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NOTES

CLEAN-UP ORDERS AND THE BANKRUPTCY CODE: AN EXCEPTION TO THE AUTOMATIC STAY

The Bankruptcy Reform Act of 1978¹ represents the most significant modernization and expansion of federal bankruptcy law since 1938.² This systemic overhaul was motivated by both changes in the laws governing debtor-creditor relationships and a significant increase in the use of bankruptcy by business and individual debtors.³ Aimed at removing many of the deficiencies of prior law,

¹ Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-151326 (1982)). Title I of the Bankruptcy Reform Act of 1978 contains the substantive law of bankruptcy. *See* 92 Stat. at 2549. Title II establishes the bankruptcy courts, their jurisdiction, and the authority of the bankruptcy judges. *See id.* at 2657. Title III contains amendments to other titles of the United States Code, *see id.* at 2673, and Title IV outlines the provisions of the previous act that were repealed as well as the effective dates of the 1978 Act, *see id.* at 2682. *See generally* W. PHILLIPS, *LIQUIDATION UNDER CHAPTER 7 OF THE BANKRUPTCY ACT* §§ 1-1 to 1-8 (1981) (overview of Bankruptcy Reform Act of 1978).

² *See* S. REP. NO. 989, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5788 [hereinafter cited as S. REP. NO. 989]. The 1978 Act updated a system of federal bankruptcy law that had been designed in 1898, and that was last overhauled in 1938. *Id.*; *see* Chandler Act of 1938, ch. 575, 52 Stat. 840.

Prior to 1938, bankruptcy acts were designed to address specific needs. *See* Bankruptcy Act of 1898, 30 Stat. 544, *amended by* Chandler Act of 1938, ch. 575, 52 Stat. 840; Bankruptcy Act of 1867, 14 Stat. 517, 517 (bankruptcy relief awarded to corporations for first time) (repealed 1878); Bankruptcy Act of 1841, 5 Stat. 440, 440-41 (involuntary or voluntary bankruptcy proceedings against individuals) (repealed 1843); Bankruptcy Act of 1800, 2 Stat. 19, 19 (providing for involuntary bankruptcy proceedings against merchants) (repealed 1803). The 1898 Act placed bankruptcy jurisdiction with the district courts of the United States, the Supreme Court of the District of Columbia, the district courts of the territories, and the United States courts in the District of Alaska and the Indian territories. *See* Bankruptcy Act of 1898, 30 Stat. at 545. The Chandler Act, however, created separate bankruptcy courts with distinct territorial limits, and with original jurisdiction under the Act. *See* Chandler Act of 1938, 52 Stat. at 842. *See generally* 2 COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* 16-30 (1974); 2 COLLIER ON BANKRUPTCY app. V, v & n.1 (15th ed. 1984).

³ *See* S. REP. NO. 989, *supra* note 2, at 5788. Since the enactment of the Chandler Act in 1938, a tremendous growth in consumer credit has occurred. *Id.* The Bankruptcy Act of 1898 was designed primarily for business debtors, and at the time of the 1938 revision, the consumer credit industry was still in its infancy. Note, *Creditor Acquiescence as a Defense*

the 1978 Act seeks to preserve the financial existence of the debtor while affording equitable treatment to all creditors.⁴

Upon the filing of a petition in bankruptcy, section 362(a) of the Bankruptcy Code (the Code) imposes an automatic stay on the commencement of most proceedings and the enforcement of certain judgments against a debtor.⁵ The provision is intended to stop virtually all collection efforts by creditors, thereby allowing the

to an Exception to Discharge in Bankruptcy, 58 IND. L.J. 319, 319 & n.4 (1982). The adoption of the Uniform Commercial Code in the 1960's also caused changes in debtor-creditor relations. S. REP. NO. 989, *supra* note 2, at 5788. The increased use of consumer credit led to a corresponding increase in the number of consumers who overextended themselves, and bankruptcy often provided the only possible relief. H.R. REP. NO. 595, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 6076-77 [hereinafter cited as H.R. REP. NO. 595]. The tremendous increase in the number of bankruptcies placed a great strain on the federal bankruptcy system. S. REP. NO. 989, *supra* note 2, at 5788-89. It is estimated that the number of bankruptcy petitions increased 2000% during the 30 years prior to the passage of the 1978 Act. H.R. REP. NO. 595, *supra*, at 6077.

⁴ See Julis, *Classifying Rights and Interests Under the Bankruptcy Code*, 55 AM. BANKR. L.J. 223, 223 (1981). Three purported goals of the Bankruptcy Code are: (1) to provide the debtor with a "fresh start" (not applicable to corporate debtors); (2) to maximize the value of the debtor's property on a liquidation or going-concern basis; and (3) to provide fair treatment to creditors, shareholders, and others with an interest in the debtor. *Id.*; see also *In re Sampson*, 17 Bankr. 528, 530 (Bankr. D. Conn. 1982) (Bankruptcy Code intended to provide "fresh start" for debtor). The Code is designed to avoid liquidation of the debtor's assets and maintain his ability to meet his obligations, Note, *Tort Claims Against the Business Debtor Filing for Reorganization and a Fresh Start*, 52 U. CIN. L. REV. 791, 791 (1983), thus providing for the "equitable settling of creditors' accounts by usurping from the debtor his power to control the distribution of his assets," *In re Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984), *cert. granted sub nom.* Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-801). The "fresh start" concept is based upon the belief that such a policy is "preferable to creating a class of at least temporary wards of the state." Mordy, Dunn, & Johnson, *Constitutionality of "Opt-Out" Statutes Providing for Exemptions to Bankrupts*, 48 MO. L. REV. 627, 627 (1983). It must be noted that the "fresh start" doctrine does not apply to corporate debtors since the 1978 Act contains no provision for the discharge of debts of nonindividuals. *Quanta*, 739 F.2d at 915 n.7; see 11 U.S.C. § 727(a)(1) (1982) (debtor must be individual for discharge to apply).

⁵ See 11 U.S.C. § 362(a)(1)-(2) (1982). The pertinent provisions of § 362(a) provide:

Except as provided in subsection (b) of this section, a petition [in bankruptcy] . . . operates as a stay, applicable to all entities, of—

(1) the commencement or continuation . . . of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against the property of the estate, of a judgment obtained before the commencement of the case under this title.

Id. The categories of § 362(a) are broad, and encompass almost any type of action that can be brought against a debtor or his estate. See W. PHILLIPS, *supra* note 1, § 6-1, at 45; see also R. AARON, *BANKRUPTCY LAW FUNDAMENTALS* § 501 (1984).

debtor to effect repayment or reorganization.⁶ The automatic stay is, however, subject to a list of exceptions set forth in section 362(b) of the Code.⁷ Specifically, subsections 362(b)(4)-(5) exempt from the automatic stay certain actions brought by governmental entities pursuant to their police or regulatory power.⁸ Nevertheless, these governmental proceedings are subject to the stay provision if they are deemed actions to enforce a money judgment, since the stay is designed to interrupt all actions asserting a pecuniary interest in the debtor's estate.⁹ Indeed, courts have struggled in determining whether an action by a state or federal government to force

⁶ See *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 271 (3d Cir. 1984); S. REP. No. 989, *supra* note 2, at 5840-41; R. AARON, *supra* note 5, at 5-2.

The stay has been described as a "breathing spell" for the debtor. See, e.g., *In re Mariner Indus.*, 734 F.2d 426, 431 (9th Cir. 1984) (overriding purpose of stay is to give debtor "breathing spell"); *Johnson v. First Nat'l Bank*, 719 F.2d 270, 276 (8th Cir. 1983) (fundamental purpose of stay to provide breathing spell), *cert. denied*, 104 S. Ct. 1015 (1984); see S. REP. No. 989, *supra* note 2, at 5840-41; Olick, *Chapter 11—A Dubious Solution to Massive Toxic Tort Liability*, 18 FORUM 361, 362 (1983).

Chapter 11 of the Bankruptcy Code allows for the reorganization of corporate debtors. 11 U.S.C. §§ 1101-1174 (1982); Olick, *supra*, at 361-62. A chapter 11 reorganization is aimed at preserving the existence of the corporation, while assuring that claims of its creditors will be satisfied as best as possible. Julis, *supra* note 4, at 224. A reorganization proceeding is appropriate when the "going-concern value of the debtor is sufficiently greater than the liquidation value." *Id.*

⁷ See 11 U.S.C. § 362(b)(1)-(8) (1982).

⁸ *Id.* § 362(b)(4)-(5). The applicable subsections of § 362(b) provide that:
The filing of a petition [in bankruptcy] . . . does not operate as a stay—

. . . .

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

Id.; see, e.g., *Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 700 F.2d 1279, 1283-84 (9th Cir. 1983) (order entered to enforce injunction); *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108, 1114 (6th Cir. 1981) (administration of workers' compensation claim by state); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981) (NLRB allowed to order reinstatement of employee with backpay).

⁹ See *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 272 (3d Cir. 1984); see also 11 U.S.C. § 362(b)(4)-(5) (1982). Determining whether a particular judgment constitutes a "money judgment" is particularly significant, since the enforcement of a money judgment will be subject to the automatic stay. The policy reason for this distinction is set forth in the legislative history:

Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

S. REP. No. 989, *supra* note 2, at 5838; H.R. REP. No. 595, *supra* note 3, at 6299.

a corporate debtor to comply with a pre-petition order to clean up hazardous wastes should be exempt from the automatic stay.¹⁰ The recent consideration of this issue in *Penn Terra Ltd. v. Department of Environmental Resources*¹¹ and *In re Kovacs*¹² (*Kovacs I*) illustrates the problem.

