cases had been filed, PEC filed a Petition for Chapter 11 bankruptcy protection in the Eastern District of Missouri. *See In re Peabody Energy Corp.*, No. 16-42529, Dkt. 1 (Bankr. E.D. Mo. Apr. 13, 2016). On March 17, 2017, the bankruptcy court entered an order confirming the company's proposed Plan of Reorganization. *In re Peabody Energy Corp.*, No. 16-42529, Dkt. 2763 (Bankr. E.D. Mo. Mar. 17, 2017). On April 3, 2017, the Plan went into effect and the reorganized company emerged from bankruptcy. *In re Peabody Energy Corp.*, No. 16-42529, Dkt. 2867 (Bankr. E.D. Mo. Apr. 3, 2017).

On August 28, 2017, PEC filed a motion before the bankruptcy judge to enjoin the Government Plaintiffs' further prosecution of their California public nuisance and related tort claims against PEC. *In re Peabody Energy Corp.*, No. 16-42529, Dkt. 3362 (Bankr. E.D. Mo. Aug. 28, 2017). The bankruptcy judge granted that motion on October 24, 2017, and ordered the Government Plaintiffs to dismiss the underlying actions in California against Peabody with prejudice. *In re Peabody Energy Corp.*, No. 16-42529, 2017 WL 4843724 (Bankr. E.D. Mo. Oct. 24, 2017). The bankruptcy judge denied the Government Plaintiffs' request for a stay of his order on December 8, 2017. *In re Peabody Energy Corp.*, No. 16-42529, Dkt. 3622 (Bankr. E.D. Mo. Dec. 8, 2017).

The Government Plaintiffs timely appealed the bankruptcy court's rulings to the U.S. District Court for the Eastern District of Missouri. On September 20, 2018, the district court denied the Government Plaintiffs' motion for stay pending appeal. *In re Peabody Energy Corp.*, No. 4:17-cv-02886-RWS, Dkt. 32 (E.D. Mo. Sept. 9, 2018). On March 29, 2019, the district court affirmed the bankruptcy court's ruling and entered judgment. *In re Peabody Energy Corp.*, 599 B.R. 610 (E.D. Mo. 2019).

The Government Plaintiffs appealed from the district court's denial of a stay pending appeal and affirmance of the bankruptcy court's injunction in separate appeals. The Eighth Circuit affirmed the district court's rulings on May 6, 2020. *In re Peabody Energy Corp.*, 958 F.3d 717.

REASONS TO GRANT THE STAY

Each element that this Court considers on an application for a stay is satisfied here. There is a reasonable probability that certiorari will be granted and at least a fair prospect that this Court will reverse the Eighth Circuit; the Government Plaintiffs will suffer irreparable harm if the mandate is not recalled and if the bankruptcy court's injunction order requiring dismissal with prejudice of all claims against PEC is not stayed; and the equities and public interest weigh in favor of a stay.

Section 101 of the United States Bankruptcy Code, 11 U.S.C. § 101(5), defines a dischargeable "claim" as "(A) 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) a 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." The principal issue in this case is whether the Government Plaintiffs' public nuisance claim against PEC for equitable abatement gives rise to a "right to payment" within the meaning of that section.

Contrary to the conclusion reached by all but one other circuit to decide the issue, and of potentially enormous concern to every public entity seeking environmental clean-up or other equitable abatement remedies against any company that has the option of declaring bankruptcy, the Eighth Circuit panel held that because under California law a defendant that "commits a public nuisance can be ordered to pay into a fund, overseen by a receiver, to remedy or eliminate the hazard complained of rather than being ordered to clean up the nuisance [itself]," the state law remedy of equitable abatement gives rise to a "right to payment" within the meaning of Section 101(5), meaning that the representative public nuisance cause of action is treated as a dischargeable "claim" in bankruptcy. *In re Peabody Energy Corp.*, 958 F.3d at 724; *accord Whizco*, 841 F.2d at 150–51 (cleanup obligation under Surface Mining Control and Reclamation Act of 1977 dischargeable where defendant lacked "physical capacity to reclaim the mine himself" and "fulfilling his obligation to reclaim the site would force the defendant to spend money").

That holding conflicts with at least four other circuits' interpretation and application of 11 U.S.C. § 101(5), including most directly the Seventh Circuit in *Apex Oil*, 579 F.3d 734, which held that the "right of payment" language in Section 101(5)(B) means payment *to the plaintiff*, because nearly every mandatory injunction (and most prohibitory injunctions) require at least some expenditure of money to implement. As the Seventh Circuit (Posner, J.) explained in that case, "[a]lmost every equitable decree imposes a cost on the defendant," and to expand the "right to payment" beyond the right of the creditor to demand its own *receipt* of payment from the estate in bankruptcy would mean "that *every* equitable claim is dischargeable in bankruptcy unless there is [some other] specific exception in the [Bankruptcy] Code." *Id.* at 738 (emphasis added). That result would conflict with

Congress's intent to carve out most equitable decrees from the definition of dischargeable "claims." *See id.* Because the California law under which the Government Plaintiffs filed their underlying representative public nuisance cause of action does not permit them to obtain a money judgment or to recover any payment of money for themselves from PEC, directly or indirectly, this appeal would have been decided differently under Seventh Circuit law.

Decisions from the Second, Third, and Fifth Circuits also hold that Congress did not intend equitable decrees to come within the meaning of "right to payment" under Section 101(5) unless they can be satisfied through an alternative payment *to the plaintiff*. A cause of action giving rise only to equitable relief is not transformed into a dischargeable claim simply because the defendant must spend money to comply with its equitable obligations. *See In re Torwico Elecs., Inc.*, 8 F.3d at 150; *Matter of Davis*, 3 F.3d at 116; *In re Chateaugay Corp.*, 944 F.2d at 1009.

The conflict between the Eighth and Sixth Circuits on the one hand, and the Second, Third, Fifth, and Seventh Circuits on the other, concerning the fundamentally important bankruptcy law question of whether and to what extent equitable claims are dischargeable in bankruptcy, is direct and immediate. The dispute is of heightened national importance now because of the substantial increase in COVID-19-related bankruptcy filings that have already begun due to stay-at-home orders and changes in the public's habits, activities, and spending patterns. The question presented plainly warrants certiorari review.