In *Penn Terra*, the Court of Appeals for the Third Circuit held that an attempt by Pennsylvania to compel a corporation to comply with a consent agreement to correct environmental damages was exempt from the automatic stay provision.¹³ The Court of Appeals for the Sixth Circuit, on the other hand, held in *Kovacs I* that an action to enforce a pre-petition clean up order was a money judgment, and thus was not entitled to exemption from the stay.¹⁴ This conflict between the circuits reveals an underlying ten-

¹⁰ Compare *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 278-79 (3d Cir. 1984) (pre-petition order exempt from automatic stay) with *In re Kovacs*, 681 F.2d 454, 456 (6th Cir. 1982) (clean-up order a money judgment, thus subject to stay), *vacated and remanded*, 103 S. Ct. 810 (1983); see also *infra* notes 11-15 and accompanying text.

¹¹ 733 F.2d 267 (3d Cir. 1984).

¹² 681 F.2d 454 (6th Cir. 1982), *vacated and remanded*, 103 S. Ct. 810 (1983).

¹³ 733 F.2d at 278-79. In *Penn Terra*, the corporate debtor operated coal surface mines in violation of Pennsylvania environmental protection statutes. *Id.* at 269 & n.1. In November of 1981, *Penn Terra* entered into a consent order to correct the violations. *Id.* at 269 & n.2. *Penn Terra* failed to comply with the order, and subsequently filed a petition in bankruptcy. *Id.* at 269-70. In May of 1982, the Pennsylvania Department of Environmental Resources (DER), attempting to enforce the consent order, obtained an injunction ordering *Penn Terra* to correct the violations of the Pennsylvania statutes. *Id.* at 270 & n.3. Responding to *Penn Terra's* assertion that the injunction violated the provisions of the Bankruptcy Code, both the bankruptcy court and the district court held that the DER sought enforcement of a money judgment, and the injunction therefore was not exempt from § 362(a). *Id.* at 270. The Court of Appeals for the Third Circuit reversed, holding that the DER's actions were within the police or regulatory power of the state and were not attempts to enforce a money judgment. *Id.* at 272-79. Consequently, the judgment against *Penn Terra* enforcing the clean-up order was exempt from the automatic stay. *Id.*; see 11 U.S.C. § 362(b)(4)-(5) (1982).

¹⁴ 681 F.2d at 456. The *Kovacs* litigation has a confusing history. William Kovacs, an officer of Chem-Dyne Corporation, was sued individually and as a corporate officer by the state of Ohio for violations of state environmental protection laws. *Id.* at 454. In 1979, Kovacs signed a stipulation enjoining him from causing further pollution and requiring him to remove hazardous waste from the Chem-Dyne site. *Id.* When Kovacs failed to comply with the stipulation, a receiver was appointed. *Id.* Five months later, Kovacs filed a petition in bankruptcy. *Id.* at 455. The bankruptcy court held that the attempts by the state to force Kovacs to comply with the stipulation were, in effect, attempts to collect money, and, therefore, were not exempt from the automatic stay. *Id.* at 455-56. The district court affirmed. *Id.* This proceeding, referred to as *Kovacs I*, was then affirmed by the Sixth Circuit. *Id.* at 456. Nevertheless, the Supreme Court vacated this judgment and remanded the case pending disposition of the *Kovacs II* litigation—a second proceeding instituted by the state of Ohio. See 103 S. Ct. 810 (1983).

Since the judgment against Kovacs had not been exempted from the automatic stay, see

sion between the governmental interests in protecting the environment and ensuring public safety while preserving the assets of a debtor in bankruptcy.¹⁵

This Note will discuss the scope of the police and regulatory power exemption to the automatic stay and will assert that a corporation filing a bankruptcy petition should not receive the protection afforded by the stay with respect to a pre-petition order compelling the cleanup of hazardous wastes. In addition, the policy reasons for favoring environmental protection over the rights of a debtor and his creditors under the Bankruptcy Code will be examined. Finally, a three-prong definition of "money judgment" under section 362(b)(5) will be provided that will suggest that toxic

Kovacs I, 681 F.2d at 456, the State of Ohio, in a second action, argued that the judgment should not even fall within the scope of the Bankruptcy Code, see Brief of Petitioner at 2, *In re Kovacs (Kovacs II)*, 717 F.2d 984 (6th Cir. 1983), *aff'd sub nom. Ohio v. Kovacs*, 105 S. Ct. 705 (1985). The state argued that the judgment against Kovacs was not a claim or debt, and, therefore, was not dischargeable under 11 U.S.C. § 727. See 717 F.2d at 987. The bankruptcy court and the district court concluded that Kovacs' obligation was dischargeable, *id.* at 986-87, and the Sixth Circuit affirmed, *id.* at 988.

The Supreme Court held not only that the judgment against Kovacs was a "claim" or "debt" dischargeable pursuant to § 727, but also that the state was, in effect, seeking to enforce a money judgment. 105 S. Ct. at 708-11. The Court based its conclusions on the grounds that a receiver had been appointed and that Kovacs had been dispossessed of the property. *Id.* at 710. Indeed, the appointment of the receiver "removed [Kovacs'] authority over the site, and divested him of assets that might have been used by him to clean up the property." *Id.* Under the circumstances, the state could only be seeking money, and the only way for Kovacs to perform was to pay money. *Id.* at 710-11. *Kovacs* is clearly distinguishable from *Penn Terra* because of the presence of the receiver. See *id.* at 711 n.11.

¹⁵ Compare *In re Quanta Resources Corp.*, 739 F.2d 912, 921-22 (3d Cir. 1984) (bankruptcy act does not allow abandonment of waste oil facility in contravention of state environmental protection laws), *cert. granted sub nom. Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-801) and *Penn Terra*, 733 F.2d at 269 (environmental protection should not be thwarted by stay) with *In re Kovacs (Kovacs II)*, 717 F.2d at 987 (debtor's obligation to clean up hazardous wastes dischargeable) and *In re Kovacs (Kovacs I)*, 681 F.2d at 456 (clean-up order should be stayed); see also Wise, *High Court Hears Arguments on Thorny Bankruptcy Issue*, N.Y.L.J., Oct. 11, 1984, at 1, col. 3.

It has been argued that exempting clean-up orders from the stay would create a "super-duper priority" for governmental entities. Wise, *supra*, at 4, col. 1. Those opposed to granting the stay, on the other hand, contend that such an outcome would create an "obvious loophole" and allow companies to "pass on their obligations to the taxpayer." *Id.*; see Schwenke & Lockett, *Superlien "Solutions" to Hazardous Waste: Bankruptcy Conflicts*, in AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ENVIRONMENTAL LAW, ENVTL. L., at 1, 1 (1983-1984). The costs of cleaning up hazardous wastes may fatally drain the resources of a company; thus "a confrontation is developing between . . . environmental requirements and other governmental policies protecting the bankrupt and its creditors." Schwenke & Lockett, *supra*, at 1; Schonholtz, *Seeking Shelter From Environmental Liabilities in the Bankruptcy Laws*, 8 CHEM. & RADIATION WASTE LITIGATION REP. 353, 353 (1984).

clean-up enforcement proceedings generally should not be deemed money judgments, and thus should not be stayed by the filing of a bankruptcy petition.

"POLICE OR REGULATORY POWER" UNDER THE
BANKRUPTCY CODE

Subsections 362(b)(4)-(5) exempt actions initiating or enforcing the police or regulatory powers of a governmental unit¹⁶ from the automatic stay.¹⁷ Such power has been defined broadly, encompassing a wide variety of conduct¹⁸ designed to protect economic interests¹⁹ or safeguard public health and safety.²⁰ This broad in-

¹⁶ See 11 U.S.C. § 101(21) (1982). Section 101 of the Bankruptcy Code defines a governmental unit as the:

United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

Id.

¹⁷ *Id.* § 362(b)(4)-(5); *supra* note 8 and accompanying text; see, e.g., *Commodity Futures Trading Comm'n v. Incomco, Inc.*, 649 F.2d 128, 133 (2d Cir. 1981) (commission proceeding to obtain equitable relief from debtor is action pursuant to police or regulatory power of governmental unit); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981) (action enforcing employment regulations is exercise of police or regulatory power); *Marshall v. Tauscher*, 7 Bankr. 918, 920 (Bankr. E.D. Wis. 1981) (penalties imposed for violation of child labor regulations constitute exercise of police or regulatory power).

"Police or regulatory power" has been interpreted as encompassing a wide variety of governmental activities over the years. Compare *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) (state authorization of dam across navigable creek upheld because would improve health of riparian inhabitants) with *In re Quinta Contractors, Inc.*, 34 Bankr. 129, 130 (Bankr. M.D. Pa. 1983) (government action against debtor intended to protect employees from sub-standard earnings). For a general discussion of police and regulatory actions falling within the scope of subsections 362(b)(4) and (5), see Johnson & O'Leary, *Automatic Stay Provisions of the Bankruptcy Act of 1978*, 13 N.M.L. REV. 599, 609-10 (1983).

¹⁸ See, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 206 n.17 (1983) (state regulates utilities pursuant to police and regulatory power); *In re Alessi*, 12 Bankr. 96, 98 (Bankr. N.D. Ill. 1981) (police and regulatory power permits state regulation of horse racing); *Commonwealth v. Peggs Run Coal Co.*, 55 Pa. Commw. 312, 318, 423 A.2d 765, 767 (1980) (Department of Environmental Resources regulation of coal production facility not subject to automatic stay).