There is at least a fair prospect of reversal if certiorari is granted, because under the appropriate standard articulated by the majority of circuits, the Government Plaintiffs' representative public nuisance causes of action are not "claims." Under California law, a public nuisance claim by a government plaintiff on behalf of the People under California Code of Civil Procedure § 731 can be remedied only by an equitable order of abatement, which is never convertible to a right of payment to the plaintiff. "Damages are not an available remedy in the type of public nuisance action [under § 731], a representative public nuisance action," only equitable abatement. *ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th at 122; *see also Cty. of Santa Clara v. Superior Court*, 50 Cal. 4th at 55–56; *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 310–11 (2006).

California courts have recognized that an equitable abatement order in a representative public nuisance case may include "establishment of a fund, in the name of the People, dedicated to abating the public nuisance," paid into by the defendant and administered by an independent, court-appointed receiver. *ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th at 131–32. In such instances, because damages at law are unavailable, the abatement fund may only be used for *future* abatement. The public entity plaintiff "may not recover . . . funds that it has already expended to remediate a public nuisance," *id.* at 132, the fund may be used "solely to pay for the prospective removal of the hazards" created by the nuisance, and "any funds that ha[ve] not been utilized for that sole purpose by the end of the . . . abatement period [a]re to be returned to [the] defendants," *id.* at 133. While California trial courts can always choose "to have defendants handle the remediation themselves" as an abatement remedy, they also have discretion to "require[e] defendants to prefund remediation costs" at an estimated value where direct abatement by the defendant "would have been difficult for the court to oversee and for defendants to undertake." *Id.* at 133–34. The establishment of an abatement fund, however, "plainly d[oes] not require, contemplate, or permit the deposit of those funds" into the plaintiff's possession. *Id.* at 134. Because there is no possibility under California law that the Government Plaintiffs here could obtain any portion of an abatement fund, the representative public nuisance claims are not "claims" within the proper interpretation of Section 101(5), and the Eighth Circuit's decision should be reversed.

The Government Plaintiffs will suffer irreparable harm without a stay. Absent recall of the mandate and a stay, Government Plaintiffs will be forced to dismiss their California representative public nuisance claims against PEC, *with prejudice*. Once those California cases are dismissed with prejudice as to PEC, any certiorari petition from Government Plaintiffs would arguably become moot, depriving the Government Plaintiffs of their right to seek certiorari review *and* depriving them of their substantive rights under California's representative public nuisance law. Mooting the Government Plaintiffs' right to pursue certiorari relief constitutes irreparable harm.

Finally, the equities and public interest weigh in favor of a stay. A recall of the mandate and stay would cause no countervailing harm to PEC, because all proceedings in the California court actions have been stayed for more than two years pending appeal to the Ninth Circuit of the district court's order remanding those consolidated case to the various state courts in which they were filed. On May 26, 2020, the Ninth Circuit affirmed that remand order, *see Cty. of San Mateo v. Chevron Corp.*, 2020 WL 2703701, and the defendants, including PEC, have been granted an extension of time to file a petition for rehearing and/or rehearing en banc until July 9, 2020. *See* Order Granting Motion for Extension of Time to File, *Cty. of San Mateo v. Chevron Corp.*, No. 18-15499, Dkt. 204 (9th Cir. June 8, 2020).

A. There Is at Least a Reasonable Probability that Certiorari Will be Granted to Resolve the Split of Circuit Authority.

There is at least a reasonable probability that the Court will grant certiorari review in this case. The Eighth Circuit's decision conflicts with the reasoning and holdings of at least four other circuit courts addressing the same question, namely whether equitable remedies that a defendant can only satisfy by paying money to a third party are dischargeable in bankruptcy. Whether such remedies are dischargeable is of major national importance with implications for federal, state, and local agencies and officials across many areas of substantive law.

The Eighth Circuit's ruling makes the existing circuit split even deeper, and review by this Court is needed to resolve that split. By holding that an order under California's representative nuisance statute that could require PEC to accomplish equitable abatement by funding an independent receiver to implement the abatement subject to judicial oversight constitutes an "equitable remedy that 'gives rise to a right to payment'" and is therefore a dischargeable "claim" under 11 U.S.C.

§ 101(5), *see In re Peabody Energy Corp.*, 958 F.3d at 724, the Eighth Circuit created a direct conflict with long-standing reasoning and holdings of at least the Second, Third, Fifth, and Seventh Circuits on an important question of bankruptcy law.

First, the Court's opinion conflicts with the most recent and most closely on point decision in *Apex Oil*, 579 F.3d 734. In that case, the Seventh Circuit held that an injunction under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* ("RCRA"), requiring a bankrupt defendant to "abate th[e] nuisance" of certain hazardous waste was *not* dischargeable, even though the defendant had "no in-house capability of cleaning up a contaminated site" and would necessarily have to pay a third-party contractor an estimated $150 million to comply with the injunction. As Judge Posner wrote for the unanimous panel: "The natural reading of [11 U.S.C. § 101(5)] is that if the holder of an equitable claim can, in the event that the equitable remedy turns out to be unobtainable, obtain a money judgment instead, the claim is dischargeable." *Apex Oil*, 579 F.3d at 736. Because RCRA "does not entitle a plaintiff to demand, in lieu of action by the defendant that may include the hiring of another firm to perform a clean up ordered by the court, payment of clean-up costs," nor indeed "*any* form of monetary relief," the injunction ordering the defendant to abate the nuisance did not give rise to a right to payment. *Id.*

The Seventh Circuit in *Apex Oil* rejected the defendant's proposed "arbitrary" distinction "between injunctions that the defendant can comply with internally and injunctions that it has to hire an independent contractor in order to achieve compliance with," because "whether a polluter can clean up his pollution himself or has to hire someone to do it has no relevance to the policy of either the Bankruptcy Code or [RCRA]." *Id.* at 738. Such a distinction "would discourage polluters from developing an internal capability of cleaning up their pollution, even if hiring third parties to do it would be more expensive," and would not advance the purposes of either RCRA or the bankruptcy code. *Id.* Posed simply: "Why distinguish a check written to an employee from a check written to an independent contractor?" *Id.*

The Eighth Circuit's decision here also conflicts with the Fifth Circuit's opinion in *Matter of Davis*, 3 F.3d 113. There, the plaintiff obtained a fraud judgment in Texas state court against his business partner, who "then took refuge in bankruptcy." *Id.* at 114. In the fraud proceeding, the Texas court ordered several forms of relief, including "the equitable remedies of resulting trust, partition in kind [of real property owned jointly by the plaintiff and defendant], deed reformation, appointment of a receiver, and dissolution of a partnership" between the plaintiff and defendant. *Id.* at 116. The defendant debtor argued that "since failure to perform his obligations under any of the equitable remedies would justify an award of money damages," the remedies were all dischargeable under Section 101(5). The Fifth Circuit concluded, based on an analysis that was similar to the Seventh Circuit's reasoning in *Apex Oil*, that "Section 101(5)(B) is designed to cause the liquidation of contingent claims for money damages that are *alternatives* to equitable remedies," and that "[t]he ability of a debtor to choose between performance and damages in some cases is not the same as a debtor's liability for money damages for failing to satisfy an equitable obligation." *Id.* at 116 (emphasis added). The court held that Texas law "does not view the payment of money as an alternative" to the remedies of a resulting trust or deed reformation. *Id.* at 117. The court also held that while Texas does permit forced sale of real property as division of the proceeds as an alternative to partition in kind, "it is not a preferred remedy" and was unavailable on the facts of the case. *Id.* Importantly, the court found that the dissolution of the parties' real estate partnership and appointment of a receiver "to conserve the assets" of the partnership *was* dischargeable—the parties did not contest the dischargeability of those remedies—because the purpose of that relief was to preserve money proceeds that would be transferred *directly to* the plaintiff, equivalent to damages. *See id.*; *see also In re Irizarry*, 171 B.R. 874, 879 (B.A.P. 9th Cir. 1994) (equitable remedy of deed reformation was not a "claim" where plaintiffs did not "have a money damage alternative in the event of non-performance," and "d[id] not seek to recover the value of the property, but only the property itself").

The Third Circuit has long applied the same reasoning as the Seventh and Fifth Circuits. In *In re Torwico Elecs., Inc.*, 8 F.3d at 150, the Third Circuit held that an order to abate "an ongoing nuisance in direct violation of state environmental laws" was not a dischargeable claim, "even if the debtor must expend money to comply." There, the debtor had been ordered prepetition by the New Jersey Department of Environmental Protection and Energy to abate hazardous waste it had released at a manufacturing facility. *Id.* at 147. The defendant argued that it would have to spend money to remediate the pollution, in part because it was no longer in possession of the facility, and thus the remedy was a dischargeable claim. *Id.* at 149. The court disagreed, holding that the state agency "d[id] not seek a monetary judgment, but rather seeks to remedy ongoing pollution by forcing [the debtor] to clean up the site." *Id.* Significantly, the court observed that if it "adopt[ed] the . . . position that any order requiring the debtor to expend money creates a dischargeable claim, it is unlikely that the state could effectively enforce its laws: virtually all enforcement actions impose some cost to the violator." *Id.* at 150 n.4. Because the agency could not "force the debtor to pay money *to the state*," its nuisance abatement action did not create a dischargeable claim. *Id.* at 150 (emphasis added).[3]

The Second Circuit reached the same conclusion in the context of a cleanup order under the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* ("CERCLA"). In *In re Chateaugay Corp.*, 944 F.2d at 1009, the court held that while EPA could not recover costs to clean up environmental contamination that it had already incurred because, "[t]o the extent that CERCLA affords EPA and others a right to payment in *lieu of an order directed solely at cleanup*, . . . such an order is a 'claim.'" The court also held, however, that

[3] In *In re Continental Airlines*, 125 F.3d 120 (3d Cir. 1997), by contrast, an airline pilots union sought specific performance of certain "seniority integration" provisions in its prepetition collective bargaining agreement with a bankrupt airline. The court held that while the collective bargaining agreement was silent on the remedy available for breach of the seniority integration terms, it was "reasonable to conclude that a corollary right to payment of liquidated damages would flow from a breach giving rise to the equitable remedy" of specific performance. *Id.* at 134 (citation omitted). Because "monetary payment [wa]s an *alternative* for the equitable remedy of seniority integration," *id.* at 133 (emphasis added), the cause of action for breach of that contractual obligation was a dischargeable claim.

an order to clean up the site to prevent future contamination was not a dischargeable claim because under the substantive law of CERCLA, EPA did not have "authority to accept a payment from a responsible party as an alternative to continued pollution." *Id.* at 1008. The Second Circuit thus concluded: "Since there is no option [for EPA under CERCLA] to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a 'claim,'" notwithstanding the practical reality that the debtor would have to spend money to comply with such an order. *Id.*

The Eighth Circuit held below—incorrectly, Government Plaintiffs contend—that an order pursuant to California law requiring abatement but permitting the trial court, in its discretion, to allow the defendant to pay into an abatement fund managed by an independent third-party receiver who would be required to return any unused abatement funds to that defendant (and *not* to the plaintiff)[4] would constitute "an equitable remedy . . . convertible into a monetary obligation" and thus constitute a dischargeable claim. *In re Peabody Energy Corp.*, 958 F.3d at 724. The Court held that the available remedy is a dischargeable claim "without regard to who receives the payment," in part because "it is the municipalities and their people who stand to benefit from" the abatement order. *Id.* But as the Seventh Circuit pointed out, the prevailing plaintiffs in an action for equitable relief *always*

[4] *See People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th at 131–34 (affirming order creating abatement fund in lead paint nuisance case).

stand to benefit from the defendant's compliance with the court-order injunction. After all, "[i]f 'any order requiring the debtor to expend money creates a dischargeable claim, it is unlikely that the state could effectively enforce its laws: virtually all enforcement actions impose some cost on the violator.'" *Apex Oil*, 579 F.3d at 737 (quoting *In re Torwico Elecs., Inc.*, 8 F.3d at 150 n.4.). And as the Second, Third, Fifth, and Seventh Circuits agree, the purpose and effect of Section 105 is to discharge payments of money *to the plaintiff* that serve as an *alternative* to equitable relief.