¹⁹ See, e.g., *In re Greenwald*, 34 Bankr. 954, 957 (Bankr. S.D.N.Y. 1983) (action against debtor for reimbursement of medicaid overpayments); *In re Powell*, 27 Bankr. 146, 147 (Bankr. W.D. Mo. 1983) (NLRB award of back pay); *In re Heckler Land Dev. Corp.*, 15 Bankr. 856, 858 (Bankr. E.D. Pa. 1981) (action by township to collect debt).

²⁰ See, e.g., *In re Shippers Interstate Serv.*, 618 F.2d 9, 11-12 (7th Cir. 1980) (legislative history indicates environmental protection is valid exercise of police or regulatory power); *In re Lawson Burich Assocs.*, 31 Bankr. 604, 612 (Bankr. S.D.N.Y. 1983) (state health law enacted pursuant to regulatory power).

terpretation, however, has created a conflict between the goals of governmental police and regulatory powers and federal bankruptcy laws.²¹ Indeed, including every exercise of police and regulatory power within the exemption to the automatic stay would undermine the vitality of the bankruptcy laws.²²

Ensuring an equitable application of the exemption to the automatic stay requires that the term "police or regulatory power" be interpreted narrowly.²³ A narrow interpretation would encompass governmental activity designed to protect the environment and maintain public health and safety, but would exclude activity intended to protect pecuniary interests.²⁴ Exempting certain actions

²¹ See Wise, *supra* note 15, at 1, col. 3. The *Kovacs II* litigation represents the second time in 2 years that the Supreme Court has examined a conflict between the Bankruptcy Code and other state and federal laws. *Id.*; Schonholtz, *supra* note 15, at 353; Schwenke & Lockett, *supra* note 15, at 1.

The unilateral termination of a collective bargaining agreement by a bankruptcy trustee has unveiled a source of tension between the Bankruptcy Code and the National Labor Relations Act. See *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188, 1191 (1984); see also *In re Brada Miller Freight Sys., Inc.*, 702 F.2d 890, 894 (11th Cir. 1983) (despite union arguments, bankruptcy trustee unilaterally empowered to reject collective bargaining agreements with approval of court). For a general discussion of the clash between bankruptcy and labor law, see Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreement*, 80 MICH. L. REV. 134 (1981).

A clash between the language of the Social Security Act and the Bankruptcy Code led a number of bankruptcy courts to hold that a debtor may elect to include social security benefits in the property of his estate. See *In re Buren*, 6 Bankr. 744, 747-48 (M.D. Tenn. 1980), *rev'd*, 725 F.2d 1080 (6th Cir.), *cert. denied sub nom.* 105 S. Ct. 87 (1984). The Sixth Circuit, relying on an amendment to the Social Security Act, held that the Bankruptcy Code was never intended to allow bankruptcy courts to order social security benefits to be paid directly to the trustee. 725 F.2d at 1087.

²² See, e.g., *Missouri v. United States Bankr. Ct.*, 647 F.2d 768, 776 (8th Cir. 1981) (to be exempt, such power must relate to "health, welfare, morals, and safety," but not pecuniary interests in debtor's property), *cert. denied*, 454 U.S. 1162 (1982); *In re Gencarelli*, 14 Bankr. 751, 752-53 (Bankr. D.R.I. 1981) (statute regulating business hours of holder of liquor license not type of regulatory activity intended to be exempt from automatic stay).

²³ See 124 CONG. REC. H11089, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6436, 6444-45. Section 362(b)(4) should be narrowly construed so that governmental units can protect the public health and safety. *Id.* Remarks made during the congressional debates concerning § 362(b)(4) indicate that:

[t]his section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

Id. (statement of Rep. Edwards); see *Missouri v. United States Bankr. Ct.*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982); *In re Sampson*, 17 Bankr. 528, 530 (Bankr. D. Conn. 1982). *Contra Penn Terra*, 733 F.2d at 267 (§ 362(b)(4) should be construed broadly, and "no unnatural effort be made to limit its scope" (emphasis added)).

²⁴ See *Missouri v. United States Bankr. Ct.*, 647 F.2d 768, 776 (8th Cir. 1981), *cert.*

that seek to clean up toxic waste sites from the automatic stay provision would require the debtor to retain as much financial responsibility as possible for clean-up operations.²⁵ Thus, environmental protection would take precedence over the protections afforded the debtor by the Bankruptcy Code.²⁶ It is submitted that strong policy arguments exist for such an outcome.

denied, 454 U.S. 1162 (1982); *In re Alessi*, 12 Bankr. 96, 98 (Bankr. N.D. Ill. 1981); *see also In re Greenwald*, 34 Bankr. 954, 956-57 (Bankr. S.D.N.Y. 1983) (well established that if action against debtor relates mainly to pecuniary interests, § 362(b)(4) does not apply).

Historically, the power to regulate matters relating to health and safety has been reserved to the states. *Norfolk & W. Ry. Co. v. Pennsylvania Pub. Util. Comm'n*, 489 Pa. 109, 116, 413 A.2d 1037, 1041 (1980). The tenth amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONSR. amend. X. The regulatory or police power of a state may be subject to congressional limitation. 489 Pa. at 116, 413 A.2d at 1041. However, "historic police powers of the States were not to be superseded by . . . [federal activity] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Pursuant to the General Welfare Clause of the federal Constitution, U.S. CONSR. art. I, § 8, cl. 1, the federal government has begun to exercise its power in the area of environmental protection. *See National Environmental Policy Act of 1969*, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4361 (1982)). Section 101(a) of the NEPA provides:

The Congress, recognizing . . . the critical importance of restoring and maintaining the environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments . . . to create and maintain conditions under which man and nature can exist in productive harmony . . .

Pub. L. No. 91-190, § 101(a), 83 Stat. at 852. This federal activity has not superseded or preempted state environmental regulation. *See, e.g., In re Quanta Resources Corp.*, 739 F.2d 912, 913 (3d Cir. 1984) (state and federal laws govern storage of PCBs), *cert. granted sub nom. Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-801); *Exxon Corp. v. Hunt*, 97 N.J. 526, 543, 481 A.2d 271, 280-81 (1984) (in enacting Superfund, Congress anticipated cooperative arrangement between federal and state governments); *see also CERCLA*, 42 U.S.C. § 9604(c)(2) (1982) (President must consult with states before removing pollutant). *But see In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690, 705 (E.D.N.Y. 1984) ("comprehensive federal legislation has . . . taken [toxic substances] out of the domain of state regulation").

²⁵ *Cf. In re Quanta Resources Corp.*, 739 F.2d 912, 921-22 (3d Cir. 1984) (abandonment provision of Code does not allow substitution of governmental activity for debtor's responsibility to comply with environmental protection statutes), *cert. granted sub nom. Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-801). It is submitted that applying § 362(b) to clean-up orders will require the debtor to retain at least as much control over the property as is necessary to effect the clean-up procedure. *See* 11 U.S.C. § 362(b)(4) (1982); *supra* note 8.

²⁶ *See, e.g., Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 269 (3d Cir. 1984) (environmental interests require that automatic stay be vacated). Environmental concerns should also supersede the trustee's power to abandon the property of the bankrupt estate. *See In re Quanta Resources Corp.*, 739 F.2d 927, 929 (3d Cir. 1984), *cert. granted sub nom. Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-801).

GOVERNMENTAL INTERESTS IN ENVIRONMENTAL PROTECTION
OUTWEIGH INTERESTS ADVANCED BY BANKRUPTCY LAW

It is well settled that states have a compelling interest in protecting both the environment and the health of their citizens²⁷—an interest that undoubtedly encompasses safeguarding the environment and the populace from the egregious effects of toxic wastes.²⁸ Traditionally, state activity governing public health and safety has been considered beyond the scope of federal limitations absent a direct conflict between state and federal law.²⁹ Nonetheless, the ex-

²⁷ See *In re Quanta Resources Corp.*, 739 F.2d 912, 915 (3d Cir. 1984), cert. granted sub nom. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-801); *Penn Terra*, 733 F.2d at 269. States have enacted laws forbidding unregulated discharge of toxic substances into the environment to protect the public. *In re Quanta Resources Corp.*, 739 F.2d at 915. Some states have explicitly established a public policy promoting a healthful environment. See, e.g., ILL. CONST. art. 11, § 1 ("public policy of the state . . . to provide and maintain a healthful environment for the benefit of this and future generations"); LA. CONST. art. 9, § 1 (legislature shall enact laws to implement policy of preserving, protecting, and replenishing natural resources of state); TEX. CONST. art. 16, § 59 (conservation and development of natural resources are public rights and duties); see also N.Y. ENVTL. CONSERV. LAW § 27-0900, commentary at 582 (McKinney 1984) (New York adopted hazardous waste management title pursuant to Federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6986 (Supp. V 1981)).

Recent catastrophes involving hazardous waste sites have focused public and governmental attention on the great dangers that result when the environment is exposed to toxic wastes. See Ginsberg & Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859, 860 & n.3 (1981).

²⁸ See *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333, 1335 (D.P.R. 1979); *supra* note 20.

²⁹ See *Bradley v. Public Utils. Comm'n*, 289 U.S. 92, 95-96 (1933). In *Bradley*, a state commission denied the petitioner a certificate to operate a motor carrier on a heavily congested highway. *Id.* at 93-94. In upholding the state action, the Court concluded that if the purpose of the activity was to promote safety, and if its effects on interstate commerce were incidental, the activity would have been upheld. *Id.* at 95. Restraints on interstate commerce that create economic barriers between states, however, have been found to be unconstitutional. See, e.g., *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949) (condemning economic restraints on interstate commerce designed to create local economic advantages); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-22 (1935) (invalidating statute regulating milk prices).