The Eighth Circuit based its holding in part on a misreading of this Court's 1985 decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985), which held that the State of Ohio had a dischargeable claim against a debtor where a receiver was appointed to "take possession of all of [the debtor's] assets" to implement an injunctive order to clean up an environmental nuisance. *Id.* at 282–83. *Kovacs*, however, is fully consistent with the holdings of the Second, Third, Fifth, and Seventh Circuits. In *Kovacs*, a cleanup injunction had been entered prior to the debtor's bankruptcy, and when the debtor "failed to comply with their obligations under the injunction," the state court ordered—before the bankruptcy petition—that a receiver be appointed to, among other actions, levy the debtor's wages and take possession of all his assets "to defray cleanup costs" that the state would otherwise pay. *Id.* at 276, 281 n.9. The Court specifically noted that "[t]he injunction surely obliged [the debtor] to clean up the site," but "*when he failed to do so*," the state chose not to "prosecute [the debtor] under the environmental laws or bring civil or criminal contempt proceedings," but instead exercised its broad authority to obtain appointment of a receiver to take over *all* of the debtor's assets. *Id.* at 282–83 (emphasis added). On those facts, the court held that "the State was seeking no more than a money judgment as an *alternative* to requiring [the debtor] to perform the obligations imposed by the injunction" because injunctive relief was no longer available under the circumstances of that case. *Id.* at 281 (emphasis added).

In this case, by contrast, the Government Plaintiffs seek an equitable abatement order in the first instance. If Government Plaintiffs prevail, the court will require PEC and its co-defendants to remediate the public nuisance they created, either through their own personnel and contractors or through those retained by an independent court-appointed receiver. Under no circumstance will PEC be required to pay any money to Government Plaintiffs, nor will Government Plaintiffs have authority to exercise any dominion or control over any PEC funds. *Cf. Apex Oil*, 579 F.3d at 737 (distinguishing relief sought in *Kovacs*, where the receiver "was seeking money rather than an order that the debtor clean up the contaminated site," from an injunction that that the defendant would have to spend money to comply with); *In re Chateaugay Corp.*, 944 F.2d at 1009 (affirming cleanup order and stating that "to the extent that an order is obtained under CERCLA or any other environmental statute that seeks to end or ameliorate pollution, we are satisfied that nothing in *Kovacs* permits a discharge of such obligation," even where defendant would be required to spend money to comply).

The Eighth Circuit's holding that a representative California public nuisance cause of action is a dischargeable claim because relief "can include obligations to pay money" into an abatement fund managed by an independent receiver thus squarely conflicts with the Second, Third, Fifth, and Seventh Circuits' holdings in that Section 101(5) could not have been intended to define "claim" so broadly.

The split of authority between this case and the Sixth Circuit's *Whizco* decision on one hand, and cases like *Apex Oil*, *In re Torwico*, *In re Chateaugay Corp.*, *Matter of Davis*, and *In re Continental Airlines* turns on interpretation of a core provision of the bankruptcy code that defines when a cause of action constitutes a "claim" under 11 U.S.C. § 101(5). Interpretation and application of that statutory provision is of critical importance to countless bankruptcies, especially in cases like this and *Apex Oil* in which a government entity is seeking an order requiring a bankrupt defendant to abate a nuisance, remediate environmental hazards, or otherwise engage in purely remedial activities, not to compensate the public entity or its residents but to restore the status quo.

The question at issue here is likely to recur with increasing frequency given the dire economic consequences that have already begun to unfold as a result of the COVID-19 pandemic. An unprecedented number of corporate entities in a broad range of industries have already begun to initiate bankruptcy proceedings. Many such entities are in the energy sector like PEC and/or are potentially subject to considerable environmental liabilities. For example, the Louisiana Oil and Gas Association, a state trade group, disclosed on May 4, 2020 that in a survey of its membership "more than half of company leaders indicated that bankruptcy or closures are likely" due to "economic consequences of the global COVID-19 pandemic" and falling oil prices. *See* State's Oil Producers Shuttering at Alarming Rate, La. Oil & Gas Ass'n (May 4, 2020), available at https://www.loga.la/news-and-articles/states-oil-producers-shuttering-at-alarming-rate. Within the last month, at least one Texas shale oil company filed a chapter 11 bankruptcy petition with more than $500 million in secured debt, citing "[t]he precipitous decline in oil prices from the combined effect of the COVID-19 pandemic and the flooding of oil markets by warring international producers" as the principal force inducing the bankruptcy. *See* Declaration of David E. Roberts Jr. in Support of the Debtors' Chapter 11 Petitions and First Day Relief, *In re Gavlian Res., LLC*, No. 20-32656, Dkt. 13 (S.D. Tex. Bankr. May 16, 2020).

Because the Eighth Circuit's ruling here has deepened a split of appellate authority on a critical question of bankruptcy law, one that is likely to recur and arise more frequently in litigation nationwide, there is at a minimum a reasonable possibility that the Court will grant certiorari review.

B. There Is Also a Reasonable Prospect that the Government Plaintiffs Will Prevail on the Merits if Certiorari Is Granted.

A party seeking to stay this Court's mandate must also show "a fair prospect that five Justices will conclude that the case was erroneously decided below." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). There appear to be few guiding principles to determine which cases present a "fair prospect" for reversal on certiorari. *See*, *e.g.*, *Rostker v. Goldberg*, 448 U.S. 1306, 1309 (1980)

(Brennan, J., in chambers) (likelihood of reversal "in a context as sensitive as that before me cannot be predicted with anything approaching certainty"). There is at least a fair prospect of reversal in this case if certiorari is granted, because the Eighth Circuit's analysis is at odds with the statutory language and purpose, and because of the potentially damaging implications of the Eighth Circuit's ruling upon environmental compliance cases and to the broad range of consumer protection and other cases, commonly prosecuted by public entities, where equity is the principal remedy sought by the public entity or private attorney general plaintiff.

The Eighth Circuit's holding that equitable causes of action are dischargeable whenever the bankrupt defendant might potentially have to expend money to satisfy the judgment "without regard to who receives the payment," *In re Peabody Energy Corp.*, 958 F.3d at 725, dramatically expands the scope of dischargeable liabilities and ultimately renders superfluous Section 101(5)(B)—which only makes dischargeable a narrow category of equitable claims (those that create "a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment . . .").