In *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), a state regulation prohibited displaying advertisements on motor vehicles, unless the advertisements were for products of the vehicle's owner, *id.* at 107-08. The Court upheld the regulation, holding that "[w]here traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce." *Id.* at 111. These holdings are consistent with the Court's policy of "rebuff[ing] attempts of states to advance their own commercial interests . . . while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 535 (1949).

tent to which the state interest in environmental protection will triumph over the Bankruptcy Code and its policy of protecting debtors and creditors remains unclear,³⁰ and courts are required to perform a delicate balancing of the respective equities involved.³¹

The legislative history of the Bankruptcy Reform Act of 1978

The Supreme Court recently held that state interests in conservation and wildlife protection are also legitimate state purposes. See *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). Such interests are compelling enough to avoid Commerce Clause limitations. *Id.* The power of a state to regulate the use of water during periods of shortage "for the purpose of protecting the health of its citizens, and not simply the health of the economy, is at the core of its police power." *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956 (1982). Thus, state regulation of the uses of natural resources such as water will be sustained provided it does not conflict with any national interest as to the particular use. See Comment, *Sporhase, the Commerce Clause, and State Power to Conserve Natural Resources—Is the Local Well Running Dry?*, 14 ST. MARY'S L.J. 1033, 1033-35 (1983); see also Frank & Eckhard, *Power of Congress Under the Property Clause to Give Extraterritorial Effect to Federal Lands Law: Will "Respecting Property" Go the Way of "Affecting Commerce"?*, 15 NAT. RESOURCES LAW. 663, 672 & n.66 (1983) (states may exercise police power so long as it is consistent with federal law). It is suggested that the foregoing principles militate in favor of giving priority to environmental protection concerns when applied to the conflict between environmental protection and federal bankruptcy interests.

³⁰ See *supra* note 15 and accompanying text. The Supreme Court determined that the judgment against Kovacs constituted a "claim," see *Ohio v. Kovacs*, 105 S. Ct. 705, 708-10, (1985), and, therefore, the argument that the *Kovacs I* decision is moot has been rejected, see Brief of Petitioner at 2, *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983), *aff'd*, 105 S. Ct. 705 (1985). Thus, the Sixth Circuit still must consider the stay issue presented in *Kovacs I*, see 105 S. Ct. at 707 n.2, and the vacated decision seems to indicate a willingness to favor bankruptcy interests over environmental protection interests. See 681 F.2d at 456.

³¹ *Cf.* *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 768-69 (1945) (when state regulation of local concerns also operates as regulation of interstate commerce, Court must balance competing state and federal interests). In *Southern Pacific*, the issue presented was whether a state statute regulating the length of trains traveling across state boundaries violated the Commerce Clause. See *id.* at 763. Concluding that the national interest in an efficient, economic railway system outweighed the state interest in safety, the Court invalidated the Arizona statute. *Id.* at 783-84. The Court balanced the conflicting interests by examining whether "the total effect of the law as a safety measure" sufficiently "outweigh[ed] the [conflicting] national interest." *Id.* at 775-76.

To survive Commerce Clause scrutiny, a state must show that significant interests will be served by the challenged safety measure. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981); see also *Raymond Motor Transp. v. Rice*, 434 U.S. 429, 449 (1978) (Blackmun, J., concurring) ("if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce").

Even such a broad federal power base as the Commerce Clause, however, can be limited by a valid state exercise of its police or regulatory powers. See *Raymond*, 434 U.S. at 443. Since state environmental protection statutes fall within the ambit of the police or regulatory power of a state, *Penn Terra*, 733 F.2d at 274; *supra* notes 27-28 and accompanying text, and since such statutes can survive challenge under the Commerce Clause, see *supra* note 29, it is suggested that these state regulations should survive a clash with a less significant federal powerbase; namely, federal jurisdiction over bankruptcy.

states that actions aimed at preventing or halting violations of environmental protection laws were intended to fall within the exemption to the automatic stay.³² This statement of congressional intent and the express requirement that section 362(b) be read narrowly³³ illustrate that the legislature intended certain governmental activities, particularly those aimed at preserving the environment, to prevail over the protections afforded the debtor under the Bankruptcy Code.³⁴ Therefore, it is suggested that allowing the automatic stay provision to encompass a pre-petition judgment requiring a corporation to comply with state environmental protection statutes is inconsistent with legislative intent.

State interests in environmental protection are complemented by strong federal concerns over protecting the environment and public health.³⁵ Extensive federal guidelines regulating private use

³² See S. REP. NO. 989, *supra* note 2, at 5838; H.R. REP. NO. 595, *supra* note 3, at 6299. "[W]here a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, or similar police or regulatory laws, . . . the action or proceeding is not stayed under the automatic stay." S. REP. NO. 989, *supra* note 2, at 5838; H.R. REP. NO. 595, *supra* note 3, at 6299; see also *Penn Terra*, 733 F.2d at 274 (state attempt to enforce order is obvious exercise of police power, and, therefore, exempt from stay).

³³ 124 CONG. REC. H11089, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6436, 6444-45; see *supra* note 23 and accompanying text.

³⁴ See *In re Quanta Resources Corp.*, 739 F.2d 912, 915-16 (3d Cir. 1984), *cert. granted sub nom. Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 53 U.S.L.W. 3579 (U.S. Feb. 19, 1985) (No. 84-801). There is no indication that Congress intended rights created by the Bankruptcy Code to be unrestricted by health and safety regulations. See *id.* However, there is evidence indicating that "Congress did *not* intend the bankruptcy scheme generally to abrogate the enforcement of state police power regulations . . ." *Id.* at 918 (emphasis added); see also *In re Quanta Resources Corp.*, 739 F.2d 927, 929 (3d Cir. 1984) (equities must favor interest of public in controlling hazardous wastes over trustee's interest in preserving debtor's estate), *cert. granted sub nom., Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-801).

In re Canarico Quarries, Inc., 466 F. Supp. 1333 (D.P.R. 1979), decided prior to the effective date of the Bankruptcy Reform Act of 1978, illustrates the foregoing principles under the prior bankruptcy law. See *id.* at 1339. Relying on the 1978 Act as persuasive authority, the *Canarico* court ruled that congressional intent indicates that environmental quality should not be superseded by economic considerations. 466 F. Supp. at 1336-39. Indeed, Congress has stated expressly that actions pursuant to the police or regulatory power should not be restrained by the protections afforded a debtor under the Code, and that this applies to both state and federal governmental units. S. REP. NO. 989, *supra* note 2, at 5838; H.R. REP. NO. 595, *supra* note 3, at 6299; see *supra* note 32 and accompanying text.

³⁵ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 852 (1970). The purpose of the Act is to declare a national policy encouraging "productive and enjoyable harmony between man and his environment" and to "stimulate the health and welfare of man." *Id.*; see also *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm.*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (NEPA "makes environmental protection a part of the mandate of every federal agency and department"). The conflict encoun-

of the environment and various statutes seeking to conserve natural resources have been enacted in the past two decades.³⁶ Congressional authority to legislate in the area of environmental protection arises under both the Commerce Clause³⁷ and the General Welfare Clause³⁸ of the Constitution.³⁹ Just as state actions to ensure public health and safety have been upheld despite competing federal interests,⁴⁰ so too federal health and safety measures generally

tered in the *Penn Terra* and *Kovacs I* disputes applies to both state and federal actions to enforce obligations to clean up waste sites. Brief for the United States as Amicus Curiae Supporting Petitioner at 2, *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983), *aff'd*, 105 S. Ct. 705 (1985); see also *Illinois v. Electrical Util.*, 41 Bankr. 874, 875 (N.D. Ill. 1984) (court must decide whether stay precludes continuation of action for violation of federal act); *United States v. Johns-Manville Sales Corp.*, 19 Env't Rep. Cas. (BNA) 1177, 1178 (D.N.H. 1982) (government contended that relief sought for violation of federal statutes should be exempt from stay).

³⁶ See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 2767 (codified at 42 U.S.C. §§ 9601-9657 (1982)) (response to hazardous wastes released into environment); Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, 816 (codified at 33 U.S.C. §§ 1251-1281 (1982)) (to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters") (amending Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155 (1948)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795, 2795 (codified at 42 U.S.C. §§ 6901-6986 (Supp. V. 1981)) (to regulate management of hazardous waste); Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003, 2003 (1976) (codified at 15 U.S.C. §§ 2601-2629 (1982)) (to regulate commerce and protect human health and environment by restricting certain chemical substances); see also *United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982); *United States v. Solvents Recovery Serv. of New England*, 496 F. Supp. 1127, 1136 (D. Conn. 1980). Construing § 7003 of the Resource Conservation and Recovery Act (RCRA), the *Price* court concluded that the United States may seek injunctive relief whenever it "receives evidence that the handling, storage, treatment, transportation or disposal of hazardous wastes may present an 'imminent and substantial endangerment to health or the environment.'" 688 F.2d at 208. The court concluded that Congress, by enacting such a provision, intended to "invoke nothing less than the full equity powers of the federal courts in the effort to protect public health [and] the environment . . . from the pernicious effects of toxic wastes." *Id.* at 214.

³⁷ U.S. CONST. art. I, § 8, cl. 3.

³⁸ U.S. CONST. art. I, § 8, cl. 1.

³⁹ See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281-83 (1980) (Commerce Clause empowers Congress to regulate activities causing environmental hazards); *City of Gallatin v. Cherokee County*, 563 F. Supp. 940, 943 (E.D. Tex. 1983) (congressional authority exists for RCRA under Commerce Clause because hazardous waste likely to be transported among different states) (quoting H.R. REP. NO. 1491, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6238, 6247).