As the Seventh Circuit cautioned in *Apex Oil*, "[a]lmost every equitable decree imposes a cost on the defendant, whether the decree requires him to do something . . . or, as is more common, to refrain from doing something." 579 F.3d at 737. By adopting the contrary rule that a right to payment exists whenever a defendant may have the option of complying with an equitable judgment by paying someone to act on its behalf, the Eighth Circuit has effectively concluded "that every equitable claim is dischargeable in bankruptcy unless there is a specific exception in the Code," which "is inconsistent with the Code's creation in 11 U.S.C. § 101(5)(B) of only a limited right to the discharge of equitable claims." *See id.*

Absent a stay followed by a grant of certiorari review and reversal, the Eighth Circuit's ruling will have grave consequences for government litigation against defendants in or post-bankruptcy (where defendants have the choice of filing their bankruptcy petition in the Eighth or Sixth Circuits rather than elsewhere), from environmental enforcement and consumer protection actions to cases arising out of the national opioid crisis. Indeed, the United States warned of that very consequence when it sought to enforce the RCRA cleanup order as the plaintiff in *Apex Oil*. In opposing the defendant's petition for certiorari in that case, the United States argued that "[b]ecause neither RCRA nor the relevant district court order allows petitioner to pay money *to the government* in lieu of carrying out the required cleanup, the obligation imposed on petitioner is not dischargeable in bankruptcy." Brief of United States in Opp. to Petition for Writ of Certiorari at 13, *Apex Oil Co. v. United States*, No. 091023 (U.S. July 2010) (emphasis added). The government further argued that the "expenditure-of-money test" applied by the Sixth Circuit in *Whizco* and now by the Eighth Circuit did not "accor[d] with the statutory definition of 'claim' and with congressional intent," and would "prevent Section 101(5)(B)'s 'right to payment' language from imposing any meaningful practical limit on the class of equitable remedy rights that will constitute dischargeable claims." *Id.* at 17–19.

As the United States correctly observed in *Apex Oil*, the plain text of the U.S. Bankruptcy Code supports the majority of circuits' interpretation of Section 101(5)(B). Section 101(5)(A) states in relevant part that any "right to payment" is dischargeable, "whether or not such right is . . . legal [or] equitable . . . ." 11 U.S.C. § 101(5)(A). Section 101(5)(B), in turn, states that a "right to an equitable remedy *for breach of performance*" is dischargeable "*if such breach gives rise* to a right to payment . . . ." *Id.* § 101(5)(B). If every equitable decree that required a defendant to spend money constituted a "right to payment," any remedy encompassed by Section 101(5)(A) would already be a dischargeable "claim" under that section, the plain language of which permits discharge of any "right to payment" whether "legal" or "equitable." Under the Eighth Circuit's analysis, the entirely of Section 101(5)(B) would therefore become mere surplusage.

As the *Apex Oil* court thus correctly concluded, the "natural reading" of Section 101(5)(B), as a matter of logic no less than plain language, must be that an equitable remedy is dischargeable only "*if* the holder of an equitable claim can, in the event that the equitable remedy turns out to be unobtainable, obtain a money judgment *instead* . . . ." 579 F.3d at 736 (emphasis added). That is, Section 101(5)(A) allows the discharge of a cause of action or other obligation that gives the holder a right to receive payment—whether in equity or at law—while Section 101(5)(B) additionally allows the discharge of a cause of action or other obligation that provides an equitable remedy for specific performance, but only if the holder can *convert* the underlying cause of action into a right to receive payment in the event of breach.

Congress has made clear that while the statutory definition of a "claim" is broad, Section 101(5)(B) is "intended to cause the liquidation or estimation of contingent rights of payment for which there may be an *alternative* equitable remedy, with the result that the equitable remedy will be susceptible to being discharged in bankruptcy." H.R. Rep. No. 95-595, at 549 (1977); *cf. Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 558 (1990). Thus, for example, a dischargeable claim exists when under state law "a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused," while by contrast, "rights to an equitable remedy for breach of performance with respect to which such breach does not give rise to a right to payment are not 'claims' and would therefore not be susceptible to discharge in bankruptcy." H.R. Rep. No. 95-595, at 549. This Court has thus held that equitable causes of action are claims under Section 101(5)(B) only when they have been or can be "reduced to a monetary obligation" under the substantive law giving rise to the cause of action. *See Kovacs*, 469 U.S. at 282. The Sixth and Eighth Circuits' interpretation would bulldoze the carefully tailored statutory language and reach far beyond the clear intent of the statute.

Given the potentially broad and harmful ramifications of the Eighth Circuit's opinion, the persuasive analysis of the Seventh Circuit in *Apex Oil*, and the federal government's past agreement with the position advocated by Government Plaintiffs here, there is at least a reasonable prospect that this Court will reverse on the merits if certiorari is granted.

C. The Government Plaintiffs Will Suffer Irreparable Harm if the Mandate is Not Recalled Because Dismissing Their Claims in California Could Moot Review of the Eighth Circuit's Ruling.

Government Plaintiffs will suffer irreparable harm if the mandate is not recalled and this case is not stayed. The bankruptcy court's order, affirmed by the Eighth Circuit, requires the Government Plaintiffs to dismiss the claims in their California lawsuits against PEC with prejudice. If no stay is granted and Government Plaintiffs are compelled to comply with the bankruptcy court's order and dismiss with prejudice their claims against PEC in the California action, they will have forfeited the very causes of action against PEC that they seek to preserve by pursuing certiorari review in this Court, potentially mooting their ability to seek such review.[5] The risk of pretermitting Government Plaintiff's ability to meaningfully petition for certiorari constitutes sufficient irreparable harm to justify recalling the mandate and issuing a stay, as mootness on appeal is "the 'quintessential form of prejudice.'" *In re Country Squire Assocs. of Carle Place, L.P.*, 203 B.R. 182, 183 (B.A.P. 2d Cir. 1996) (quoting *In re Advanced Min. Sys., Inc.*, 173

[5] "The rule in federal cases is that an actual controversy must be extant at all stages of review" to supply jurisdiction consistent with Article III of the Constitution. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). "That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires." *Honig v. Doe*, 484 U.S. 305, 317 (1988).

B.R. 467, 469 (Bankr. S.D.N.Y. 1994). Government Plaintiffs' untenable position can only be overcome by a stay.

PEC and the other defendants in the California actions have previously argued that if Government Plaintiffs dismiss their California actions against PEC and the bankruptcy court's order is later reversed, Government Plaintiffs could seek reinstatement of those actions under Fed. R. Civ. P. 60(b)(5), which authorizes courts to "relieve a party or its legal representative from a final judgment . . . based on an earlier judgment that has been reversed or vacated." But that argument provides no solace because, if dismissal of the California lawsuits with prejudice moots the petition for certiorari from the bankruptcy court order, Government Plaintiffs will have lost the opportunity to challenge the basis for the order leading to the dismissal, and with it any possibility for relief under Rule 60. Moreover, even if the contingent possibility of relief under Rule 60 were enough to overcome mootness, Government Plaintiffs have identified no case (and PEC has never cited one) in which Rule 60(b)(5) has been applied to relieve a plaintiff from a voluntary dismissal with prejudice, as the bankruptcy court order would require here. Further, there is no California provision comparable to Rule 60 that Government Plaintiffs could pursue in state court, and state court procedures, not federal, would likely govern now that the Ninth Circuit has affirmed the California district court's order remanding the California cases to state court. *See* Cal. Civ. Proc. Code § 473(b) (limiting relief from judgment to instances of "mistake, inadvertence, surprise, or excusable neglect").

The harm threatened to Government Plaintiffs here from the mandate issuing without a stay is "both certain and great; . . . actual and not theoretical." *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986). Government Plaintiffs risk losing not only their right to obtain an appellate decision on the underlying merits of the bankruptcy court's order, but their entire underlying *California* case against PEC. That harm is irreparable and warrants a stay.

D. The Equities Weigh in Government Plaintiffs' Favor.

The balance of equities, including the public interest, further supports recalling the mandate and staying the bankruptcy court's order. The underlying California litigation has been stayed in the Northern District of California for more than two years. Neither PEC nor any of the other defendants have been served with discovery, filed any dispositive motions, or answered the complaints. The defendants, including PEC, were recently granted an extension of 30 days to file any petition for rehearing with the Ninth Circuit from that court's affirmance of the district court's remand order, meaning the mandate directing the case to be remanded to state court cannot issue until at least mid-July, and likely much later if the defendants in fact petition for rehearing. *See* Order Granting Motion for Extension of Time to File, *Cty. of San Mateo v. Chevron Corp.*, No. 18-15499, Dkt. 204 (9th Cir. June 8, 2020). PEC's burden to date has thus been *de minimis* and any additional burden to PEC from a stay of the bankruptcy court's order pending the Government Plaintiffs' petition for certiorari (or decision not to file such a petition) would likewise be minimal, given the litigation's slow and limited pace to date.

The public interest, by contrast, weighs strongly in favor of enabling the Court to resolve the question raised by Government Plaintiffs' anticipated petition, as the scope of dischargeable obligations in bankruptcy has an enormous potential impact on public entities and others who seek to pursue their statutory and common law rights to equitable relief from entities that are, or may be, in bankruptcy proceedings.

CONCLUSION

For the reasons stated herein, Applicants County of San Mateo, California; City of Imperial Beach, California; and County of Marin, California ("Government Plaintiffs") respectfully request that the mandate of the Eighth Circuit Court of Appeals be recalled, and the court's judgment be stayed pending Government Plaintiffs' timely petitioning this Court for a writ of certiorari.

Dated: June 10, 2020

Respectfully submitted,

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APPENDIX

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United States Court of Appeals, Eighth Circuit.

IN RE: PEABODY ENERGY CORPORATION Debtor
County of San Mateo, California;
City of Imperial Beach, California;
County of Marin, California Appellants
v.
Peabody Energy Corporation Appellee
Office of U.S. Trustee U.S. Trustee
In re: Peabody Energy Corporation Debtor
County of San Mateo, California;
City of Imperial Beach, California;
County of Marin, California Appellants
v.
Peabody Energy Corporation Appellee
Office of U.S. Trustee U.S. Trustee

No. 18-3242, No. 19-1767
|
Submitted: March 10, 2020
|
Filed: May 6, 2020

Synopsis

Background: Reorganized Chapter 11 debtor moved to enforce discharge injunction by requiring dismissal of state-court causes of action filed against it by California counties and city which sought to hold debtor and other energy companies liable for their alleged contributions to global warming. The United States Bankruptcy Court for the Eastern District of Missouri, Barry S. Schermer, J., 2017 WL 4843724, granted motion and required dismissal of causes of action as claims that had been discharged. Counties and city appealed. The District Court, Rodney W. Sippel, J., 599 B.R. 610, affirmed, and appeals were taken.

Holdings: The Court of Appeals, Morris S. Arnold, Senior Circuit Judge, held that:

the bankruptcy court did not abuse its discretion in determining that the municipalities' common-law claims did not fall within the plan's carve-out for government claims brought under any "Environmental Law" to which reorganized debtor was subject, and so were discharged;

while a closer call, the bankruptcy court did not abuse its discretion in determining that the municipalities' nuisance claims did not fall within the carve-out for government claims brought under "Environmental Law";

the bankruptcy court did not abuse its discretion in determining that the municipalities' claims did not fall within the plan's carve-out for government claims brought under "applicable police or regulatory law"; and

the bankruptcy court did not abuse its discretion in determining that reorganized debtor's bankruptcy discharged their representative public-nuisance claim, even though California law limited recovery on that claim to the equitable remedy of abatement.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Enforce Discharge Injunction.

***720** Appeals from United States District Court for the Eastern District of Missouri—St. Louis

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant was Matthew Kendall Edling, of San Francisco, CA. Also appearing on appellants' brief were Victor M. Sher and Michael Rubin of San Francisco, CA.

Counsel who presented argument on behalf of the appellee was Shay Dvoretzky, of Washington, DC. The following attorney(s) appeared on the appellee brief; Jaimie L. Mansfield, of Saint Louis, MO, Parker Andrew Rider-Longmaid, of Washington, DC, Heather Lennox, of Cleveland, OH, John G. Willard, of Saint Louis, MO, Matthew Curtis Corcoran, of Columbus, OH.

Before GRUENDER, ARNOLD, and SHEPHERD, Circuit Judges.

Opinion

ARNOLD, Circuit Judge.

In April 2016, Peabody Energy Corporation filed for Chapter 11 bankruptcy. As part of the court-approved plan governing Peabody's reorganization, governmental entities with claims against Peabody had to file proof of their claims with the bankruptcy court [1] by a certain date or the claims were barred. After that date came and went, Peabody emerged as a reorganized company.

A few months after Peabody was reorganized, three California municipalities (San Mateo County, Marin County, and the City of Imperial Beach) sued Peabody and more than thirty other energy companies for their alleged contributions to global warming. Each of these municipalities filed a separate though nearly identical lawsuit, all in California state courts, raising claims of strict liability and negligence for failing to warn, strict liability for a design defect, negligence, trespass, and private nuisance. They also brought two public-nuisance claims, one on behalf of the ***721** people of California seeking abatement of the nuisance, and the other on their own behalf seeking, among other things, damages and disgorgement of profits. Peabody returned to the bankruptcy court and asked that it enjoin the municipalities from pursuing their claims against it and require them to dismiss their claims with prejudice on the ground that the court-approved reorganization plan had discharged them.