Courts have implicitly recognized that congressional authorization for the National Environmental Policy Act (NEPA) stems from the General Welfare Clause. See, e.g., *Noe v. Metropolitan Atlanta Rapid Transit Auth.*, 644 F.2d 434, 438 (5th Cir.), *cert. denied*, 454 U.S. 1126 (1981); *Crosby v. Young*, 512 F. Supp. 1363, 1387-88 (E.D. Mich. 1981).

⁴⁰ See *supra* note 29 and accompanying text.

have triumphed over competing areas of federal law.⁴¹ This fact, it is suggested, lends support to the proposition that the federal interest in protecting the national environment should supersede the interests protected by the Code. Two recent cases addressing the conflicts between bankruptcy and environmental protection statutes support this proposition.⁴²

*In re Quanta Resources Corp.*⁴³ involved a conflict over a storage site containing fuel tanks contaminated with polychlorinated biphenyls (PCBs).⁴⁴ The trustee of Quanta, who was already in violation of an order requiring clean up of the facility,⁴⁵ sought to abandon the property under section 554 of the Bankruptcy Code.⁴⁶ Despite objections by the State of New York, the district court affirmed the bankruptcy court's grant of an order permitting the abandonment.⁴⁷ New York subsequently appealed to the Court of Appeals for the Third Circuit.⁴⁸ The Third Circuit reversed, holding that the bankruptcy act does not permit abandonment of the property of a bankrupt estate in violation of state environmental law.⁴⁹ The court determined that "Congress did not intend the bankruptcy scheme generally to abrogate the enforcement of state police power regulations."⁵⁰ Balancing the purposes of bankruptcy

⁴¹ See, e.g., *In re Canarico Quarries, Inc.*, 466 F. Supp. 1333, 1339-40 (D.P.R. 1979) (interest in enforcing Federal Clean Air Act outweighs bankruptcy court's order authorizing debtor's operation of its business); cf. *SEC v. First Fin. Group of Texas*, 645 F.2d 429, 438 (5th Cir. 1981) (civil action brought by SEC against debtor not stayed by bankruptcy code).

⁴² See *In re Quanta Resources Corp.*, 739 F.2d 912 (3d Cir. 1984), cert. granted sub nom. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-801); *Illinois v. Electrical Util.*, 41 Bankr. 874 (N.D. Ill. 1984).

⁴³ 739 F.2d 912 (3d Cir. 1984), cert. granted sub nom. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985) (No. 84-801).

⁴⁴ 739 F.2d at 913. The Quanta waste site contained approximately 500,000 gallons of waste chemicals, and at least 70,000 gallons of these chemicals were contaminated with PCBs. *Id.* PCBs are hazardous, toxic chemicals, and both their storage and use is subject to an array of regulations. *Id.* & n.1.

⁴⁵ See *id.* at n.2.

⁴⁶ See *id.* Section 554(a) of the Bankruptcy Code provides:

(a) 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 to the estate.

11 U.S.C. § 554(a) (1984).

⁴⁷ See 739 F.2d at 914. Alleging that abandonment would create a substantial danger to public health and safety, New York requested that permission to abandon be denied until the toxic wastes were properly removed from the site. *Id.* New York also requested a lien on the property with respect to any monies that the state might expend to clean up the site. *Id.*

⁴⁸ See *id.*

⁴⁹ See *id.* at 921-22.

⁵⁰ See *id.* at 918. The *Quanta* court noted that Congress expressly provided for exceptions to the automatic stay. *Id.*; see *supra* notes 31-32 and accompanying text. Examining 28

law and environmental protection laws, the Third Circuit concluded that the interests served by environmental protection laws are superior.⁵¹

The court reasoned that “[i]f trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default.”⁵² It is submitted that permitting a bankrupt corporation to stay the enforcement of injunctive relief requiring it to remove toxic waste would result in harm similar to that feared by the Third Circuit in *Quanta*;⁵³ in both situations the toxic material would continue to pollute and damage the environment.⁵⁴

*Illinois v. Electrical Utilities*⁵⁵ is factually similar to *Penn Terra*.⁵⁶ In *Electrical Utilities*, the state of Illinois charged the de-

U.S.C. § 959(b) (1982), which provides that trustees should manage and operate the property pursuant to the laws of the state in which the property is located, *id.*, the court determined that the general congressional scheme of the Bankruptcy Code was not intended to subordinate state and local regulatory laws, 739 F.2d at 919. Finally, the court noted that bankruptcy courts are courts of equity with authority to apply equitable principles to the extent that such principles are consistent with bankruptcy law. *Id.* at 920-21; *see Stuhley v. Hyatt*, 667 F.2d 807, 809 (9th Cir. 1982); *In re Huntington Ltd.*, 654 F.2d 578, 589-90 (9th Cir. 1981); *In re Ponteri*, 31 Bankr. 859, 863 (Bankr. D.N.J. 1983).

⁵¹ *See* 739 F.2d at 921.

⁵² *See id.* at 921. The court in *Quanta* found no basis for the proposition that the Bankruptcy Code was intended to permit debtors to substitute governmental clean-up programs for citizen compliance with environmental protection statutes. *Id.* at 921-22.

⁵³ *See id.* at 921-22.

⁵⁴ *See supra* note 27 & *infra* notes 98-99 and accompanying text. A diagnostic study of the health threat posed by hazardous substances is “intended to be the first step in the remedial process of abating an existing but growing toxic hazard which, if left unchecked, [would] result in even graver future injury.” *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982). Merely requiring the termination of pollution-generating activity will not prevent the dissemination of hazardous substances throughout the environment. Therefore, “effective public protection . . . requires clean-up or containment of the pollution.” Brief for the United States as Amicus Curiae Supporting Petitioner at 14 n.13, *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983), *aff'd*, 105 S. Ct. 705 (1985).

⁵⁵ 41 Bankr. 874 (N.D. Ill. 1984).

⁵⁶ Compare *Electrical Utilities*, 41 Bankr. at 875 (defendant filed for bankruptcy after being charged with dumping PCBs) with *Penn Terra*, 733 F.2d at 269-70 (Penn Terra filed for bankruptcy after state environmental protection agency found Penn Terra’s mining operation to be violation). In both *Electrical Utilities* and *Penn Terra*, the corporation was charged with violating environmental protection statutes. *See* 41 Bankr. at 875; *Penn Terra*, 733 F.2d at 269. However, in *Penn Terra*, a consent order and agreement was signed by the corporation, 733 F.2d at 269, whereas no such order was obtained in *Electrical Utilities*, 41 Bankr. at 875. Moreover, the two cases are procedurally distinguishable; in *Penn Terra*, injunctive relief was sought after the bankruptcy petition was filed, 733 F.2d at 270, while in *Electrical Utilities*, injunctive relief was sought before filing of the petition, 41 Bankr. at 875. Nevertheless, this procedural distinction is of no effect, since § 362(b)(4)-(5) of the

feudant corporation with dumping PCBs in violation of the Toxic Substances Control Act.⁵⁷ The state sought to enjoin Electrical Utilities from further PCB disposal and to require the company to remove the PCBs previously dumped.⁵⁸ After initiation of the suit, but before judgment was rendered, the corporation filed a petition in bankruptcy.⁵⁹ The court requested that the parties brief the issue of whether the proceeding should be stayed pursuant to 11 U.S.C. § 362(a),⁶⁰ and subsequently concluded that the action would not be subject to the automatic stay.⁶¹ Examining the legislative history of the Bankruptcy Code, the court noted that section 362(b)(4) "insulates states from the automatic stay provision[s] when they attempt to protect their citizens from environmental hazards."⁶² The court determined that an exception to the automatic stay provision in such a situation permits the state to clean up existing toxic waste while preventing further pollution.⁶³

"MONEY JUDGMENT" UNDER SECTION 362(b)(5)

Section 362(b)(5), which extends the relief provided in section 362(b)(4) to enforcement proceedings,⁶⁴ specifically excludes the enforcement of a money judgment from its scope,⁶⁵ thus creating an "exception to the exception."⁶⁶ Consequently, debtors seeking to avoid liability for violations of environmental protection laws

Bankruptcy Code covers both situations. See 11 U.S.C. § 362(b)(4)-(5) (1982).

⁵⁷ 41 Bankr. at 875; see 15 U.S.C. §§ 2601-2629 (1982).

⁵⁸ 41 Bankr. at 875. In addition to asking for the proper disposal of the PCBs, the state of Illinois also requested that Electrical Utilities pay the costs of the action and any costs incurred by the state for study and investigation of the PCB contamination at the dump site. *Id.*

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.* at 875, 877.

⁶² See *id.* at 875-76; S. REP. NO. 989, *supra* note 2, at 5838; H.R. REP. NO. 595, *supra* note 3, at 6299.

⁶³ 41 Bankr. at 876.

⁶⁴ See 11 U.S.C. § 362(b)(5) (1982); *supra* note 8. Subsection (5) of § 362(b) extends the exemptions of subsection (4) to include the enforcement of judgments obtained pursuant to the police or regulatory power of a state. Compare 11 U.S.C. § 362(b)(4) (1982) (denying automatic stay when governmental unit commences or continues action) with 11 U.S.C. § 362(b)(5) (1982) (denying automatic stays for government enforcement proceedings other than proceeding to enforce money judgment).

⁶⁵ See 11 U.S.C. § 362(b)(5) (1982).

⁶⁶ See *Penn Terra*, 733 F.2d at 273. The *Penn Terra* court favored a narrow reading of the money judgment exception to the police or regulatory power exemption from the automatic stay. *Id.*

have asserted that an action by a governmental unit seeking to enforce a clean-up order should be classified as an attempt to enforce a money judgment.⁶⁷ Determining whether any action or proceeding is aimed at enforcing a "money judgment" must begin with an examination of the form of the judgment sought.⁶⁸

Noting the absence of a definition of "money judgment" in the Bankruptcy Code, the Third Circuit, in *Penn Terra*, followed the axiom of statutory construction that words, unless otherwise defined, should be given their ordinary and traditional meaning.⁶⁹ The critical element of a money judgment generally has been the designation of a definite and certain sum.⁷⁰ Determining that the judgment against *Penn Terra* did not direct the payment of money to the state, the court concluded that on its face the original judgment ordering the clean up was not a money judgment.⁷¹ *Penn Terra*, however, argued that although the judgment did not direct

⁶⁷ See, e.g., *Penn Terra*, 733 F.2d at 275 (debtor asserted that suit by government was in substance an action to enforce money judgment); *In re Kovacs (Kovacs I)*, 681 F.2d 454, 456 (6th Cir. 1982) (order of government cannot be distinguished from money judgment), *vacated and remanded*, 103 S. Ct. 810 (1983); *Illinois v. Electrical Utils.*, 41 Bankr. 874, 877 (N.D. Ill. 1984) (debtor argued that suit was nothing more than attempt to get money judgment); *United States v. Johns-Manville Sales Corp.*, 18 Env't Rep. Cas. (BNA) 1177, 1178 (D.N.H. 1982) (Manville argued that government sought expenditure of funds, not injunction). Clean-up orders must be closely scrutinized to prevent artful pleading by the government that defeats the legislative intent to stay all actions that are, in fact or substance, money judgments. See *Penn Terra*, 733 F.2d at 275; *Kovacs I*, 681 F.2d at 456; *Electrical Utilities*, 41 Bankr. at 877 n.2; *Johns-Manville*, 18 Env't Rep. Cas. (BNA) at 1179.

⁶⁸ See *Penn Terra*, 733 F.2d at 274-75.

⁶⁹ See *id.*; see also *Perrin v. United States*, 444 U.S. 37, 42-43 (1979) (fundamental canon of statutory construction is to give words ordinary, contemporary meaning, unless otherwise defined); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975) (words to be given ordinary meaning in absence of persuasive reasons to contrary). The *Penn Terra* court looked to legal custom and practice to determine the traditional understanding of the recovery of money damages. 733 F.2d at 275.

⁷⁰ 733 F.2d at 275. Federal courts generally have defined a money judgment as an order to pay a sum certain, and have excluded orders to perform a specified act. See, e.g., *Kohn v. American Metal Climax, Inc.*, 322 F. Supp. 1331, 1367 (E.D. Pa. 1971), *cert. denied*, 409 U.S. 874 (1972); *Harris v. United States*, 204 F. Supp. 228, 229 (D. Mass.), *aff'd*, 308 F.2d 573 (1st Cir. 1962); *Terry v. United States*, 101 F. Supp. 165, 166 (Ct. Cl. 1951) (*per curiam*); see also BLACK'S LAW DICTIONARY 907 (5th ed. 1979) (money judgment an order "to pay a sum of money in contrast to a decree or judgment of equity in which the court orders some other type of relief"). A second, less relevant, aspect of a money judgment, as recognized by the court in *Penn Terra*, is that the parties involved be identifiable. 733 F.2d at 275.

⁷¹ See 733 F.2d at 275. The Third Circuit concluded that the action against *Penn Terra* "could not have resulted even in the mere entry of a money judgment." *Id.* The court reasoned that the proceeding against *Penn Terra* could not have led to "the adjudication of liability for a sum certain" and thus the essential element of a money judgment was missing. See *id.*

the payment of money, such would be the practical effect of its enforcement and, thus, the judgment was in substance a money judgment.⁷² It is submitted, however, that a proper interpretation of the term "money judgment" requires that three factors be analyzed: the nature of the injury, the purpose of the relief sought, and the method of effecting that relief.

At times it is difficult to distinguish between the nature of the injury and the purpose of the relief.⁷³ Attempting to determine whether a pre-petition judgment ordering the debtor to clean up the waste site was in substance a money judgment, the Third Circuit stated that the analysis must focus on the nature of the injuries that the judgment was intended to remedy.⁷⁴ When discussing the nature of the injuries, the court stated that an important factor in the determination is whether the remedy would compensate for injuries already suffered, or protect against potential future harm.⁷⁵ It is suggested, however, that the Third Circuit was actually focusing on the purpose of the relief rather than the nature of the injury.⁷⁶ The "nature of the injury" refers to the type of harm actually suffered by a party,⁷⁷ whether it consists of injury to the

⁷² See *id.* The Third Circuit conceded that an examination of only the form of the judgment could possibly lead to circumvention of the legislative intent behind the stay. See *id.* at 275-76; cf. *In re Kovacs*, 681 F.2d 454, 455-56 (6th Cir. 1982) (enforcement action against debtor not different in substance from attempt to enforce money judgment), *vacated and remanded*, 103 S. Ct. 810 (1983). But see *Illinois v. Electrical Utils.*, 41 Bankr. 874, 877 (N.D. Ill. 1984) (substance of governmental action not merely an attempt to obtain money judgment).

⁷³ See 733 F.2d at 275-78.

⁷⁴ See *id.* at 278. The bankruptcy court, ruling in favor of the debtor, had concluded that a money judgment was any judgment requiring the expenditure of money. See *In re Penn Terra Ltd.*, 24 Bankr. 427, 433 (Bankr. W.D. Pa. 1982), *rev'd*, *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267 (3d Cir. 1984). On appeal, the Third Circuit rejected this interpretation as unduly expansive. 733 F.2d at 277. The Third Circuit concluded that almost all injunctions require that money be spent, and an injunction that does not require some expenditure "may often be an effective nullity." *Id.* at 277-78.

⁷⁵ See 733 F.2d at 276-77. The Third Circuit determined that any action seeking to "prevent culpable conduct *in futuro*" normally would not be construed as an action for a money judgment. *Id.* at 277. The court concluded that "the very nature of injunctive relief is that it addresses injuries which may not be compensated by money." *Id.*

⁷⁶ Cf. *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982) ("[d]amages are awarded as a form of substantial redress . . . [and] are intended to compensate a party for an injury suffered or other loss"). The *Penn Terra* court may have mislabelled the distinction between compensation for past damages and the prevention of future harm as relating to the nature of the injury, rather than relating to the purpose of the relief. Compare *Penn Terra*, 733 F.2d at 278 (compensation/prevention distinction relates to nature of injury) with *Price*, 688 F.2d at 212 (compensation/prevention distinction concerns purpose of relief).

⁷⁷ See, e.g., *Raphael J. Musicus, Inc. v. Safeway Stores, Inc.*, 743 F.2d 503, 508 (7th Cir.

person,⁷⁸ the deprivation of a right,⁷⁹ or a definite monetary loss.⁸⁰ Determining the nature of the injury, however, is not always conclusive in ascertaining whether the relief is properly categorized as a money judgment.⁸¹

Considering the second element of this proposed analysis, relief generally can be granted for either a compensatory or a preventive purpose.⁸² Compensatory relief is granted to make a party whole by compensating for any loss that may have been sustained.⁸³ Preventive relief, however, is aimed at precluding future

1984) (plaintiff injured by defendant's alleged breach of contract); *Chicago, St. P., M. & O. Ry. v. Pender Drainage Dist.*, 183 F.2d 773, 773 (8th Cir. 1950) (per curiam) (plaintiff harmed by alleged taking and damaging of right of way); *Moore v. Carney*, 84 Mich. App. 399, 406, 269 N.W.2d 614, 617 (1978) (oppressive acts of defendant resulted in plaintiff losing corporate office); see also BLACK'S LAW DICTIONARY 706 (5th ed. 1979) (injury is "[a]ny wrong or damage done to another, either in his person, rights, . . . or property").

⁷⁸ See, e.g., *Anderson v. Sears, Roebuck & Co.*, 377 F. Supp. 136, 138 (E.D. La. 1974). In *Anderson*, a child was almost burned to death in a fire that ravaged her home. See *id.* Severe scarring led to great limitations on mobility and use of the child's extremities. *Id.*; see also *Herman v. Welland Chem., Ltd.*, 580 F. Supp. 823, 825 (M.D. Pa. 1984) (plaintiff sustained severe physical injury after being struck by automobile); *Tindall v. Moore*, 417 F. Supp. 548, 550-51 (N.D. Ga. 1976) (plaintiff's index finger mutilated by malfunctioning machine).

⁷⁹ See, e.g., *Davis v. Fowler*, 504 F. Supp. 502, 506 (D. Md. 1980). In *Fowler*, authorities seized some of the plaintiff's property during a valid search and refused to return it to him. See *id.* at 504. The court ruled that under the fourteenth amendment the plaintiff had been deprived of property without due process of law. See *id.* at 505-06.

⁸⁰ See, e.g., *Caesars World, Inc. v. Venus Lounge, Inc.*, 520 F.2d 269, 271 (3d Cir. 1975) (plaintiff suffered economic loss due to infringement of service mark); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 431-32 (Tenn. 1982) (monetary loss includes property damages and out-of-pocket expenses).

⁸¹ Compare, e.g., *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431, 431-32 (money damages for contamination of water supply) with *Davis v. Fowler*, 504 F. Supp. 502, 506 (D. Md. 1980) (injunctive relief for deprivation of rights).