The bankruptcy court agreed. It began with a review of the municipalities' complaints, explaining that they focused on acts occurring from 1965 to 2015. The court noted, moreover, that the complaints mentioned Peabody sparingly, and, when they did, they alleged that Peabody had exported coal from California, continued to export coal from California, participated in "a national climate change science denial campaign" in 1991, and was linked to groups seeking to undermine the connection between the companies' fossil fuel products and climate change. The bankruptcy court determined that the municipalities' claims, which involved Peabody's pre-bankruptcy conduct save for the anodyne allegation that Peabody continues to export coal from California, were all discharged during Peabody's bankruptcy proceedings, and so it enjoined the municipalities from pursuing their claims against Peabody. The municipalities appealed the bankruptcy court's decision to the district court, [2] which affirmed. *See* 28 U.S.C. § 158(a)(1).

The municipalities now appeal to our court. When a bankruptcy court's decision is appealed to the district court, that court acts as an appellate court by reviewing legal determinations de novo and factual findings for clear error. *See Fix v. First State Bank of Roscoe*, 559 F.3d 803, 808 (8th Cir. 2009). When the case comes to us, "[a]s the second court of appellate review, we conduct an independent review of the bankruptcy court's judgment applying the same standards of review as the district court." *Id.*

Confirmation of a Chapter 11 reorganization plan discharges claims "[e]xcept as otherwise provided ... in the plan," *see* 11 U.S.C. § 1141(d)(1), and the municipalities contend that there are two provisions in the plan that exempt all their claims from discharge. Importantly, since a confirmed Chapter 11 plan is an order of the bankruptcy court, we review the bankruptcy court's interpretation of a confirmed plan for an abuse of discretion. *See In re Dial Bus. Forms, Inc.*, 341 F.3d 738, 744 (8th Cir. 2003).

As relevant, the first provision that the municipalities rely on exempts from discharge governmental claims brought "under any applicable Environmental Law to which any Reorganized Debtor is subject," but the bankruptcy court held that the municipalities' claims were not made under "Environmental Law" as the plan contemplates that phrase and so this carveout did not save the municipalities' claims from discharge. The plan defined Environmental Law as "all federal, state and local statutes, regulations and ordinances concerning pollution or protection of the environment, or environmental impacts on human health and safety, including [ten federal statutes] and any state or local equivalents of the foregoing." A sample of the federal statutes listed includes the Atomic Energy Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; ***722** and the Federal Insecticide, Fungicide, and Rodenticide Act.

The municipalities argue that their common-law claims against Peabody are "state or local equivalents" of "statutes, regulations and ordinances concerning pollution" and so forth because the municipalities raised these claims to protect the environment. But as the bankruptcy court explained, when the definition of Environmental Law mentioned "state or local equivalent[s]," it was talking about equivalents to the ten federal statutes listed, not equivalents to "statutes, regulations and ordinances concerning pollution." We think this is a reasonable conclusion because we doubt the drafters of the definition would feel the need to clarify that the equivalents could be state or local when the part of the definition dealing with pollution already explicitly said that state and local laws could qualify. In other words, under the municipalities' reading, the second mention of "state" and "local" would be superfluous, and so we don't see how that reading could comport with the parties' intentions. And the municipalities have not demonstrated that their common-law claims are equivalent to the listed federal statutes.

We also think that if the drafters of this carveout had meant for it to include common-law claims they would have explicitly said so, or at a minimum would not have specifically limited Environmental Law to "statutes, regulations and ordinances." The bankruptcy court's interpretation is at least a reasonable one, and so we cannot say that the bankruptcy court abused its discretion in concluding that the municipalities' common-law claims did not fall within the plan's definition of Environmental Law.

The municipalities' nuisance claims are a closer call because they rely on specific California statutes, bringing them at least arguably more in line with the plan's definition of Environmental Law. But unlike the federal statutes listed, nuisance claims have their roots in the common law and are often referred to as common-law claims, including in Missouri—the jurisdiction that Peabody calls home—whose laws may well have been the focus of the parties who drafted the carveout. *See Smith v. ConocoPhillips Pipe Line Co.*, 801 F.3d 921, 926–27 (8th Cir. 2015). So we are not convinced that the incidental tethering of the nuisance claims here to statutes in a jurisdiction far from where Peabody's bankruptcy proceedings occurred was the kind of claim the drafters intended to carve out. And as the bankruptcy court noted, the federal statutes listed are designed to remedy particular environmental problems. In contrast, nuisance law, while it may be used to resolve an environmental problem, does not focus on particular environmental problems. In fact, a nuisance can be something with no effect whatsoever on the environment—like something "indecent or offensive to the senses" or the sale of illegal drugs. *See* Cal. Civ. Code § 3479. We understand the force of the municipalities' argument that their particular nuisance claims do focus on the environment, no matter what other nuisance claims might involve. But we cannot say that the bankruptcy court abused its discretion in pointing out the broader potential scope of a California nuisance claim, especially when we consider that if the drafters of the carveout had wanted to include claims of a fundamentally broader nature than the ten statutes listed, they would have said so.

The municipalities emphasize that the plan, in a separate provision governing its interpretation, explained that when the plan used the word "including," it meant "including without limitation," and so the municipalities urge us not to dwell exclusively on the list of federal statutes in ***723** interpreting the carveout. But that list shows the kinds of laws on the minds of the parties who wrote the carveout, and we understand the bankruptcy court's skepticism that more far-reaching claims were also carved out. We think that "including without limitation" could reasonably mean that there might be more environmental statutes of a similar scope that could be considered Environmental Laws, not that any claim with a potential environmental reach is carved out. If any claim with a potential environmental reach were included, then why would the drafters include the list in the first place? Or why would they not add to the list statutes that are not so obviously Environmental Laws? Although the municipalities advance a reasonable interpretation of the plan, their interpretation is not without its faults, and so the bankruptcy court's interpretation, which we also believe is reasonable and is entitled to deference, does not amount to an abuse of discretion.