⁸² See *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982); see also *Carter v. Orleans Parish Pub. Schools*, 725 F.2d 261, 263 (5th Cir. 1984) (correction of falsified records is equitable remedy intended to prevent future harm); *Noerr Motor Freight, Inc. v. Eastern R.R. Presidents Conference*, 166 F. Supp. 163, 168 (E.D. Pa. 1958) (injunctive relief under antitrust laws designed to prevent repetition of unlawful practices), *aff'd*, 273 F.2d 218 (1959), *rev'd on other grounds*, 365 U.S. 127 (1961); *Robison, The Confidence Game: An Approach to the Law About Trade Secrets*, 25 ARIZ. L. REV. 347, 357 (1983) (plaintiff in trade secret litigation has choice of preventive or compensatory relief).

⁸³ See H. OLECK, DAMAGES TO PERSONS AND PROPERTY § 12, at 22 (1961). Referring to "actual" damages as "compensatory" damages, Oleck defines them as the expenses that are "the natural and reasonable result of an injury or loss." See *id.* Actual damages are those that "suffice to restore the injured party." *Id.* at 23; see also *Atchison, T. & S.F. Ry. v. Jarboe Livestock Comm'n*, 159 F.2d 527, 530 (10th Cir. 1947) (theory behind money damages is compensation of losses); D. DOBBS, REMEDIES § 3.1, at 135 (1973) (money judgment intended to make up for loss suffered by plaintiff). Theoretically, compensatory relief should be commensurate with the harm; the intent of such relief is to place the injured party in the

injury or harm, and in cases in which such relief is appropriate, mere money judgments cannot furnish adequate relief.⁸⁴

The method chosen to effect relief will be derived from an analysis of the nature of the injury and the purpose for granting relief.⁸⁵ When a party has suffered some definite loss, and the purpose of the relief is to compensate that party, payment of a definite sum of money will often suffice.⁸⁶ However, when there is a threat of indefinite harm not readily convertible into a monetary amount, and the purpose of relief is to prevent such harm, injunctive relief is often the best remedy.⁸⁷ Injunctive relief often calls

same position in which he would have been had the injury not occurred. H. OLECK, *supra*, § 80, at 59.

⁸⁴ See *Penn Terra*, 733 F.2d at 276-78. The Third Circuit referred to preventive relief as relief that would "protect against potential future harm." *Id.* at 277 (emphasis in original); see also *Home Placement Serv., Inc. v. Providence Journal Co.*, 573 F. Supp. 1423, 1428 (D.R.I. 1983) ("sole function of . . . injunction . . . to forestall future violation") (quoting *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 333 (1952)), *aff'd in part, rev'd in part*, 739 F.2d 671 (1st Cir. 1984), *cert. denied*, 105 S. Ct. 964 (1985). Preventive relief, involving preliminary and permanent injunctions, requires the consideration of whether the present circumstances, if left unchanged, will result in serious irreparable harm. See *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 518 (3d Cir. 1976); *Goldhaber v. Foley*, 519 F. Supp. 466, 473 (E.D. Pa. 1981). Section 2 of the Solid Waste Disposal Act, see 42 U.S.C. § 6973(a) (1982), allowing for abatement of environmental hazards caused by the dumping of toxic substances into the environment, has been construed as providing injunctive as opposed to compensatory relief, see *United States v. Diamond Shamrock Corp.*, 17 Env't Rep. Cas. (BNA) 1329, 1334 (N.D. Ohio 1981); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870, 887-88 (E.D. Ark. 1980).

⁸⁵ See *infra* notes 87-90 and accompanying text.

⁸⁶ See *Brown, The Law/Equity Dichotomy in Maryland*, 39 Md. L. Rev. 427, 433 (1980). When damages will remedy the plaintiff's injury adequately, the relief will be limited to damages, and injunctive relief will not be available. See *id.* at 432-33; see also D. DOBBS, *supra* note 83, § 2.5, at 57 (equitable relief denied unless plaintiff's remedy at law inadequate). If the object injured can be valued and replaced, the plaintiff's remedy is for a money judgment. *Brown, supra*, at 433 n.45; see, e.g., *Miener v. Missouri*, 673 F.2d 969, 982 (8th Cir.) (compensatory relief measurable based on past educational deprivation, but would not ensure future compliance), *cert. denied*, 459 U.S. 909 (1982); *Schiff v. Williams*, 519 F.2d 257, 262 (5th Cir.) (award of backpay for past earnings a money judgment), *cert. denied sub nom.* 423 U.S. 834 (1975); *Caesars World, Inc. v. Venus Lounge, Inc.*, 520 F.2d 269, 274 (3d Cir. 1975) (monetary relief will be granted only with evidence of actual damage).

⁸⁷ See *Rendleman, The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 U. FLA. L. REV. 346, 346 (1981). Injunctive relief will be granted when the plaintiff can establish the inadequacy of a monetary remedy. *Id.* Damages have been deemed inadequate when it would be practically impossible to determine them adequately. *Brown, supra* note 86, at 433. When exercise of or forbearance from particular conduct is the goal of the relief, courts generally will order an injunction. See *Rendleman, supra*, at 346. In some cases, however, courts will exercise equity jurisdiction when a remedy at law exists, but is insufficient or uncertain. See *Brown, supra* note 86, at 428 & nn.8-9.

In *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965), the defendants sought to prevent black citizens of Louisiana from exercising their

for some affirmative action by the party against whom the relief is sought.⁸⁸ Although some injunctive relief requires the expenditure of money for execution, this is not enough to classify the relief as a "money judgment."⁸⁹

civil rights, *id.* at 334. The defendants relied on intimidation, systematic economic coercion, and physical violence. *Id.* In bringing actions, the federal government attempted not to compensate the black victims for the injuries suffered as a result of the racial discrimination, but to prevent further discrimination and coercion. *See id.* at 334-36. Consequently, the court enjoined the defendants from further interference with the rights of the black citizens, *id.* at 335, and expressly recognized both the inadequacy of monetary damages and the necessity of injunctive relief, *id.* at 349-50. Finally, the court concluded that effective protection against further acts of violence and intimidation committed by the defendants could be accomplished only by broad injunctive relief. *Id.* at 356; *see also* *Commodity Futures Trading Comm'n v. Crown Colony Commodity Options Ltd.*, 434 F. Supp. 911, 911 n.2 (S.D.N.Y. 1977) (injunction intended to prevent future wrongs); *Stuthman v. Lippert*, 205 Neb. 302, 304, 287 N.W.2d 80, 82 (1980) (purpose of injunction "preventive, protective and prohibitory"). In *Stuthman*, the court denied injunctive relief because the alleged wrongful activities had ceased and were not likely to resume. *Id.* at 305, 287 N.W.2d at 82. The plaintiff was not precluded from seeking injunctive relief, however, should any future violations occur. *Id.*

When toxic wastes are dumped into the environment, the prospective harm to people and the environment will not be abated absent a clean up of the wastes, even if actual dumping has ceased. *See, e.g.*, *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 338 n.5 (4th Cir. 1983) (risk of contamination exists from undisclosed barrels or waste residues); *see also* Brief of Petitioner at 43, *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983), *aff'd*, 105 S. Ct. 705 (1985) (abatement of hazard necessary to prevent serious harm in the future); *Ginsberg & Weiss, supra* note 27, at 861-63 (toxic wastes left in environment create risk of further harm).

⁸⁸ *See* D. DOBBS, *supra* note 83, § 2.10, at 105. Injunctions order the defendant either to act or not to act in a designated manner. *See, e.g.*, *Penn Terra*, 733 F.2d at 269 & n.2, 278 (order required backfilling and erosion control to preserve environment and rectify safety hazard); *see* D. DOBBS, *supra* note 83, §§ 1.1 at 2, 2.10 at 105.

⁸⁹ *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974) (when states prohibited from denying welfare benefits to otherwise qualified alien recipients, "fiscal consequences to state treasuries . . . were the necessary result of compliance with decrees which by their terms were prospective in nature"); *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982) (payment or expenditure of money does not foreclose possibility of equitable relief); *ICC v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 914 (8th Cir. 1974) (in railroad situations, where operation is physically impossible without substantial expenditures, issuance of injunction is an equitable determination), *cert. denied*, 420 U.S. 972 (1975); *see also* *Tustin v. Heckler*, 591 F. Supp. 1049, 1056 (D.N.J.) (equitable relief not prohibited because expenditure of money required), *vacated in part*, 749 F.2d 1055 (3d Cir. 1984). The *Price* court relied on a balancing test to determine whether the injunctive relief was warranted. 688 F.2d at 211, 213. The court considered four factors: (1) whether there is a likelihood that the plaintiff will succeed on the merits; (2) whether the plaintiff will suffer irreparable injury if injunctive relief is not granted; (3) whether the threatened injury to the plaintiff outweighs the harm that will result to the other party if relief is granted; and (4) whether granting relief is in the public interest. *Id.* at 211; *Esquibel v. Torvik*, 571 F. Supp. 732, 733 (D. Wyo. 1983); *Robb Container Corp. v. Sho-Me Co.*, 566 F. Supp. 1143, 1151-52 (N.D. Ill. 1983). However, if the plaintiff is a sovereign and the activity sought to be enjoined endangers the public health, "injunctive relief is proper, without resort to balancing." *Illinois v. Milwau-*

Applying the three-part analysis outlined above, it is submitted that the relief sought in actions to enforce a pre-petition order requiring clean up of a toxic waste site is not a money judgment. Traditionally, judgments classified as "money judgments" have been awarded to compensate an injured party for some harm suffered.⁹⁰ Nevertheless, certain types of relief, although involving an expenditure of money by the defendant, have been held not to be money judgments.⁹¹ For instance, although an order requiring the defendant to fund an examination of a toxic waste site required the defendant to spend money, the order was deemed a form of equitable relief.⁹² In the absence of definite injury, the purpose of

kee, 599 F.2d 151, 166 (7th Cir. 1979), *rev'd on other grounds*, 451 U.S. 304 (1981); see *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337-38 (4th Cir. 1983). Also, when public health legislation is involved, the focus shifts "from irreparable injury to concern for the general public interest." 714 F.2d at 338.

⁹⁰ See *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979). In *Jaffee*, the plaintiff requested that the government provide or subsidize medical care for members of the United States Army injured while on active duty. *Id.* at 714. The court determined that the claim was, in effect, one for money damages. *Id.* at 715.

Similarly, when a defendant negligently and wrongfully terminated a plaintiff's water supply, the damages sought by the plaintiff were deemed a money judgment. See *Jordan v. Metropolitan Utils. Dist.*, 498 F.2d 514, 516 (8th Cir. 1974). The nature of the injuries in these cases was some form of actual and definite harm to the plaintiff. See *Jaffee*, 592 F.2d at 714; *Jordan*, 498 F.2d at 515. The purpose of the relief was to compensate for such harm. In *Raphael J. Musicus, Inc. v. Safeway Stores, Inc.*, 743 F.2d 503 (7th Cir. 1984), the plaintiff sued, alleging breach of lease agreements, failure to provide liability and fire insurance, failure to maintain the premises in good repair, and failure to pay rent. *Id.* at 505. The relief sought included compensatory and punitive damages. *Id.* at 505, 508. The court labeled this relief an attempt to obtain a money judgment against the defendant. *Id.* at 508. The aim of this relief was not to prevent the defendant from injuring the plaintiff in the future, but to compensate the plaintiff for harm already suffered. See *id.* at 509. In *Chicago, St. P., M. & O. Ry. v. Pender Drainage Dist.*, 183 F.2d 773 (8th Cir. 1950), the defendant allegedly took and damaged the plaintiff's right of way. *Id.* at 773. If the plaintiff had prevailed on the merits, the relief obtained would not have been preventive, but rather, would have been a money judgment to compensate the plaintiff. *Id.*

When payment of compensatory damages is the most appropriate method of effecting relief, see, e.g., *Jaffee v. United States*, 592 F.2d 712, 715 (3d Cir.) (payment of money would satisfy plaintiff's claim for compensatory damages), *cert. denied*, 441 U.S. 961 (1979), it becomes apparent that the judgment can be classified as a "money judgment."

⁹¹ See *infra* notes 92-95 and accompanying text.

⁹² See *United States v. Price*, 688 F.2d 204, 213 (3d Cir. 1982). In *Price*, evidence at trial revealed that the groundwater around the defendant's site was contaminated with toxic substances. *Id.* at 209. Because the region around the site had no alternative water source, the district court concluded that an "imminent and substantial danger" existed. *Id.* The district court, however, viewed the plaintiff's requests for funds as a claim for damages requiring the payment of money. *Id.* at 211. The Third Circuit, however, determined that the district court misread *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979), and concluded that the relief sought by the government was a claim not for a monetary award, but for a preventive

the relief in such situations is the prevention of future harm, and the crucial element of these judgments is not the payment of money, but the restoration of the equities.⁹³ The Supreme Court in *Ohio v. Kovacs* recently has lent support to the contention that orders enforcing state regulatory statutes by requiring affirmative action must be distinguished from judgments awarding mere pecuniary relief from a receiver in bankruptcy.⁹⁴ Moreover, it is submitted that the readiness of some courts to hold that the enforcement of a backpay award in a labor dispute is exempt from the automatic stay⁹⁵ indicates a proper willingness to look at factors other than the pecuniary nature of relief in defining what is and what is not a money judgment under the Code.

In *Penn Terra*, the harm suffered was not definite and was not easily convertible into monetary terms; the injury involved a threat of future harm to the environment and to individuals that was likely to occur if the toxic wastes were not cleaned up.⁹⁶ Although compliance with the order by removal of the wastes already deposited was somewhat compensatory in nature, the true purpose of

remedy, 688 F.2d at 211-13. The court stated that "damages are awarded as a form of substantial redress . . . intended to compensate a party for an injury suffered or other loss." *Id.* at 212. The plaintiff's request, the court concluded, was not for "a traditional form of damages." *Id.*

⁹³ See *Penn Terra*, 733 F.2d at 276-77. Since the payment of money would not prevent any future harm resulting from the presence of toxic wastes in the environment, the *Penn Terra* court deemed equitable relief the proper remedy. Cf. D. DOBBS, *supra* note 83, § 2.5, at 57 (equitable relief granted when remedy at law inadequate).

⁹⁴ See *Ohio v. Kovacs*, 105 S. Ct. 705, 711 n.11 (1985).

⁹⁵ See *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23, 24 (1st Cir. 1983), *enforcing* *Ahrens Aircraft, Inc.*, 259 N.L.R.B. 839 (1981); *NLRB v. Evans Plumbing Co.*, 639 F.2d 291, 293 (5th Cir. 1981). In *Evans*, the court held that the NLRB is a governmental unit, and an action by the Board to enter an award of backpay was a valid exercise of its police or regulatory powers. 639 F.2d at 293. The court, however, expressed "no opinion as to whether an action to execute or enforce [this judgment] would be exempt from the automatic stay." *Id.*

The *Ahrens* court attempted to resolve the issue that was not addressed in *Evans*. 703 F.2d at 23. The First Circuit held that the enforcement of a backpay award against the debtor corporation is not subject to the automatic stay. *Id.* at 24. Specifically, the court determined that "[i]t is . . . clear that 11 U.S.C. § 362(b)(4) and (5) prevents the application of the automatic stay provisions of 11 U.S.C. § 362(a)(1) and (2)." *Id.* It is submitted that since the court considered § 362(b)(5) and concluded that it does not stay the attempt to enforce the judgment, a fortiori such a judgment cannot be a money judgment.

⁹⁶ See 733 F.2d at 278; see also *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 338 n.5 (4th Cir. 1983) (risk of environmental damage exists from waste-filled barrels on property and from residue of waste formerly on property); *United States v. Price*, 688 F.2d 204, 209 (3d Cir. 1982) (wells contaminated or about to be contaminated); *Ginsberg & Weiss*, *supra* note 27, at 861-63 (hazardous wastes not cleaned up result in physical, property, and environmental damages).

the relief was prospective; only if the wastes were cleaned up could the potential future harm be prevented.⁹⁷

The presence of toxic chemicals may indeed cause immediate harm to the land upon which they are deposited. However, the focus of clean-up orders is speedy removal to prevent both the full integration of these substances into the environment and the injury resulting from such integration.⁹⁸ Therefore, as in *Penn Terra*, a governmental unit that institutes a proceeding to enforce a pre-petition clean-up order generally will be seeking not compensation as such, but affirmative action.⁹⁹ The best method of accomplishing this relief is through the use of injunctions requiring affirmative action by the polluting corporation.¹⁰⁰ The payment of money damages does not halt the permeation of toxic substances into the environment.¹⁰¹

CONCLUSION

A pre-petition clean-up order against a corporation that has dumped hazardous substances into the environment should not be subject to the automatic stay provision of the Bankruptcy Code. Public policy mandates that bankruptcy interests yield to the interests safeguarded by environmental protection policy. Although

⁹⁷ See, e.g., *Penn Terra*, 733 F.2d at 278 (order intended to restore environment and rectify safety hazard); *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982) (if status quo allowed to continue, result will be serious irreparable injury).

⁹⁸ See *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982). Courts have recognized that one of the purposes of environmental protection statutes is to remedy past occurrences that continue to pose a threat to the public health and the environment. See *United States v. Diamond Shamrock Corp.*, 17 Env't Rep. Cas. (BNA) 1329, 1333-34 (N.D. Ohio 1981). Section 7003 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6973 (Supp. V 1982), is intended to rectify conditions that constitute imminent hazards to the public health or environment, and "[i]ts focus is on the *prevention and ameliorization of conditions*, rather than the cessation of any particular . . . conduct." *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127, 1139-40 (D. Conn. 1980) (emphasis added).

The danger posed by the migration of toxic wastes from a disposal site into the surrounding environment led New York to declare a health emergency at the Love Canal site in 1978. Ginsberg & Weiss, *supra* note 27, at 860. Recognizing the danger presented by allowing toxic substances to permeate the surrounding soil, New York spent more than 20 million dollars in an attempt to contain the wastes. *Id.* Studies of the Love Canal area indicate that exposure to the hazardous substances resulted in serious health problems to those who lived near the site. *Id.* at 873-74 & nn.55-57.

⁹⁹ See 733 F.2d at 278.

¹⁰⁰ See *id.* at 269 & n.2, 278; cf. *United States v. Vertac Chem. Corp.*, 489 F. Supp 870, 888-89 (E.D. Ark. 1980) (injunctive relief requiring defendant to take affirmative action to abate environmental hazard).

¹⁰¹ See *supra* notes 97-100 and accompanying text.

money judgments are not exempt from the automatic stay, a clean-up order should not be classified as a money judgment. Money judgments are awarded to compensate parties for harm suffered; a judgment ordering a corporation to clean up toxic wastes, however, is intended to prevent future harm to the public and the environment. This purpose can be accomplished only as the result of affirmative action by the party against whom the relief is sought. Payment of money alone will not protect future generations from the devastating effects of improper toxic waste disposal.

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