A relevant portion of the second provision that the municipalities rely on for the survival of their claims exempts from discharge a governmental claim brought "under any ... applicable police or regulatory law." The bankruptcy court held that the claims here were not brought under a police or regulatory law, drawing from a section of the bankruptcy code, *see* 11 U.S.C. § 362(b)(4), that excepts a government's attempt to enforce its "police and regulatory power" from the automatic stay that results from the filing of a bankruptcy petition. The bankruptcy court pointed out that our court has held, in construing that provision, that when the government's actions "would result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate," then the government is not exercising its police or regulatory power. It is acting as a creditor. *See In re Commonwealth Cos.*, 913 F.2d 518, 523 (8th Cir. 1990). Applying this so-called pecuniary-interest rule, the bankruptcy court concluded that if the municipalities' claims were successful, they would obtain a pecuniary advantage over other creditors because they were seeking damages and disgorgement of fifty-years-worth of profits and so they were not seeking to enforce its police or regulatory power.

The municipalities maintain on appeal that we should not review this aspect of the bankruptcy court's decision for an abuse of discretion because in this instance the court was interpreting a provision of the bankruptcy code, which raises a question of law that we would review de novo. *See In re Archdiocese of Saint Paul & Minneapolis*, 888 F.3d 944, 950 (8th Cir. 2018). We disagree. It is apparent to us that the bankruptcy court here was simply construing the terms of the plan, and, as it explained, thought that § 362 provided a helpful guide in that effort. We therefore think what we have before us is a question about the meaning of the plan, not the bankruptcy code, and so we review the bankruptcy court's holding for an abuse of discretion.

We see no abuse of discretion in the bankruptcy court's decision to draw on § 362, along with our court's interpretation of it, in determining the meaning of the plan. To the extent the municipalities are objecting to the way the bankruptcy court applied the pecuniary-purpose rule, we reject their contention. If the municipalities forced Peabody to disgorge its profits and recovered the damages they sought, they would diminish the value of the other creditors' ownership stakes in the reorganized Peabody, redistributing the bankruptcy estate without ever having themselves participated in the bankruptcy proceedings.

In addition, the municipalities seek money as the victims of alleged torts, not ***724** because they are exercising regulatory or police authority over Peabody, which, according to the complaints, is an out-of-state company acting outside of the municipalities' borders. So for this independent reason, the second carveout does not salvage the municipalities' claims.

The municipalities also assert that, even if the plans did not exempt all their claims from discharge, Peabody's bankruptcy did not discharge their representative public-nuisance claim. Before addressing this argument, a brief survey of the relevant bankruptcy law is in order. Confirmation of a Chapter 11 plan for reorganization "discharges the debtor from any debt that arose before the date of such confirmation," regardless of whether "proof of the claim based on such debt is filed" with the bankruptcy court. 11 U.S.C. § 1141(d)(1)(A). A debt, meanwhile, is simply a "liability on a claim." *Id.* § 101(12). A claim, in turn, is a "right to payment" or, as more relevant here, a "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." *Id.* § 101(5). The Supreme Court has noted that, by defining "claim" as it did, Congress intended to adopt the "broadest available definition" of the term. *See* *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991). Our court has said that Congress intended "claim" to include "virtually all obligations to pay money." *See* *In re Flight Transp. Corp. Sec. Litig.*, 874 F.2d 576, 583 (8th Cir. 1989).

The municipalities contend that the public-nuisance claim they assert on behalf of the people of California is not a claim under bankruptcy law because California law does not permit them to recover damages under that theory; they can obtain only an equitable decree ordering Peabody to abate the nuisance. As a result, the argument goes, they do not have a "right to payment" or an equitable remedy that "gives rise to a right to payment," so Peabody's bankruptcy does not affect this claim in their complaint.

The difficulty with this argument is that, even though California law limits the recovery on this claim to equitable relief, that relief can include obligations to pay money. As one of the cases that the municipalities rely on most heavily explains, it is a "myth" that "equitable remedies are always orders to act or not to act, rather than to pay," as "equity often orders payment[s]" that can be discharged in bankruptcy. *See* *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009). In California, a party who commits a public nuisance can be ordered to pay into a fund, overseen by a receiver, to remedy or eliminate the hazard complained of rather than being ordered to clean up the nuisance themselves. *See, e.g.*, *People v. ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d 499, 569–70 (Cal. Ct. App. 2017). It does not matter that the municipalities do not request that Peabody be ordered to pay into an abatement fund. That a California court could order them is sufficient to make the claim dischargeable, *see* *In re Torwico Elecs., Inc.*, 8 F.3d 146, 150 (3d Cir. 1993); *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir. 1991), because that order would convert the requirement to abate a nuisance into an "obligation[ ] to pay money." This case is therefore unlike other cases that the municipalities point to where the relevant equitable remedy was not convertible into a monetary obligation. *See, e.g.*, *Apex Oil*, 579 F.3d at 736; *Torwico*, 8 F.3d at 150.

The municipalities point out that they would not receive the proceeds that a ***725** court directs to be paid into an abatement fund; that money, unlike damages, would go to a receiver. That is true enough, but we don't see why it makes a difference. As already noted, we have broadly stated that a "claim" includes "virtually all obligations to pay money," *see* *Flight Transp.*, 874 F.2d at 583, without regard to who receives the payment. The Supreme Court, moreover, in holding that obligations to pay for environmental cleanup are subject to discharge, paid little attention to the fact that those payments would go to a receiver, apparently assuming that did not disqualify the right to payments from being a "claim." *See* *Ohio v. Kovacs*, 469 U.S. 274, 283, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). Besides, even if the municipalities cannot deposit abatement-fund payments into their general treasuries, it is the municipalities and their people who stand to benefit from them.

We therefore disagree with the municipalities' contention that, since their representative public-nuisance claim entitles them only to the equitable remedy of abatement, it is not dischargeable in bankruptcy.

The municipalities contend finally that they have asserted claims concerning Peabody's post-bankruptcy activities and that those claims should be allowed to proceed. But we agree with the bankruptcy court that all the claims in the complaint are directed at Peabody's pre-bankruptcy conduct, as the only allegation against Peabody involving its post-bankruptcy conduct was that it continues to export coal from California. That allegation is insufficient to raise a claim, and so we decline to hold that it somehow changes the character of the complaints as the municipalities maintain.

As a result, we affirm the judgment of the district court, and though it probably goes without saying, we necessarily also deny the municipalities' request for a stay of the bankruptcy court's decision pending appeal.

All Citations

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Footnotes

1 The Honorable Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri.

2 The Honorable Rodney W. Sippel, Chief Judge, United States District Court for the Eastern District of Missouri.

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